JUTA

Criminal Procedure

HANDBOOK



Basdeo • Geldenhuys • Karels • Kemp • Swanepoel • Terblanche • Van der Merwe

TWELFTH EDITION

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Preface

Legal developments (as far as case law and statutory amendments are concerned) up to September 2016 are covered in this work.

Books cited repeatedly (for example, E du Toit et al *Commentary on the Criminal Procedure Act* and *Hiemstra's Criminal Procedure* by A Kruger 2013) are referred to by the surname of the author concerned. Works cited only occasionally are referred to in full in the text.

Concise references to Chapter 2 (Bill of Rights) of the Constitution of the Republic of South Africa, 1996, have been inserted in appropriate places in the material based on the Criminal Procedure Act. Sections of the Constitution dealt with in the chapters that follow, are reproduced after the table of contents to each chapter, with mention of the subdivisions of the chapter where each section appears. These selected sections of the Constitution are included by way of an appendix at the end of the book. Also supplied are lists of the sections of statutes of cardinal importance in the particular field (the Criminal Procedure Act, 1977; the Child Justice Act, 2008; the Constitution; the Superior Courts Act, 2013), as dealt with in the text. The relevant pages are indicated. On account of the Child Justice Act being referred to constantly in the various phases of the criminal process, relevant sections of this Act are — as in the case with the Constitution — reproduced at the beginning of each chapter.

The co-authors responsible for the various chapters are mentioned immediately after the heading of each chapter.

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Chapter 1
A basic introduction to criminal procedure

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The Constitution and this chapter:

Section—Supremacy of Constitution

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

See 3.1, below

Section 7—Rights

7(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

7(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

See 3.2, below

Section 8—Application of Bill of Rights

8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

See 3.1, below

8(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

See 3.1 and 3.2, below

Section 35—Arrested, detained and accused persons

see the Appendix 'Selected sections, Constitution . . .'

See 3.3, 3.5, 5.2 and 6, below—and *passim* in this book.

Section 36—Limitation of rights

see the Appendix 'Selected sections, Constitution . . .'

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Section 37—States of emergency

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Section 38—Enforcement of rights

see the Appendix 'Selected sections, Constitution . . .'

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Section 39—Interpretation of Bill of Rights

see the Appendix 'Selected sections, Constitution . . .'

The Child Justice Act 75 of 2008 and this chapter:

Section 52(2)*(a)*—Consideration for diversion

(2) A prosecutor may, in the case of an offence referred to in Schedule 1, if the matter has not already been diverted in accordance with Chapter 6, or in the case of an offence referred to in Schedule 2, after he or she has—

(a) . . . considered the views of the victim or any person who has a direct interest in the affairs of the victim, whether or not the matter should be diverted, unless it is not reasonably possible to do so; and

See 2.5.1 below

Section 52(3)*(b)*(i)—Consideration for diversion

(3) *(a)* The Director of Public Prosecutions having jurisdiction may, in the case of an offence referred to in Schedule 3, in writing, indicate that the matter be diverted if exceptional circumstances exist, as determined by the National Director of Public Prosecutions in directives issued in terms of section 97(4)*(a)*(iii).

(b) A Director of Public Prosecutions may only indicate that a matter may be diverted in terms of paragraph *(a)* after he or she has—

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(i) afforded the victim or any person who has a direct interest in the affairs of the victim, where it is reasonable to do so an opportunity to express a view on whether or not the matter should be diverted, and if so, on the nature and content of the diversion option being considered and the possibility of including in the diversion option, a condition relating to compensation or the rendering of a specific benefit or service and has considered the views expressed; and

See 2.5.1 below

Section 7—Impact of offence on victim

(1) For purposes of this section, a victim impact statement means a sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim which reflects the physical, psychological, social, financial or any other consequences of the offence for the victim.

(2) The prosecutor may, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim, and, where practicable, furnish the child justice court with a victim impact statement provided for in subsection (1).

(3) If the contents of a victim impact statement are not disputed, a victim impact statement is admissible as evidence on its production.

See 2.5.1 below

Section 43(1)*(a)*—Nature and objectives of preliminary inquiry

(1) A preliminary inquiry—

(a) is an informal pre-trial procedure which is inquisitorial in nature;

See 4 below

See also 5.3.1 below

1 Introduction

This chapter deals with various preliminary topics, issues, perspectives and approaches. It serves as a basic backdrop to the rest of the book and does not provide a complete overview of the study of criminal procedure. It is an ‘introduction’.

Crime is a reality of life, especially in South Africa; and every country needs rules, principles, mechanisms and state structures to prevent, detect, cope with and control criminal behaviour. Criminal procedural rules play a pivotal role in this regard. According to Aranella 'Rethinking the Functions of Criminal Procedure: the Warren and Burger Courts' Competing Ideologies' 1983 72 *The Georgetown Law Journal* 185 188, the three main purposes served by criminal procedure are as follows:

> First, criminal procedure must provide a process that vindicates substantive criminal law goals. [P]rocedural mechanism[s] must determine substantive guilt reliably, authoritatively, and in a manner that promotes the criminal law's sentencing objectives. Second, criminal procedure must provide a dispute resolution mechanism that allocates scarce resources efficiently and that distributes power amongst state officials. Finally, criminal procedure can perform a legitimation function by resolving state-citizen disputes in a manner that commands the community's respect for the fairness of its processes as well as

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> the reliability of its outcomes. Criminal procedure can serve this function by articulating fair process norms that attempt to validate the state's exercise of coercive power over its citizens.

Of course, all of the above—the state's duty to enforce criminal law, the allocation of power to state officials, the articulation of fair process norms—are subject to the supremacy of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution'). See para 3 below. The Bill of Rights (ie, Chapter 2 of the Constitution) is of fundamental importance in this regard. See para 3.2 below. Constitutional provisions (and especially those contained in the Bill of Rights) form a dominant source of criminal procedure. See para 5.1 below.

1.1 Criminal procedure: the distinction between substantive and adjectival law

It is customary to distinguish between substantive and adjectival (formal) law. Substantive law comprises legal rules determining the rights and duties of individuals and the state; and both private law and public law are part of substantive law. Substantive criminal law, for instance, determines the prerequisites for criminal liability (like unlawfulness, fault) and prescribes the elements of various specific crimes (like theft, fraud or murder). It also attaches a sanction to breach of its prohibitions. But the mere threat of criminal sanctions would serve little purpose. Measures are necessary to enforce the rules of substantive criminal law. These measures are provided by adjectival law. Adjectival law puts substantive criminal law into action. The rules of criminal procedure form that part of adjectival law which assists in making substantive criminal law dynamic. The law of evidence—which is also a part of adjectival law—operates in tandem with criminal procedural rules in ensuring that criminal law is not static.

It must be appreciated that criminal procedural rules—although identifiable as adjectival law—do not, may not and cannot operate in isolation from common-law and constitutional rights such as the right to life, human dignity, privacy, bodily integrity, etc.

1.2 Criminal procedure

1.2.1 Scope and content

Criminal procedure regulates, inter alia, the duties and powers of the criminal courts and prosecutorial authority; the duties and powers of the police, especially in the course of the investigation of a crime; the rights of suspects and arrested and accused persons; pre-trial procedural matters; bail, charge sheets (in the lower courts) and indictments (in the superior courts); pleading; the course of the criminal trial, and especially the trial rights and duties of the prosecution (the State) and the defence; verdict; sentencing; post-trial remedies (such as appeal or review) and executive action (eg mercy, indemnification and free pardon). All these aspects are dealt with in the rest of this book. Criminal procedure must also accommodate and protect the rights and interests of victims. See paras 2.4 to 2.5.2 below.

1.2.2 Criminal procedure as component of the criminal justice system

Seen in a different context, criminal procedure also functions as part of a system which is referred to as the 'criminal justice system' ('strafregsplegingstelsel').

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'Criminal justice' consists of criminal procedure, substantive criminal law, the law of evidence in criminal proceedings, the law of sentencing (and related disciplines like penology and criminology) and, furthermore, the law governing prisoners and prisons (see, for example, the Correctional Services Act 111 of 1998, which provides for, amongst other things, the custody of all prisoners under humane conditions, parole and the rights and obligations of unsentenced and sentenced prisoners). The common binding factor between the aforementioned branches of the law is that they deal primarily with crime and its perpetrators and form (or should form) a coherent whole in order to ensure that there is, in the interests of society, firm but fair enforcement of the rules of substantive law in accordance with constitutional and all other legal requirements.

In *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) at 13 the Constitutional Court said that 'an effective criminal justice system is . . . vital to our democracy'.

1.3 The double functional nature of some rules

Many rules of criminal procedure are double-functional in the sense that apart from regulating procedure, they also operate as grounds of justification in substantive law, ie substantive criminal as well as private law. Thus, if a police officer infringes a suspect's interests in privacy by searching him in terms of the provisions of criminal procedure, the act of searching is both a regular procedural action and a lawful limitation of the suspect's right to privacy; in terms of substantive law the suspect can neither successfully charge the peace officer with an offence nor sue him in a delictual matter. If, on the other hand, the search was illegal (eg, in that it was not permitted by the law of criminal procedure), then, in terms of criminal procedure and the consequences of procedural actions, and if an exclusionary rule is applied (see para 2.2 below), the procedural/evidential consequences of the unlawful conduct may be that the evidence thus obtained will not be admissible; the substantive law consequences may be a criminal charge against the officer as well as an action for damages.

Conversely, grounds of justification in substantive law may also be double-functional and may be used to great effect in criminal procedure. For instance, if a police officer may lawfully arrest a suspect and the latter attacks the officer, the officer may rely on the law of self-defence and defend himself. While self-defence as such is primarily a ground of justification in substantive criminal and private law (meaning that conduct which would otherwise be unlawful is rendered lawful in the circumstances), it here also empowers the officer to act in a criminal procedural sense. (The officer may, of course, also rely on relevant provisions in the law of criminal procedure, viz the rules relating to overcoming resistance in arrest.) In a similar way, functionaries in criminal procedure may where appropriate rely on any of the recognised grounds of justification. (See, in general, handbooks on substantive criminal law and the law of delict. Many reported cases on, for example, unlawful arrest and excessive use of force actually appear in the law reports as civil cases for damages or other relief.)

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2 Crime control and due process

2.1 The need to balance values

The description of the scope and content of criminal procedure in para 1.2.1 above is formalistic. Seen from a different angle, criminal procedure consists of a series of compromises: there is a constant need to strike a balance between the interest of society in effective criminal law enforcement and the interest of society in the protection of the rights and freedoms of all individuals suspected of, arrested for, charged with, convicted of, and sentenced for crime. Society needs a reliable and fair system in which the guilty are separated from the innocent.

Criminal procedure is, in the final analysis, a system which seeks to incorporate and balance certain fundamental values. These values can be best explained in terms of the crime control model and the due process model of criminal procedure. Packer *The Limits of the Criminal Sanction* (1968) 158 states: 'The value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process.' In contradistinction to the crime control model, the due process model—whilst acknowledging the importance of effective criminal law enforcement—proceeds from a different premise: it is based on the principle that the primary function or goal of a criminal justice system is not merely to secure a conviction and sentence, but to ensure that such results are achieved in terms of rules which duly and properly acknowledge the rights of an individual at every critical stage during pre-arrest investigation and pre-trial, trial and post-trial proceedings. This due process argument gathers considerable momentum when assessed in the context of a Bill of Rights which by its very nature not only demands and guarantees due process, but also places important limitations upon official power in order to protect fundamental rights and liberties. See para 3 below.

It is necessary to note that the crime control and due process models are not necessarily rival models. Both models seek to vindicate the goals of substantive criminal law. But they seek to do so along different routes. It should, furthermore, be pointed out that the two models represent value systems. No real-life system conforms exactly to one specific model. It is a matter of emphasis. And it is ultimately a matter of securing an appropriate balance even when interpreting constitutional provisions. In *Cloete* 1999 (2) SACR 137 (C) 150*h* Davis J observed:

> [T]he burden of the crime wave and the need for crime control weighs very heavily. It is wrong to conclude that an attempt to preserve the Constitution is necessarily a nod in the direction of criminals. The Constitution is not the cause of crime in this country. The court's task is to uphold the Constitution in such a manner that gives it its proper effect which I consider is to attempt to achieve some balance between the models of crime control and due process.

2.2 The internal tensions

Devising a reliable and fair system in the context of the values explained above is a delicate and difficult task. Consider the following internal tensions:

First, one cannot create strict criminal procedural rules on the assumption that these rules will only be applied to 'criminals'. The system must allow for the fact that innocent people can also get drawn into the system, especially during the pre-trial investigative stage of the criminal process.

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Secondly, 'the liberty of an innocent individual should not be sacrificed in order to increase the efficiency of crime control—more particularly . . . [a] rule or procedure should be opposed if it secures greater crime control by increasing the probability that innocent persons will be convicted' (Ashworth 'Concepts of Criminal Justice' 1979 *Criminal Law Review* 412 416). At the same time it is equally true that 'the more we want to prevent errors in the direction of convicting the innocent, the more we run the risk of acquitting the guilty' (Damaska 'Evidentiary barriers to conviction and the two models of criminal

procedure: A comparative study' 1972-73 121 *University of Pennsylvania Law Review* 506 576).

Thirdly, if the state were to have absolute powers, it would probably be able to curb criminality to a significant extent. But then society would live under a tyranny. And yet, if the rights of the individual were absolute, the state would be powerless and unable to enforce criminal law. And then society would also suffer.

Fourthly, criminal procedural rules must regulate state power (eg, police power) in a positive as well as a negative sense: there must be rules authorising the police to do something (the positive sense) and there must be rules limiting their authority to do so (the negative sense). The police must, for example, have the power to arrest. The circumstances under which they do so, and the manner in which they do so, must be restricted in order to protect fundamental rights, such as the right to liberty, human dignity and bodily integrity.

Fifthly, the conflict between the rights of the accused and the rights of the victim will always be there. See paras 2.4 to 2.5.2 below. Here, too, it is matter of striking an appropriate balance. The difficulty, of course, is that *in the absence of a conviction* of the accused by a court of law 'not all "victims" are victims, and not all accused persons are criminals' (Paciocco *Getting Away with Murder—The Canadian Criminal Justice System* (1999) 380 as cited by Burchell *Principles of Criminal Law* 3ed (2005) 14).

Lastly, there is another area of tension which normally only surfaces at the trial level but which has important implications for pre-trial investigative procedures: should a court—in pursuit of factual guilt—admit reliable and incriminating evidence despite the fact such evidence was obtained by the state in breach of the fundamental rights of the accused. By admitting such evidence, a court would in a subtle or indirect manner give a signal to the state and its officials that unlawful conduct in the evidence-gathering process is acceptable and that pursuit of the truth is not subject to fundamental rights. Section 35(5) of the Constitution provides as follows: 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.' This section creates a qualified exclusionary rule. See Schwikkard and Van der Merwe *Principles of Evidence* 4 ed (2016) at paragraph 12 8. In *Naidoo* 1998 (1) SACR 479 (N) the police had obtained incriminating evidence in breach of the constitutional right to privacy. This evidence was excluded on the basis of s 35(5) and resulted in acquittal of the accused despite the fact that the robbery in question was (at that stage) the 'biggest robbery' in the history of South Africa. This case illustrates how the pre-trial unconstitutional conduct of the police can have serious consequences at the trial level; it also illustrates the tension between crime control and due process values. See also *Pillay* 2004 (2) SACR 419 (SCA) and *Tandwa* 2008 (1) SACR 613 (SCA). Section 35(5) can be invoked to exclude evidence unconstitutionally

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obtained from any person, not only from the accused concerned. See *Mthembu* 2008 (2) SACR 407 (SCA).

2.3 Due process (legality, the rule of law) and the need to limit state power

It is sometimes argued that modern criminal procedural systems tend to over-emphasise due process considerations in resolving some or all of the internal tensions referred to above; that these systems neglect the rights of victims of crime and law-abiding individuals; and, furthermore, that these systems fail to bring the factually guilty to justice. The valid response to this criticism is that 'two wrongs do not make a right'. The fact that someone has been robbed, assaulted, defrauded or even murdered does not suspend the rule of law. 'The criminal law not only sets limits on what individuals can do to one another, it also limits what the authorities can do to suspects and accused persons' (*Report 32: Our Criminal Procedure: Law Reform Commission of Canada* (1987) 24).

A system which is essentially weighted in favour of due process does not ignore the rights of the victim of crime; it merely seeks to ensure that vindication of the rights of the victim should not trigger or lead to further injustices. In pursuit of this dual purpose, difficult choices have to be made; and at times it is necessary to accept that certain measures to establish the truth and combat crime must, in the best interests of society, not be employed. Acker and Brody *Criminal Procedure—A Contemporary Perspective* (1999) 2 state as follows (emphasis in the original):

> [*R*]*eliable fact finding* is essential if the criminal justice system is to ensure both that the guilty are punished and that the innocent remain free. However, ascertaining the truth about suspected crimes cannot be the exclusive function of the criminal justice process. Few people would condone using the rack or other forms of torture to coerce confessions from suspected criminals or would agree that citizens should be strip-searched at the whim of a police officer, or would enthusiastically entertain a search party in their homes in the dead of night. Such activities might prove highly effective in detecting criminal activity and even in discriminating between the guilty and the innocent. Yet they illustrate that limits must be placed on fact-finding initiatives, even if those limits impede an otherwise commendable search for the truth. *Safeguarding individual freedoms, checking abuses of power by law enforcement officials, and preserving basic fairness in government-citizen interactions* also are important goals of the law of criminal procedure . . . The law strives to maintain a balance between truth seeking and individual liberties . . .

There can be no doubt that individuals and society suffer severely at the hands of criminals. But there can also be no doubt that in the absence of a system which limits state power by protecting substantive rights (like the rights to privacy, dignity, etc) and procedural rights (like the right to silence), individuals and society will also suffer at the hands of the state and its officials. It has been said that '[t]he history of . . . freedom is, in no small measure, the history of procedure' (Frankfurter J in *Malinski v New York* 324 US 401 414 (1945)).

Due process demands that there must be practical limitations on state power in the detection, investigation, prosecution and punishment of crime. 'Power,' said Packer in *The Limits of the Criminal Sanction* (1968) 166, 'is always subject to abuse—sometimes subtle, other times, as in the criminal process, open and ugly.' In the history of South Africa, there have been several examples of abuse of state power in the criminal justice system. See generally Dugard *Human Rights and the South African Legal Order* 205-275; Mathews *Law, Order and Liberty in South Africa*

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(1971) 133-163; Mathews *Freedom, State Security and the Rule of Law—Dilemmas of the Apartheid Society* (1986) 241. These abuses were the products of parliamentary sovereignty. Parliament is no longer supreme. It is subject to the supremacy of the Constitution. The Constitution has, so to speak, brought the state under the discipline of the rule of law. In the rest of this work it will become evident that this constitutional dispensation has had (and will in future also have) profound implications for criminal procedure.

2.4 Models based on conceptions of victims' rights

In para 2.1 above reference was made to Packer's 'due process' and 'crime control' models of criminal procedure. These two models are not the sole normative analyses of the criminal process. Roach 'Four Models of the Criminal Process' 1999 89 (2) *Journal of Criminal Law and Criminology* 671 distinguishes between the 'punitive model of victims' rights' and the 'non-punitive model of victims' rights'. These two models, says Roach (at 672-3, emphasis added)—

> are based on different conceptions of victims' rights. Like Packer's crime control and due process models, they aspire to offer positive descriptions of the operation of the criminal justice system, normative statements about values that should guide criminal justice, and descriptions of the discourses which surround criminal justice. Models based on victims' rights can thus describe phenomena such as the new political case which pits the accused against crime victims or minority

> and other groups associated with crime victims, or restorative justice practices which bring crime victims and their supporters together with offenders and their supporters. *Normatively*, *my punitive model of victims' rights affirms the retributive and expressive importance of punishment and the need for the rights of victims to be considered along with the rights of the accused. My non-punitive model of victims' rights attempts to minimize the pain of both victimization and punishment by stressing crime prevention and restorative justice*. Discursively, both punitive and non-punitive models of victims' rights promise to control crime and respect victims, but *the punitive model focuses all of its energy on the criminal justice system and the administration of punishment while the non-punitive model branches out into other areas of social development and integration*. In short, the construction of models provides an accessible language to discuss the actual operation of the criminal process, the values of criminal justice, and the way that people think and talk about criminal justice.

According to Roach the punitive model of victims' rights asserts the 'rights of crime victims and potential victims of crime as worthy of respect' (at 700) and 'resembles the crime control model by assuring that the enactment of a criminal law, prosecution, and punishment controls crime' (at 702). At 714 he also states that '[t]he punitive victims' rights model is new because it employs rights . . . [C]rime control . . . [is] now re-conceived and strengthened as victims' rights . . .' The emergence of or emphasis on victims' rights over the last two or more decades has now provided a new ground for countering due process challenges advanced by the defence.

The non-punitive (as opposed to the punitive) model is less concerned with the traditional criminal sanction; *the non-punitive model prefers to put the emphasis on prevention of crime and restorative justice*, an emphasis which does not necessarily require strict adherence to due process. Restorative justice involves a process that seeks to avoid the invocation of the formal criminal sanctions. Its aim is to reach a non-punitive resolution of a dispute stemming from criminal conduct. The offender, the victim and members of the community are involved in an attempt to restore the position which existed prior to the unlawful conduct. The co-operation

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of all parties is required to secure restorative justice. In *M* (*Centre for Child Law as* Amicus Curiae) 2007 (2) SACR 539 (CC) Sachs J said: '[R]estorative justice ideally requires looking the victim in the eye and acknowledging wrongdoing.' An advantage of restorative justice is that it brings to the fore the fact that many crimes have a profound and personal impact on the victim: 'Restorative justice,' said Ponnan JA in *Matyityi* 2011 (1) SACR 40 (SCA) at [16], 'seeks to emphasise that a crime is more than the breaking of the law or offending the state—it is an injury or wrong done to another person.' Restorative justice sentences, however, are not appropriate in very serious cases. See *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) at [16]-[20]. In *Mbuyisa* 2012 (1) SACR 571 (SCA) it was warned that '[t]he advantages of . . . orders of restorative justice should not be devalued by their use in cases in which such sentences are inappropriate' (at [17]).

'Restorative justice' is for purposes of the Child Justice Act 75 of 2008 defined as 'an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.' See s 1 of Act 75 of 2008, which came into operation on 1 April 2010. See also para 5.3.2 below.

Section 73 of Act 75 of 2008 deals with restorative justice sentences. A child court that convicts a child of an offence may refer the matter to a family group conference (in terms of s 61) or for victim-offender mediation (in terms of s 62). See s 73(1)*(a)* and *(b)* of Act 75 of 2008. Another alternative is to refer the matter to any other restorative justice process which is in accordance with the definition of restorative justice (s 73(1)*(c)*).

It is possible that the non-punitive model of victims' rights is really a peripheral model of limited practical application. Burchell *Principles of Criminal Law* 3ed (2005) at 8 makes the following valid observations:

> It is, of course, when an impasse is reached, where the truth or even part of the truth is not willingly disclosed, that a community cannot avoid entrusting the making of unpopular decisions to an independent court of law, with compulsory jurisdiction, staffed by personnel experienced in weighing evidence and reaching an impartial verdict . . . The central issue for the future will be determining to what degree restorative justice will be integrated into the mainstream criminal justice process or whether it will be seen as merely a parallel (or add-on) aspect of criminal justice . . . It would seem that if restorative justice does gain a significant foothold in a criminal justice process essentially based on retributive justice, this will possibly be in the context of youth crime and less serious infringements of the criminal law, rather than in the context of serious criminal behaviour, and the actual implementation of various forms of punishment.

The future nature or further development of the criminal justice system—and more particularly the law of criminal procedure—will ultimately depend upon the extent to which the values and principles of a specific model might gain ground. Roach makes the following diagnosis and prognosis (at 713-4):

> [T]he crime control model represents our past; the due process and the punitive victims' right models compete in the present and the future depends on whether punitive or non-punitive forms of victims' rights dominate. True to Packer's original warning, however, any actual system of criminal justice is bound to reflect aspects of all of the models. There will be a continued need for punishment and incapacitation in the worst cases and

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> continued conflict between due process and victims' rights. Much will depend on when punitive responses are deemed necessary and if crime prevention and restorative justice are accepted as legitimate responses to crime.

2.5 The position of the victim in the criminal process

A criminal prosecution at the instance of the state is, in essence, a contest between the state and the accused; the role of the victim (or relatives of the deceased) is in principle confined to that of an ordinary witness who is called upon to testify on the question concerning guilt or innocence and, should there be a conviction, on the question of sentencing.

There is a viewpoint that the system is offender-orientated to the detriment of the rights and interests of victims and other witnesses. It is said that the system lacks adequate victim support strategies, such as protection of victims from secondary traumatisation, for example, trauma that results from repeated and improper pre-trial police questioning or questioning by the defence in court—especially as regards the victims of sexual offences. It has also been argued that current victim support measures—which should cover the pre-trial, trial and post-trial stages—are inadequate and, where they do exist, are uncoordinated, limited and under-utilised. See Meintjes-Van der Walt 'Towards victim's empowerment strategies in the criminal justice system' 1998 *SACJ* 157 158. Present measures aimed at enhancing victim participation (see para 2.5.1 below) and promoting victim protection (see para 2.5.2 below) are generally considered insufficient to enhance the rights and interests of victims. Victims, it has often been said, feel alienated from the process—an experience which is exacerbated by factors such as repeated remands granted by the court at the request of the defence or the prosecutor or both; inadequate pre-trial communication with victims; real or alleged poor investigation and presentation of the case by overworked officials and, furthermore, the absence of a comprehensive victim compensation fund for certain categories of victims.

2.5.1 Victim participation

There are certain statutory provisions which promote victim participation in the criminal process. See, for example, s 105A(1)*(b)*(iii) of the Criminal Procedure Act 51 of 1977

(consultation with the complainant as regards the possible content of a plea and sentence agreement); s 300 of the Act (as discussed in para 13.1 of Chapter 19 below); s 179(5)*(d)*(iii) of the Constitution (as cited in para 4.1 of Chapter 3 below). On victim participation in deciding on a proper sentence, see generally *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (2) SACR 101 (CC).

In sexual offences the investigating officer is obliged to obtain an 'impact statement' from the victim before the latter testifies in court. An impact statement sets out the extent to which the offence has affected the victim's life. This impact statement must be brought to the attention of the prosecutor. See para 21(3) of the National Instruction on Sexual Offences as published in terms of s 66(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Section 299A of the Criminal Procedure Act (as read with s 75(4) of the Correctional Services Act 111 of 1998) provides, in respect of certain serious crimes, that complainants (or relatives of the deceased) have the right to make representations

with regard to a convicted person's placement on parole, on day parole or under correctional supervision.

The institution of a private prosecution in the limited circumstances provided for in terms of s 7 of the Act can also be viewed as a form of victim participation in the criminal process. See paras 5.1 to 5.3.9 in Chapter 3 below.

2.5.2 Victim protection

There are also some statutory provisions aimed at *protecting* a victim (or other witness). Selected examples found in the Act are the following: s 144(3)*(a)*(ii)—where an accused is arraigned for a summary trial in the High Court, the indictment ('charge') must be accompanied by a list of the names and addresses of prospective prosecution witnesses, provided that if the Director of the Public Prosecutions is of the opinion that a specific witness may be intimidated the name and address of such a witness may be withheld; s 153 (2)—if it appears to the court that there is a likelihood that harm may result to a witness, the court may direct that the witness shall testify behind closed doors and that his identity shall not be revealed for a period specified by the court; s 158(3)*(e)*—a court may in certain circumstances order that a witness testify by means of a closed circuit television (or similar electronic media) if it appears to the court that to do so would prevent the likelihood that prejudice or harm might result to any person if he testifies or is present at such proceedings (see generally *Domingo v S* 2005 (1) SACR 193 (C)); s 170A—a court may appoint an intermediary if it appears to the court that criminal proceedings would expose a witness under the physical or mental age of eighteen years to undue mental stress if he testifies at such proceedings (see Schwikkard & Van der Merwe *Principles of Evidence* 4 ed (2016) at paragraph 18 11 for a discussion of the role of the intermediary); s 191A—the Minister may make regulations relating to, among other things, the assistance of, and support to, witnesses at courts; the establishment of reception centres for witnesses at courts; and, furthermore, the counselling of witnesses.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 creates a framework for the adequate and effective protection of victims of sexual offences. Chapter 5 of this Act, for example, determines the procedure that can be followed to ensure the compulsory HIV testing of an alleged sex offender.

Any witness (including, of course, a victim-witness) who has reason to believe that his safety, or the safety of any related person, is or may be threatened by any person or group or class of persons (whether known to him or not), may in terms of the Witness Protection Act 112 of 1998 apply that he or any related person be placed under protection as provided

for in this Act. This Act—which came into operation on 31 March 2000—established an Office for Witness Protection headed by a Director who is supported by witness protection officers. The Act not only covers proceedings in criminal cases as specified in the Schedule to this Act, but extends to certain other proceedings such as those referred to in Chapters 5 and 6 of the Prevention of Organised Crime Act 121 of 1998. The provisions of the Witness Protection Act (and its regulations) deal with various matters relating to witness protection, for example, the period of protective custody and the assistance, if necessary, that must be rendered to the witness at the completion of the proceedings concerned.

Part 16 of the *Prosecution Directives* issued by the National Director of Public

Prosecutions (see para 4.5.6 in Chapter 3 below) instructs prosecutors as follows as regards the protection of witnesses:

1. Prosecutors must at all times consider the safety of witnesses.
2. Voluntary witness protection is dealt with by the Office of Witness Protection under the provisions of the Witness Protection Act 112 of 1998.
3. This Act provides that where, in respect of certain scheduled offences, a witness who has reason to believe that his or her safety or that of any related person is being threatened by any person, reports this belief to a prosecutor, the latter shall assist the witness in making an application for protection.
4. If a prosecutor has reason to believe that the safety of a witness or a related person is being threatened he or she may, with the consent and on behalf of the witness or person concerned, make an application for protection.
5. Where a witness is opposed to being placed under protection, prosecutors are referred to the provisions of section 185 of Act 51 of 1977. Applications for the detention of such witnesses must be brought by the DPP before a judge in chambers, and such matters should therefore be referred to the office of the DPP. Prosecutors should note that if such an order is granted, the trial must begin within six months of the date on which the witness was detained.
6. Where the interests of a witness are threatened as contemplated in section 158(3)*(e)* of Act 51 of 1977, the prosecutor must bring an application in terms of section 158(2) for the witness to give evidence by way of closed circuit television or similar electronic media (if available).
7. Requests for defence access to dockets should be opposed where witnesses may be intimidated or tampered with should their identity be made known through disclosure of the contents of the docket. (See *Shabalala and Others v Attorney-General Transvaal and Another* 1995 (2) SACR 761 (CC) at 781*g*-785*b*.)
8. High Court prosecutors must similarly endeavour to protect the identity of witnesses as contemplated in section 144(3)*(a)*(ii) of Act 51 of 1977, if they are of the opinion that such witnesses may be intimidated or tampered with should their identity be made known in the list of witnesses attached to the indictment.
9. Sections 153 and 154 of Act 51 of 1977 provide *inter alia* for *in camera* proceedings, protecting the identity of witnesses in specific instances and the prohibition of publication of certain information. Prosecutors must utilise these provisions where necessary.

3 Constitutional criminal procedure

3.1 Introductory remarks

It is possible to have legislation which conflicts with the Constitution and Bill of Rights set aside—declared null and void for unconstitutionality. The Bill of Rights operates like a protective umbrella over all areas of law and state action. Section 2 of the Constitution explicitly states that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state—s 8(1). (See also Chapter 8 of the Constitution, which further regulates the declaration of a law as unconstitutional and which regulates the powers of the courts in constitutional matters.)

Constitutions or Bills of Rights are not self-executing or self-explanatory; they have to be interpreted authoritatively—this is called the principle of justiciability.

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Reported judgments relating to 'constitutional criminal procedure' accordingly have to be studied well. *Zuma* 1995 (2) SA 642 (CC) emphasises that the Constitution is to be interpreted so as to give clear expression to the values it seeks to nurture. Constitutional interpretation involves interpretation of a written document. Due regard must be paid to the express language which is used, since a less rigorous approach entails the danger that the Constitution may be taken to mean whatever one wishes it to mean.

A few preliminary points are important: *First*, in a Bill of Rights, the criminal procedural provisions usually have 'vertical' operation; they do not regulate relationships between equal persons, but between the state-as-power-wielder and the subject, or rather, between the community's interest in state power and the community's interest in individual rights and liberties—ie between the two competing sets of community interests already discussed. However, the present Constitution in s 8(2) also provides for 'horizontal' operation of the Bill of Rights: 'a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' (See also s 8(3) in this regard.) *Secondly*, constitutional criminal procedural provisions usually are stated negatively, ie they are limitations on state powers, prohibiting the state from infringing certain fundamental rights. (Only occasionally may they be mandatory provisions, for instance, requiring that free counsel be provided to indigent accused persons by the state.) In this way they may also be limitations on *democracy*; if, for instance, the Bill of Rights forbids torture, then torture will remain illegal even if a sounding majority of the people want it legitimised and even if Parliament purports to legitimise it. South Africa does not have an unlimited democracy, but one limited inter alia by the Bill of Rights. *Thirdly*, the Bill of Rights recognises that most rights are not absolute and may under certain circumstances be curtailed or limited, as we shall indicate in para 3.2(4) below. *Lastly*, without the principle of justiciability (see above), a Bill of Rights would be useless; this principle requires a strong and independent Bench. Sometimes the judges will have to go against popular sentiments in interpreting the Bill of Rights.

3.2 A survey of the contents of the Bill of Rights

Chapter 2 of the Constitution of the Republic of South Africa, 1996 (which is called the 'Bill of Rights'), consisting of ss 7 to 39, is organised as follows:

(1) *Section 7* identifies the Bill of Rights as a cornerstone of democracy (s 7(1)) and refers to the fact that there are limitations to the rights referred in the Bill of Rights (s 7(3)). See also para 3.2(4) below. Section 7(2) provides that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.' This section places a positive duty on the state. The rights covered by this duty are not confined to the rights of the accused. The rights of victims are included. This much is clear from the following observations made by the Constitutional Court, per Ackermann J, in *Basson* 2004 (1) SACR 285 (CC) at [31]:

> In our constitutional State the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The State must protect these rights through, amongst other things, the policing and prosecution of crime.

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(2) *Section 8* regulates the application of the chapter, ie its vertical and horizontal operation (see para 3.1 above).

(3) *Sections 9–35* state the fundamental rights, ranging from the right to equality to the rights of arrested, detained and accused persons. See further para 3.3 below.

(4) *Section 36* is the so-called limitation clause; it regulates the scope of the rights and how they may be limited (eg how the right to privacy may be limited so as to allow search and seizure in the course of criminal procedure). The section provides, inter alia, that entrenched rights may be limited by law only to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

— the nature of the right;
— the importance of the purpose of the limitation;
— the nature and extent of the limitation;
— the relation between the limitation and its purpose; and
— less restrictive means to achieve the purpose.

It should be noted that the listing of certain rights in the Bill of Rights does not mean that other rights (eg, granted by the common law) are negated—s 39(3). See further para 5.1 below.

Early rulings of the Constitutional Court (in terms of the limitation clause and the Bill of Rights of the 'interim' Constitution, Act 200 of 1993) include *Williams* 1995 (3) SA 632 (CC), in which corporal punishment was held to violate the right to human dignity and the protection against cruel, inhuman or degrading punishment, and could not be saved by the limitation clause; and *Zuma* 1995 (2) SA 642 (CC), which held that it is not permissible that constitutional rights which have been conferred without express limitation be cut down by reading implicit restrictions into them so as to bring them into line with the common law. Fundamental rights provisions should be interpreted generously.

(5) *Section 37* provides for derogation from the Bill of Rights following the declaration of a state of emergency—only to the extent that the derogation is strictly required by the state of emergency; that the legislation is consistent with the Republic's obligations under international law applicable to states of emergency (s 37(4)); and that the derogation does not affect the rights listed and qualified in the Table of Non-Derogable Rights following s 37(5). It is important to note that any competent court may enquire into the validity of a declaration of a state of emergency as well as any action taken under such declaration (s 37(3)). The 'absolute' rights in the Table of Non-Derogable Rights which may *never* be limited or abolished at all, are the rights to human dignity and life.

(6) *Section 38* lists those who have *locus standi* in constitutional litigation where fundamental rights have allegedly been violated or threatened: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in his or her own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.

(7) *Section 39* contains certain important provisions relating to the interpretation

of the Bill of Rights, inter alia requiring that courts must, in interpreting this chapter, 'promote the values which underlie an open and democratic society based on human dignity, equality and freedom' and must consider international law. In addition, courts *may* have to consider foreign law. Courts must promote the spirit, purport and objects of the Bill of Rights. (It is accordingly not enough that students and practitioners of criminal procedure be experts in criminal procedure itself—they must also at least be conversant with constitutional law, criminal law, administrative law, law of evidence,

law of interpretation, international law, comparative law, and jurisprudence/legal philosophy.)

3.3 Section 35 of the Constitution

This section contains provisions of great importance for criminal procedure, relating to some of the basic principles and procedural rights discussed in the rest of this book. *The section is reproduced in the appendix to this book*. The various subsections will often be referred to in the course of the rest of the book. *Veldman v Director of Public Prosecutions WLD* 2006 (2) SACR 319 (CC) [22]-[23] confirmed that the right to a fair trial embraces *more* than what is contained in the list of specific rights enumerated in s 35(3)*(a)-(o)* of the Constitution. The right to a fair trial requires that criminal trials be conducted in accordance with notions of basic fairness and justice, and it is the duty of criminal courts to give content to these notions. See further para 2.1 in Chapter 17 below.

3.4 The presumption of innocence

It is important to note that criminal procedure does not deal with the detection, investigation and prosecution of *criminals*, but of *suspects and accused persons*. 'Suspect' generally refers to a person who has not yet been charged, eg an arrested person who is being taken to the police station; 'accused' refers to a person who has been charged. The terms are not mutually exclusive, nor is the term 'suspect' a legally defined one. In this handbook, we shall use 'accused' in wide terms to include suspects as well as charged persons, or in narrow terms to include only the latter; the meaning should be clear from the context.

3.4.1 The presumption of innocence and legal guilt

Due to the presumption of innocence, every person is regarded as innocent until properly convicted by a court of law. See generally Schwikkard *Presumption of Innocence* (1999) 7-9. The adverb 'properly' involves, inter alia, compliance with the rules of evidence and criminal procedure. A conviction is an objective and impartial official pronouncement that a person has been proved legally guilty by the State (prosecution) in a properly conducted trial, in accordance with the principle of legality, ie in a trial where the State obeyed the rules of criminal law, criminal procedure, evidence, and the Constitution. A person may in the public's subjective view be factually or morally guilty of a crime, but that does not mean that he will or can be proved to be legally guilty. In a state under the rule of law (*Rechtsstaat*), only legal guilt counts; to 'convict' a person in any other way may amount to vigilantism, mob trials and even anarchy. See further para 2.2 in Chapter 17 below.

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3.4.2 The presumption of innocence as a statement of the prosecution's burden of proof

In order to obtain a conviction, the prosecution must prove the accused's guilt beyond a reasonable doubt. The onus or burden of proof rests on the prosecution because of the above-mentioned presumption of innocence regarding the accused. This means that an accused person does not have to prove that he is innocent. The prosecution must cover adequately every substantive element of the crime as defined in criminal law and which the accused is alleged in the charge sheet/indictment to have perpetrated, by presenting concrete and admissible evidence in order to prove *prima facie* that the accused is guilty. As has been mentioned in para 1.1 above, the elements which make up each offence are defined in substantive criminal law. If but a single element is not proved by the prosecution beyond a reasonable doubt, the accused can in no way be convicted and may in fact be discharged at the end of the State's case, without even being required to proceed with the defence case, as will be seen below in para 4 of Chapter 17. If the State does succeed in proving a *prima facie* case and the accused does nothing to disturb that case, the *prima facie* proof may 'harden' into proof beyond reasonable doubt and the accused may be convicted—simply because there is nothing which reasonably (ie not in a far-fetched or

purely speculative way) produces a doubt in the court's mind about the guilt of the accused on each and every element of the alleged crime. If, on the other hand, the accused can make the court doubt reasonably that one (or more) of the required elements has been proved, he must be acquitted. The accused can raise a reasonable doubt through cross-examining a State witness, objecting to the admissibility of certain evidence, producing his own witness(es), or testifying himself. Whereas the quantum of proof required in a criminal case is 'beyond reasonable doubt', in civil matters it is 'on a balance or preponderance of probabilities', which is a much smaller quantum of proof. The smaller quantum in a civil case means that if the court is in doubt at the end of, say, a suit for damages, it will assess the probabilities; if the plaintiff's version seems more likely or probable than that of the defendant, in the light of human experience and other factors, the plaintiff will win. Not so in a criminal case: even if the State's version is more likely or probable than the accused's, he will be acquitted if there is a reasonable possibility that his version may be true; this 'possibility' need not be a probability. If there is a reasonable doubt that every single element of the offence has been proved, the defendant gets the benefit of it. It is not even necessary for the court to believe the accused—*V* 2000 (1) SACR 453 (SCA).

3.4.3 The presumption of innocence and the nature of the alleged crime

Neither the prevalence nor the offensiveness of the alleged crime (rape, murder, etc) can be allowed to disturb, replace or detract from the presumption of innocence. In *Coetzee* 1997 (1) SACR 379 (CC) at [220] the Constitutional Court, per Sachs J, said (emphasis added):

> Much was made during argument of the importance of combating corporate fraud and other forms of white collar crime. I doubt that the prevalence and seriousness of corporate fraud could itself serve as a factor which could justify reversing the *onus* of proof. *There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become*. The starting point of any balancing enquiry where

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> constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. *If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, carjacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases*.

3.5 The right to silence (including the privilege against self-incrimination)

Not unrelated to the presumption of innocence is the rule that an accused can never be forced to testify; he has a right to silence, which is also called his privilege against self-incrimination or his right to a passive defence. An accused can remain silent even if his answers would not be self-incriminating. This applies to the pre-trial stage (ie the investigative or police phase, as well as the pleading phase), the trial phase and also the sentencing stage—*Dzukuda* 2000 (2) SACR 443 (CC). Accordingly, the Constitution guarantees the right of every arrestee to remain silent (s 35(1)*(a)*) and not to be compelled to make a confession or admission which could be used in evidence against him or her (s 35 (1)*(c)*), as well as the right of every accused to remain silent and not to testify during the proceedings (s 35(3)*(h)* and *(j)*). At the root of this is the fact that the suspect/accused is in our law a full legal subject and not merely an object of enquiry. The interrelatedness of the presumption of innocence and the right to silence is apparent in s 35(3)*(h)* and was explored

in *Zuma* 1995 (2) SA 642 (CC), which declared unconstitutional the reverse onus in the then s 217(1)*(b)*(ii) of the Criminal Procedure Act which required an accused, in certain circumstances, to prove that a confession was not freely and voluntarily made. The presumption of innocence is the basis for the rule that the onus in criminal cases should always rest on the State. Section 21(1)*(a)*(i) of the Drugs and Drug Trafficking Act 140 of 1992, which placed the burden of proof on the accused under certain circumstances, is therefore an unconstitutional infringement of the right entrenched in s 35(1)*(a)*—*Bhulwana*; *Gwadiso* 1995 (2) SACR 748 (CC).

The accused is a full legal subject, and as such he is entitled to participate in his trial according to his own autonomous decisions and to be assisted, if he so wishes, by a legal representative. (When we mention an accused's right to counsel, we refer in general to his right to be legally represented by an attorney or advocate or any other permissible legal adviser or practitioner. See the Constitution s 35(2)*(b)* and *(c)* and s 35(3)*(f)* and *(g)*.) Since an accused is viewed as a legal subject, he must be able to participate meaningfully (ie with understanding), as he wishes, in the criminal process. His counsel will assist him in this. If he is unrepresented, he should at all crucial decision-making or option-choosing stages in the process be informed of his rights and options, as well as their implications—for example, his right to counsel, right to silence, right to call witnesses, right to cross-examine and so forth; otherwise his status as legal subject is empty and useless. His position as full legal subject in the modern criminal process also implies that he cannot be

tried if he is mentally unable to understand enough to participate meaningfully and communicate with his lawyer (see s 77 of the Criminal Procedure Act).

If a person has certain rights, he should obviously not be penalised for exercising those rights, otherwise the rights in reality amount to nothing at best and to liabilities or traps at the worst. A person who exercises his right to silence at his trial should accordingly not be penalised for the exercise of the right as such; no adverse inference should be drawn from his decision not to testify, for two reasons: first, no such inference *could* be drawn, for there may be a multitude of reasons why he does not wish to testify (he may think the State case is so weak that it does not merit an answer; he may not trust the court or legal system, or be afraid or ignorant as to strategy; or he may simply want to exercise the right to silence about which he has been informed); secondly, no such inference could *logically* be drawn to fill gaps in the State case: if an element of a crime (eg identity in the case of robbery) has not been covered by *prima facie* proof, the nothingness of the accused's silence cannot logically fill that gap in the State's case.

The foregoing, however, does not mean that an accused's defence cannot be severely or fatally damaged by his silence. It can happen like this: If the State has proved a *prima facie* case against the accused, ie it has covered each and every element of the crime (as defined by substantive criminal law) by evidence (whether verbal or documentary, lay or expert, direct or circumstantial) and the accused has not raised a reasonable doubt on any of these elements (eg, by shaking a State witness in cross-examination), and he then does not testify (ie he does not put his innocent version before the court), the court as a matter of fact only has the uncontroverted State evidence to go on; the *prima facie* proof hardens into sufficient evidence for a conviction. But note that this happens simply because the defence did not 'disturb' the State's case; the silence of the defence did not add anything positively to the State's case. The inference is not really an inference in the strict sense of the word, but simply an observation or conclusion that the accused could not or would not disturb the State's *prima facie* case, with the result that the latter stands uncontroverted and becomes proof beyond a reasonable doubt. See further *Boesak* 2001 (1) SACR 1 (CC) at 24. In *Tandwa* 2008 (1) SACR 613 (SCA) it was said that although the accused was constitutionally entitled to refuse to testify, 'his exercise of the right does not suspend the operation of

ordinary rational processes'. See also *Mavinini* 2009 (1) SACR 523 (SCA) and *Mdlongwa* 2010 (2) SACR 419 (SCA).

4 Accusatorial and inquisitorial procedures and a brief history of South African criminal procedure

Regarding the history and antecedents of South African criminal procedure, see in general Dugard *South African Criminal Law and Procedure* vol 4: *Introduction to Criminal Procedure* (1977) 1-56.

The roots of South African criminal procedure may be found in the Roman, Roman-Dutch and English law. Before expounding on aspects of this, some distinctions between the accusatorial and inquisitorial systems must be noted. The essential difference between the accusatorial and inquisitorial models of criminal procedure lies in the functions of the parties, ie the judicial officer, the prosecution and the defence. In an inquisitorial system (as a modern example of which we may cite the French system), the judge is the master of the proceedings (*dominus litis*) in the sense that he himself actively conducts and even controls the search for the

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truth by dominating the questioning of witnesses and the accused. After arrest, the accused is questioned primarily by the investigating judge, not by the police. In the trial, the presiding judge primarily does the questioning, not the counsel for the prosecution or the defence. Conversely, in accusatorial systems (the modern examples of which are the Anglo-American systems), the judge is in the role of detached umpire, who should not enter the arena of the fight between the prosecution and the defence for fear of his becoming partial or losing perspective as a result of all the dust caused by the fray. The police are the primary investigative force; they hand over the collected evidence, in dossier (file) format, to the prosecution, which then becomes *dominus litis*; the prosecution decides on the appropriate charges, the appropriate court, etc. See further paragraph 4.13 in Chapter 3 below. In court, the trial takes the form of a contest between two theoretically equal parties (the prosecution and the defence) who do the questioning, in turn leading their own witnesses and cross-examining the opposition's witnesses. It follows that the accusatorial system (also known as the 'adversarial' system) can only function optimally if the prosecution and defence perform their duties properly. In *Sebofi* 2015 (2) SACR 179 (GJ) Sutherland J stated (at [65], emphasis added):

> The calibre of the case presentations, both prosecution and defence, was unacceptable for a case of this seriousness. A prosecutor cannot present a case by just pouring out a jumble of random facts as if one were pouring treacle from a jar. It is unfair to a court and it retards the aim of a fair trial which, apart from other factors, needs to be coherent and orderly. The defence fares little better: the cross-examination hardly plumbed the body of evidence and appeared to have no plan or objective and was either blind or inattentive to several material or potentially material details. The narrative of the testimony refers to relevant aspects which were ignored or overlooked. *An adversarial process is founded on proper preparation and commitment to testing the testimony available*. It is not served by treating the process as a clerical chore.

South African criminal procedure, as will be seen in later chapters of this book, has basically been accusatorial. But in certain circumstances a judge may, and sometimes even must, call witnesses of his own. See paragraph 2.3.2 in Chapter 17 below. The procedure of questioning that may take place under s 115 (plea of not guilty) contains inquisitorial elements, as does part of s 112 (questioning pursuant to a plea of guilty); on the other hand, the fact that an accused can be found guilty solely on his plea of guilty without the judge doing any questioning to investigate the 'truth' is a strong accusatorial element (even though it can happen only in the case of relatively minor offences).

Modern Western European systems are due process inquisitorial systems. In Germany, an accused has all the rights that an accused has under Anglo-American systems, if not more:

the presumption of innocence is fully operative—if the court has reasonable doubt whether any element of an offence has been adequately proved by the prosecution, the accused will be acquitted; the accused has the right to silence and no adverse inferences may be drawn from the exercise of that right; evidence wrongfully obtained, for example through trick or torture, is inadmissible.

Not all accusatorial systems are necessarily also due process systems. In the not-too-distant past it was possible under South African criminal procedure for a person to be detained indefinitely *incommunicado*, without access to a lawyer or to the courts; illegally obtained evidence was fully admissible; in terrorism cases the

accused had, under certain circumstances, to prove his innocence beyond reasonable doubt.

Modern South African criminal procedure has shifted increasingly towards the due process model as a consequence of the new constitutional order. See para 3 above. The present system differs materially from the European system that was brought to Southern Africa more than three and a half centuries ago.

With the Dutch occupation of the Cape in 1652, the system of criminal procedure based on the Philip II Ordinance of 1570 was introduced. Torture was widely practised. Punishments were equally severe and included hanging, strangling, breaking on the wheel, burning, drowning, whipping, branding, keelhauling, dismemberment and the pillory.

The first British occupation (1795-1803) saw the abolition of legalised torture in 1796 two years before it was abolished in the Netherlands. After the second British occupation (1806), the Roman-Dutch law of criminal procedure nevertheless remained in force in the Cape. The structure of the courts was, however, subject to several amendments, which resulted in uncertainty as to which procedure the newer courts should follow. This led to the Chief Justice and the members of the Court of Justice issuing a code of criminal procedure in 1819, which document—introducing elements of English criminal procedure—became known as *Crown Trial*. Eventually all prosecutions in the Cape fell under the authority of an official called the fiscal. In 1827, a commission of enquiry recommended that the system of criminal procedure in the Cape should approximate even more closely that of England. The recommendations were largely accepted, resulting in the *First Charter of Justice* in 1827, which was replaced by a very similar *Second Charter of Justice* in 1832. The *First Charter of Justice* was followed by Ordinances 40 (1828) (on criminal procedure) and 72 (1830) (on evidence), which virtually completed the anglicisation of the law of criminal procedure and evidence and which form the foundation of our modern law, putting an end to the inquisitorial system and replacing it with the accusatorial English procedure; the trial now took the form of an open confrontation between prosecutor and accused with the court acting as passive adjudicator. Theoretically, however, the Roman-Dutch law of criminal procedure still remains the common law of the South African law of criminal procedure.

After the establishment of the Union of South Africa in 1910, the Criminal Procedure and Evidence Act 31 of 1917 was enacted, which was a comprehensive code of criminal procedure, popularly called ‘The Code’. Many amendments followed, the one of 1935 being the most important. The Judges’ Rules were formulated by a conference of judges in 1931 as guidelines intended to protect the accused’s privilege against self-incrimination during police interrogation. A consolidating Criminal Procedure Act (Act 56 of 1955) replaced the 1917 Act. Trial by jury, already exceptional in practice, was abolished *de jure* by the Abolition of Juries Act 34 of 1969. The present Criminal Procedure Act 51 of 1977 came into force on 22 July 1977. The Constitution of the Republic of South Africa, 1996, also contains important provisions affecting criminal procedure. See para 3 above.

5 Sources of South African criminal procedure

5.1 Constitutional provisions

The Constitution contains provisions which directly or indirectly govern our criminal procedural system. See para 3 above. And as a result of the supremacy of the

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Constitution, these provisions are the most important sources of criminal procedural rules. It should be noted though that the Constitution does not deny the existence of statutory or common-law rights which are consistent with the Bill of Rights. See s 39(3) of the Constitution. The interaction between constitutional provisions and common-law and statutory criminal procedure is explained as follows by Steytler *Constitutional Criminal Procedure* (1998) 3:

> Apart from constitutional rights that can be applied directly, criminal justice will continue to be administered in terms of statutory and common-law rules of criminal procedure. The constitutional standards set by the Bill of Rights serve, then, only as a safety net and an interpretive norm. While the Bill of Rights sets the foundational norms of criminal procedure, it is no substitute for or replacement of the ordinary rules and principles of criminal procedure. Courts should apply the usual rules and principles, interpreted in the light of the Bill of Rights, and only if they do not vindicate a person's claim, does the Bill of Rights come into play. The converse is also true; because the Bill of Rights constitutes a minimum set of guarantees, ordinary rules of criminal procedure can provide more protection than what the Constitution demands.

5.2 The Criminal Procedure Act 51 of 1977 ('the Act')

The above Act contains detailed provisions concerning criminal procedure. It not only regulates the day-to-day mechanics of the system, but also contains important provisions which give practical effect and meaning to the rights contained in the Bill of Rights. Compare, for example, s 151 of the Act and s 35(3)*(h)* and *(i)* of the Bill of Rights. The Act consists of a section on definitions and 33 chapters dealing with matters such as the ascertainment of bodily features of accused persons, the conduct of criminal proceedings, verdicts, etc. The Act is sometimes referred to as the Criminal Procedure Code, which might imply that it is the sole source of criminal procedural rules. It is, however, not the sole source of criminal procedural rules. It is only the main source and is supplemented by other sources. See, for example, paras 5.3 and 5.4 below. In this work the emphasis will be on the Act.

5.3 Legislation other than the Act

5.3.1 The Child Justice Act 75 of 2008

The Child Justice Act 75 of 2008 came into operation on 1 April 2010. In the Preamble it is stated that this Act seeks to establish 'a criminal justice system for children . . . in accordance with the values underpinning our Constitution and our international obligations . . . by creating, as a central feature of this new criminal justice system for children, the possibility of diverting matters involving children . . . while children whose matters are not diverted, are to be dealt with in the criminal justice system in child justice courts'. The following should be noted:

- In terms of s 1 of the Child Justice Act a 'child' means 'any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of s 4(2)' (of the Child Justice Act).
- Section 1 also defines a 'child justice court' as 'any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child'.

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> Where a child and an adult are charged together in the same trial in respect of the same facts in terms of ss 155, 156 and 157 of the Criminal Procedure Act, a court must apply the provisions of the Child Justice Act in respect of the child, and the provisions of the Criminal Procedure Act in respect of the adult. See s 63(2) of the Child Justice Act.

The Child Justice Act amends several sections in the Criminal Procedure Act 51 of 1977. It should be noted that the ambit of the 'criminal justice system for children', as referred to in the Preamble to the Child Justice Act, is determined by s 4 of the Child Justice Act, which provides that the Criminal Procedure Act applies in relation to children, except in so far as the Child Justice Act provides for amended, additional or different procedures. The changes brought about by the Child Justice Act are extensive and cover pre-trial, trial and post-trial matters.

Schedule 5 to the Child Justice Act contains a valuable and informative exposition of the interface between the Criminal Procedure Act and the Child Justice Act. However, it should be noted that this Schedule 'is not part of the [Child Justice] Act and does not have the force of law'. See s 4(3)*(b)* of the Child Justice Act.

5.3.2 Various other statutes

There are also various other statutes, in addition to the Criminal Procedure Act and the Child Justice Act, which regulate aspects of criminal procedure. Some examples are the following: the Magistrates' Courts Act 32 of 1944 and the Superior Courts Act 10 of 2013 (both of which deal, for example, with the structure of the courts and jurisdictional matters as discussed in Chapter 2 below); the National Prosecuting Authority Act 32 of 1998, as discussed in Chapter 3 below; the Legal Aid Act 22 of 1969, which is referred to in para 4 of Chapter 4 below; the Extradition Act 67 of 1962, which is briefly discussed in para 7 of Chapter 7 below; the South African Police Service Act 68 of 1995, as discussed in paras 4.2.3 to 4.2.5 of Chapter 9 below; the Drugs and Drug Trafficking Act 190 of 1992, as referred to in para 9 of Chapter 9 below; the Adjustment of Fines Act 101 of 1991, as discussed in para 5.2 of Chapter 19 below; and, furthermore, the Criminal Law Amendment Act 105 of 1997 regarding minimum sentences, a matter which is discussed in para 5.3 of Chapter 19 below.

5.4 Common-law rules and case law

Not all criminal procedural matters stem from legislation. Common-law rules (see para 4 above) are, for example, applied to recusal in criminal proceedings—a procedure which is discussed in para 2.4 of Chapter 13 below. Legislation is silent on the matter of recusal.

Decided cases in which constitutional, legislative and common-law provisions were interpreted are obviously also—in terms of the doctrine of precedent—an important source.

6 Remedies

We have discussed the proposition that suspects and accused persons are accorded certain rights and that the powers of the authorities are subject to limitations in criminal procedure. It has become evident that it is in society's interest that the police should act lawfully and that meaningful control should be exercised over

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the actions of the executive (including law enforcement officials) in the criminal process. We have called this part of the principle of legality in pre-trial criminal procedure: the conduct and actions of executive officers in the criminal process ought to conform to the general requirements of the law, whether written or unwritten.

Apart from any new protective measures that may be developed under the Bill of Rights, the rights of the suspect are maintained and protected, and lawful conduct by state officials is encouraged, by a continuum of sanctions ranging from informal social sanctions to formal legal sanctions. The following are more or less familiar: civil action for damages, for example, on the ground of wrongful arrest, wrongful detention or physical injury; criminal sanctions, for example, on the ground of assault; the interdict; the writ of *habeas corpus*, or rather, its local Roman-Dutch equivalent, the *interdictum de libero homine exhibendo*; rules of evidence (for example, regarding the admissibility of admissions and confessions, privilege, and exclusionary rules); judicial criticism of police action; newspaper reporting and editorial comment; internal disciplinary measures by the police; even public protest, to mention but a few.

It is clear that judicial supervision and control are of the utmost importance for the maintenance of the principle of legality in the modern state under the rule of law (the *Rechtsstaat*). The judiciary is indeed the ultimate guardian of the principle of legality, and access to an independent and strong bench is the highest guarantee of respect for and maintenance of the rights of the individual. As has been pointed out, the Constitution and its Bill of Rights acknowledge this; s 165(2) provides that the courts are independent and subject only to the Constitution and the law. Section 167 provides inter alia that the Constitutional Court has the final say on all matters relating to the Constitution (see s 167 (3)).

We now wish to draw attention briefly to some remedies for infractions or threatened infractions of fundamental rights.

6.1 The writ of habeas corpus (or rather the interdictum de libero homine exhibendo)

This is an important remedy which may be resorted to in the course of the criminal process to obtain judicial review of police action and thus to protect the subject against unlawful deprivation of his liberty. The court is asked for an order that the respondent (who may be the Minister, the commanding officer, the chief warder, etc) produce the body of X (the detainee) before the court at a certain date and time. This order is coupled with a rule *nisi* that the respondent must show reason why X should not be released. *Prima facie* reasons for believing that the detention is wrongful must be adduced. The application is usually heard by a single judge in a civil court where it enjoys preference on the roll. The application may be made *ex parte*. The return date is as early as possible and the case may be dealt with summarily, on the strength of oral evidence. It is quite possible, for example, that by special arrangement the application is made at 7h00; that the return date is set for 10h00 the same day; and that, after argument, the detainee obtains his release at 13h00 (see Kentridge 'Habeas corpus procedure in South Africa' 1962 *SALJ* 283). It is immediately apparent how important inter alia the following rights are for the successful implementation of this remedy: specified place of detention; information as to reasons of arrest; and access to friends, counsel, etc.

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6.2 A civil action for damages

An action for damages, for example on the ground of wrongful arrest, is an example of delictual liability which may arise in the course of the criminal process and which may be used by suspects to compensate them for any abuse which they suffered. See textbooks on the law of delict for a fuller discussion.

6.3 The interdict

This is an order of court whereby a person is prohibited from acting in a certain way. Since its purpose is to limit or prevent harm or damage, it may even be obtained where harm has

not yet occurred but is threatening. This legal remedy can be fruitfully employed during criminal proceedings to obtain relief, for example for detainees.

6.4 Mandamus

This is the reverse of an interdict; it is a positive order that a functionary perform his or her duty (eg furnish an accused with proper particulars relating to the charges), whereas an interdict is a negative order that a person refrain from doing something.

6.5 The exclusionary rule

This evidential 'remedy' is recognised in s 35(5) of the Constitution and was quoted in para 2.2 above. Note that exclusion is not automatic but is contingent on a finding that admission would be unfair or detrimental to the administration of justice. Our courts thus have a guided discretion to exclude or to admit.

The exclusionary rule, in any of its forms, is a remedy that properly belongs to the sphere of the law of evidence. It was developed in the USA and aims, inter alia, to deter unlawful police conduct in the pre-trial criminal procedure by rendering inadmissible in a court any evidence which was obtained by state officials by unlawful means—for example, during illegal detention, or as a result of an unlawful search, or as a result of overbearing questioning (infringement of the right to silence) or torture (third-degree methods), or through denial of the right to (pre-trial) counsel. In our view it is more satisfactory to view this remedy as a means of maintaining and vindicating the principle of legality than just as a police deterrent—see also para 2.2 above.

The exclusionary rule must be understood in the light of the concept of legal guilt:

> [A] person is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in a procedurally regular fashion and by authorities acting within competencies duly allocated to them [Packer *The Limits of the Criminal Sanction* (1968) 166].

The argument sometimes raised against the exclusionary rule, viz that it lets criminals go free, is without substance for two reasons. First, it shows no understanding of the concept of 'legal guilt'; secondly, it loses sight of the fact that if the police had acted lawfully, the 'criminal' would in any case have gone free, as the following illustration will show: In terms of s 22*(b)* of the Criminal Procedure Act

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(search without a warrant) a policeman who has a mere suspicion that the delay in obtaining a warrant would defeat the purposes of the search may not search without a warrant: a belief on reasonable grounds is required. Therefore the law-abiding policeman who knows that, objectively speaking, he has no reasonable grounds to rely on, will restrain himself even if he has a strong subjective notion, sixth sense or suspicion as a basis for action. He will first obtain a warrant. In the meantime, the culprit disappears with all the evidence. This possible result is a calculated risk that we must run if we value our personal liberty and human rights so highly that we are not prepared to deliver ourselves to the mere suspicions of police officials. The exclusionary rule *ex post facto* compels the same result: '[I]f the criminal goes free in order to serve a larger and more important end, then social justice is done, even if individual justice is not.'—Goldstein 'The State and the accused: Balance of advantage in criminal procedure' 1960 69 *Yale Law Journal* 1149.

6.6 Informal remedies

An informal way of obtaining relief is to resist unlawful arrest or to escape from unlawful custody. In practice this resort may, of course, be risky.

6.7 Constitutional mechanisms

Various mechanisms for the promotion of the maintenance of human rights and legality as against overbearing state action are contained in the Constitution. Section 38, for instance, lists those who may approach a competent court to allege that a right in the Bill of Rights has been infringed or threatened.

Further 'state institutions supporting constitutional democracy' are listed in Chapter 9 of the Constitution, including the office of Public Protector, and the Human Rights Commission. Of great importance are also many private (ie non-governmental) organisations which offer help to citizens.

7 Remarks in conclusion

The following statement by Schaefer 'Federalism and state criminal procedure' 1956 70 *Harvard Law Review* 1 26 was cited with approval by Warren CJ in *Miranda v Arizona* 384 US 436 480 (1966): 'The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law.' However, considerations such as real or perceived crime problems, emphasis on human rights, war and states of emergency will always play a role in determining rights and powers in a particular country at a particular time. The pendulum always swings; it is never stationary. Over the past decade South Africa, under a new constitutional dispensation which emphasises human rights, has been moving towards more rights, with concomitant limitations on powers. Perhaps we have reached a stage where it is appropriate to say that '[t]he achievement of a sustainable balance between crime control and due process might well require legislative reconsideration' (Davis J in *Hoho* 1999 (2) SACR 159 (C) 186*b*). See also Van Dijkhorst 'The criminal justice system in jeopardy—Is the Constitution our bane?' 1998 *Consultus* 136.

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Chapter 2
The criminal courts of the Republic

JP Swanepoel

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Jurisdiction to pronounce upon the validity of laws or the conduct of the President

The Constitution and this chapter:

Section 165—Judicial authority

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision by a court binds all persons to whom and all organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

Section 166—Judicial system

Section 166 of the Constitution provides that the courts are—

(a) the Constitutional Court;
(b) the Supreme Court of Appeal;
(c) the High Court of South Africa;
(d) the Magistrates' Courts; and

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(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court or the Magistrates' Courts;

See 1, below

The Child Justice Act 75 of 2008 and this chapter:

Section 1—Definitions

In this Act, unless the context indicates otherwise—

'child justice court' means any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child;

'children's court' means the court established under section 42 of the Children's Act;

See 4.2.2.2 below

1 Introduction

The judicial authority of the Republic is vested in the courts (s 165(1) of the Constitution of the Republic of South Africa, 1996). The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or

prejudice (s 165(2) of the Constitution). The hierarchy of the South African courts system in South Africa, as far as the criminal justice system is concerned, consists of superior courts and the lower courts. While the superior courts consist of the Constitutional Court, the Supreme Court of Appeal, the High Court of South Africa ('High Courts') and any court of a status similar to the High Courts, the lower courts consist of the courts of regional divisions (regional courts) and district courts. Child justice courts are not separate criminal trial courts but function within the ordinary criminal courts structure. Consequently, there is no separate criminal justice system exclusively for children, although there are specific provisions relating to child offenders in the pre-trial, trial and post-trial criminal process contained in the Child Justice Act 75 of 2008 and the Criminal Procedure Act 51 of 1977. In terms of the Judicial Matters Second Amendment Act 43 of 2013 certain divisions of the High Courts and certain magistrates' courts may be designated by the Minister as special sexual offences courts dealing with sexual offences.

The Constitution Seventeenth Amendment Act, 2012, and the Superior Courts Act 10 of 2013, both of which came into operation on 23 August 2013, rationalised and brought about a number of changes in the composition of the courts and defined the role of the Chief Justice as the head of the judiciary. The Chief Justice of the Constitutional Court and the Office of the Chief Justice exercise responsibility over all courts and are responsible for establishing and monitoring norms and standards necessary for exercising the judicial functions of all courts (s 165(6) of the Constitution). In view of this the SA Judicial Education Institute was established in 2012 to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts through judicial education by virtue of the South African

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Judicial Education Institute Act 14 of 2008. See also the Judicial Matters Amendment Act 24 2015 in this regard.

Since 2013 the Constitution also provides a single High Court of South Africa, and regulates the jurisdiction of the Constitutional Court and the Supreme Court of Appeal. The Renaming of High Courts Act 30 of 2003 and the Supreme Court Act 59 of 1959 were repealed by the Superior Courts Act 10 of 2013. The traditional appellations of 'the Supreme Court', or 'a High Court', or 'a division of the Supreme Court' are, in terms of ss 6(1) and 53 *(b)* of Act 10 of 2013, replaced by the collective name of 'the High Court of South Africa' with a main seat of a division and local seat(s) established under a division.

The composition of the courts of South Africa and the criminal jurisdiction of courts of first instance form the focus of this chapter. Jurisdiction refers generally to the authority of a court to hear and decide any issue or a specific matter whether on trial, on appeal or on review.

2 The Superior Courts

2.1 The Constitutional Court

2.1.1 The composition of the Constitutional Court

The Constitutional Court (with its seat in Johannesburg) is the highest court of the Republic and consists of a Chief Justice, a Deputy Chief Justice and nine other judges (s 167(1) of the Constitution). A matter before the Constitutional Court must be heard by at least eight judges—s 167(2) of the Constitution.

2.1.2 Constitutional jurisdiction of the Constitutional Court

This court has final jurisdiction in respect of all matters. This court may decide on all constitutional matters and may decide any factual or legal matters only if the Constitutional

Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by this court—s 167(3)*(a)*. The Constitutional Court makes the final decision on whether a matter is within its jurisdiction—s 167(3)*(c)* of the Constitution. The Constitutional Court also makes the final decision on whether an Act of Parliament, a provincial Act or the conduct of the President is constitutional. It must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa or a court of similar status, before that order has any force—s 167(5). In terms of s 167(4), the Constitutional Court is the only court that may decide on—

(i) disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
(ii) the constitutionality of any parliamentary or provincial Bill;
(iii) the constitutionality of any amendment to the Constitution; or
(iv) the question whether Parliament or the President has failed to fulfil a constitutional obligation.

The Constitutional Court decides whether an applicant may bring a constitutional matter directly to the Constitutional Court. A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution—s 167(7) (cf *Boesak* 2001 (1) SACR 1 (CC) and *Van Vuuren* 2005 (2) SACR 1 (CC)).

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The Minister may by virtue of s 15(2) of the Superior Courts Act 10 of 2013 invoke the decision of the Constitutional Court on a question of law when there are conflicting decisions on a question of law or when the Minister has any doubt as to the correctness of any decision given by any division in any criminal case on a question of law. Whenever a decision in any criminal case on a question of law is given by any division of the High Court of South Africa which is in conflict with a decision in any criminal case on a question of law given by any other division of the High Court, the Minister may submit such decision or, as the case may be, such conflicting decisions to the Constitutional court and cause the matter to be argued before that court in order that it may determine such question of law for the future guidance of all courts (cf s 333 of the Criminal Procedure Act, discussed below).

2.1.3 Appeal jurisdiction of the Constitutional Court

Access to the Constitutional Court on appeal with leave to appeal is regulated by the Constitution and is further dealt with in Chapter 21, below. The Constitutional Court has appeal jurisdiction to grant leave to appeal in terms of s 167(3)*(b)*(ii) of the Constitution to decide an appeal of general public importance for the law.

2.2 The Supreme Court of Appeal

2.2.1 Composition of the Supreme Court of Appeal

This court has its seat in Bloemfontein but may, when it is expedient or in the interest of justice, move its seat—s 5*(b)* of Act 10 of 2013.

The Supreme Court of Appeal consists of the President and Deputy President of the Supreme Court of Appeal and as many other judges as may be determined in accordance with the prescribed criteria, and approved by the President of the Supreme Court. The Supreme Court of Appeal ordinarily consists of five judges for all criminal matters. The President of the Supreme Court of Appeal may direct that an appeal be heard before a court of three judges or, if he or she considers it necessary in view of the importance of the matter, by a court of more than five judges—s 13(1) of Act 10 of 2013.

2.2.2 Constitutional jurisdiction of the Supreme Court of Appeal

This court may decide any matter *on appeal* and may enquire into and rule on the constitutionality of any legislation or any conduct of the President—s 170 of the Constitution.

Consequently, the Supreme Court of Appeal may make an order concerning the constitutionality of an Act of Parliament, a provincial Act or any conduct of the President, but such an order must be confirmed by the Constitutional Court—s 172 of the Constitution. This court has the inherent power to develop the common law with due regard to the interests of justice—s 173 of the Constitution.

2.2.3 Appeal jurisdiction of the Supreme Court of Appeal

The Supreme Court of Appeal has the authority to decide—

(i) appeals;
(ii) matters relevant to appeals;

(iii) any matter referred to this court in terms of an Act of Parliament—s 168(3) of the Constitution.

The Supreme Court of Appeal is a court of appeal only and not a court of first instance. This court does not have original sentencing jurisdiction, but may correct incorrect sentences in accordance with the sentencing jurisdiction of the trial court as court of first instance. This court has inherent power to protect and regulate its own procedures (s 172). The court as well as other superior courts may order the removal of any person interrupting the proceedings or influencing or insulting any member of the court—s 41 of Act 10 of 2013. Section 41 of the Superior Courts Act 10 of 2013 allows any superior court the power of removal and a brief detention till the rising of the court of a person interrupting the court proceedings or improperly trying to influence any court in respect of any matter being or to be considered by the court. The decision to try such person for contempt remains that of the prosecuting authority.

The Supreme Court of Appeal has the authority to hear an appeal against any order or judgment of the High Court and to decide on such appeal—s 16, Act 10 of 2013, and s 315 of Act 51 of 1977. Persons who have been found guilty by a division of the High Court may not automatically appeal to the Supreme Court of Appeal. The general principle is that leave has first to be sought from the High Court (or on refusal from the Supreme Court of Appeal) before an appeal can be made to the Supreme Court of Appeal.

In addition to the jurisdiction just discussed, the Supreme Court of Appeal also has certain powers in terms of s 333 of Act 51 of 1977. This section provides that whenever the Minister of Justice has any doubt as to the correctness of any decision given by any division of the High Court in any criminal case on a question of law, or whenever a decision in any criminal case on a question of law is given by any division of the High Court which is in conflict with a decision in any criminal case on a question of law given by any other division of the High Court, he may submit that decision or, as the case may be, such conflicting decisions to the Supreme Court of Appeal and cause the matter to be argued before it, in order that it may determine the said question for the future guidance of all courts. A previous judgment of another court is not reversed or amended in any way by such a decision of the Supreme Court of Appeal, although the executive, as distinct from the judiciary, may be prepared in special cases to show clemency to a convicted person when, in the light of such a decision, it appears that his conviction was not justifiable. An example of the application of this section is seen in *Ex parte Minister of Justice: In re R v Bolon* 1941 AD 345. In this case the Minister referred to the Supreme Court of Appeal (known at that time as the Appellate Division) the question of what degree of proof was required from an accused when a statute stated that the onus of proof was on the accused. The Supreme Court of Appeal held that such an onus was the same as that in a civil trial; the accused had to discharge the onus on a balance of probabilities (not beyond reasonable doubt). The Minister has repeatedly made use of s 333 to obtain a final verdict from the Supreme Court of Appeal on conflicting decisions of

'provincial' and 'local' divisions. Another example is to be found in *Ex parte die Minister van Justisie: In re S v De Bruin* 1972 (2) SA 623 (A).

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2.3 The High Court of South Africa

2.3.1 Composition of the High Court of South Africa

In accordance with the rationalisation process envisaged in Schedule 6 of the Constitution, the name 'the Supreme Court of South Africa' was initially changed to the 'High Courts of South Africa', but with retention of the names of the erstwhile 'provincial' and 'local' divisions of the 'Supreme Court'. Subsequently, new names for the High Courts were introduced by the Renaming of High Courts Act 30 of 2008, without, however, amending the jurisdiction of these courts. This Act has been repealed by Act 10 of 2013. The new composition or constitution of the High Court of South Africa is as follows:

The High Court of South Africa includes the following divisions (the main seat (eg. Grahamstown), mentioned in each instance, forms part of the name of the division concerned):

- Eastern Cape Division, Grahamstown
- Free State Division, Bloemfontein
- Gauteng Division, Pretoria
- KwaZulu-Natal Division, Pietermaritzburg
- Limpopo Division, Polokwane
- Mpumalanga Division, Nelspruit
- Northern Cape Division, Kimberley
- North West Division, Mahikeng
- Western Cape Division, Cape Town

(These are the nine 'provincial' divisions. The Mpumalanga division forms part of the Gauteng Division until this division becomes operative. Below are the seven 'local' seats of the divisions (the numbers of which could be increased if certain criteria exist — see *GG* 39595 of 14 January 2016):

- Eastern Cape Division, Bisho, local seat of the Eastern Cape Division
- Eastern Cape Division, Mthatha, local seat of the Eastern Cape Division
- Eastern Cape Division, Port Elizabeth, local seat of the Eastern Cape Division
- Gauteng Division, Johannesburg, local seat of the Gauteng Division
- KwaZulu-Natal Division, Durban, local seat of the KwaZulu-Natal Division
- Limpopo Division, Thohoyandou and Lephalale (see *GG* 39601 of 15 January 2016), local seats of the Limpopo Division

Each division of the High Court consists of a Judge President and one or more Deputy Judges President, as determined by the President, each with specified headquarters within the area under the jurisdiction of that division, and as many other judges for each division as may be determined in accordance with the prescribed criteria, and approved by the President—s 169 (2) of the Constitution and s 6 of Act 10 of 2013. A single judge presides in a matter unless a full bench of three judges is appointed—s 14(1) of Act 10 of 2013. An appeal is heard by either two or three judges.

2.3.2 Constitutional jurisdiction of the High Court of South Africa

This court has jurisdiction to decide the constitutionality of any legislation or any conduct of the President—s 169 of the Constitution. It may develop the common law—s 172 of the Constitution.

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2.3.3 Appeal and review jurisdiction of the High Court of South Africa

The divisions of the High Court of South Africa have appeal and review jurisdiction in respect of criminal proceedings emanating from lower courts. Furthermore, all the divisions and the Gauteng Division of the High Court, Johannesburg, when sitting as a 'full court' (ie sitting with three judges), have appellate jurisdiction to hear an appeal in a criminal case decided by a single judge if the questions of law and of fact and other considerations involved in the appeal are of such a nature that the appeal does not require the attention of the Supreme Court of Appeal. (The appellate and reviewing jurisdiction of the divisions and the Gauteng Division of the High Court, Johannesburg, will be discussed in Chapters 20 and 21.) The Gauteng Division of the High Court, Johannesburg, has exactly the same appellate jurisdiction as the above divisions. Leave to appeal is required unless specific circumstances relating to child offenders are present.

The main seat of a division has concurrent *appeal* jurisdiction over the area of jurisdiction of a local seat of that division, which means that the main seat has parallel jurisdiction with the local seat operating at the same time and the case could be moved from the local seat to the main seat.

2.4 Circuit courts of a division

The Judge President of a division of the High Court establishes a circuit court under the jurisdiction of that division to adjudicate civil and criminal matters. Each circuit court of a division must sit at least twice a year at such times and places as may be determined by the Judge President—s 7 of Act 10 of 2013.

3 Lower courts

3.1 Magistrates' courts

3.1.1 Composition of lower courts

In terms of s 1 of the Criminal Procedure Act, 'lower court' means any court established under the provisions of the Magistrates' Courts Act 32 of 1944. The courts so established are the magistrates' courts with ordinary jurisdiction and the regional courts—s 2 of the Magistrates' Courts Act. In s 2(1)*(j)* of the Magistrates' Courts Act, provision is also made for the institution of periodical courts.

A magistrate's court is instituted for a district (we shall, for the sake of brevity, refer to it as the *district court*), and a court for a regional division (to which we shall refer simply as the *regional court*) is instituted in terms of s 2 of the Magistrates' Courts Act.

Periodical courts are magistrates' courts which sit at regular intervals at places other than the seats of fixed permanent district courts. Periodical courts perform the same function in large and sparsely populated areas as circuit courts in the case of the High Court. The jurisdiction of a periodical court is exactly the same as that of a district court, except that there are certain limitations as regards its territorial jurisdiction. However, no person shall, without his consent, be liable to appear as an accused before any periodical court unless he resides nearer to the place where the periodical court is held than to the seat of the magistracy of the district—s 91(1)*(b)* of the Magistrates' Courts Act.

3.1.2 Constitutional and appeal jurisdiction

Lower courts do not have jurisdiction to enquire into or rule on the constitutionality of any legislation or on any conduct of the President—s 170 of the Constitution.

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Although lower courts must decide the issue of granting or denying leave to appeal to a High Court, lower courts do not have jurisdiction to hear and decide a matter on appeal or review

except by virtue of s 29A of the Magistrates' Courts Act, where an appeal is lodged against a conviction and or sentence of chiefs, headmen and chiefs' deputies.

3.2 Other lower courts

It is foreseen that if or when traditional courts are introduced as part of a traditional criminal justice system, in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 (read with the Traditional Courts' Bill [B1—2012]), these courts will have jurisdiction to try certain offences committed within a traditional courts' jurisdiction according to traditional law and customs.

4 Jurisdiction of criminal courts

With regard to the jurisdiction of the criminal courts of the Republic, the following may be distinguished: jurisdiction in respect of offences, territory and punishment; and jurisdiction in respect of the validity of the provisions of any Act.

4.1 Jurisdiction in respect of offences

4.1.1 The divisions of the High Court of South Africa

The divisions of the High Court have original jurisdiction in respect of all offences.

4.1.2 District courts

A district court has jurisdiction to try all crimes except treason, murder, rape and compelled rape. A district court may even try some serious offences against the state.

4.1.3 Regional courts

A regional court may try all crimes except treason—see s 89, Act 32 of 1944. A regional court therefore may try murder and rape.

4.2 Jurisdiction and extended jurisdiction in respect of offences committed on South African territory

4.2.1 The divisions of the High Court of South Africa

The divisions of the High Court of South Africa have original jurisdiction in respect of all offences committed within their respective areas as defined in the Superior Courts Act 10 of 2013.

The rule that all divisions exercise jurisdiction in respect of offences committed within their respective areas has been extended in the following respects:

(1) In *Hull* 1948 (4) SA 239 (C) it was held that a division of the High Court has jurisdiction to put into effect a suspended sentence imposed by another division or by a magistrate's court.

(2) The legislature sometimes lays down, in respect of specific offences, that they shall for the purposes of jurisdiction be deemed to have been committed in any place where the accused happens to be. An example is found in s 4 of the Civil Aviation Offences Act 10 of 1972.

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(3) In *Fairfield* 1920 CPD 279 it was held that if an Act creates an offence and confers jurisdiction merely on a lower court in respect of such offence, the jurisdiction of a High Court is not ousted in respect of the offence (unless, of course, there is an express provision in the Act to this effect).

(4) Section 111 of the Criminal Procedure Act empowers the national director of public prosecutions to direct that a trial be held in a court within the area of a Director of Public Prosecutions although the offence was committed within the area of another

Director. This section is clearly applicable to lower courts as well as to the High Court of South Africa. See *Ndzeku* 1996 (1) SACR 301 (A). Furthermore, according to s 22(3) of Act 32 of 1998, where the National Director of Public Prosecutions (NDPP) or Deputy Director of Public Prosecutions, authorised thereto in writing by the NDPP, deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one director be investigated and tried within the area of jurisdiction of another director, he or she may, subject to the provisions of s 111 of the Criminal Procedure Act, in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other director. The directive must be issued before the indictment has been served on the accused—see *Mamase* [2010] 1 All SA 427 (SCA). However, s 111(3) does not prohibit such removal even though the accused has already appeared in court.

4.2.2 District courts and regional courts

Here we must distinguish between a summary trial and a preparatory examination. In a summary trial the accused is charged in the magistrate's court and this court itself decides whether he is guilty or not guilty. In the case of a preparatory examination, there is a hearing in which the accused is not tried; the magistrate does not judge whether he is guilty or not guilty, but only hears the evidence which is then sent to the director of public prosecutions who will decide whether to institute a prosecution or not, and in which court.

4.2.2.1 Summary trials

Section 90 of the Magistrates' Courts Act lays down that a district court and a regional court have jurisdiction to hear trials of persons who are charged with an offence committed within the district or within the regional division (consisting of a number of districts) respectively. This principle has been extended by the further provisions of s 90 (the so-called four kilometers rule), as follows:

(1) When any person is charged with any offence—

(a) committed within the distance of four kilometers [formerly two miles] beyond the boundary of the district, or of the regional division; or

(b) committed in or upon any vessel or vehicle on a voyage or journey, any part whereof was performed within a distance of four kilometers from the boundary of the district or the regional division; or

(c) committed on board any vessel on a journey upon any river within the Republic (or forming the boundary of any part thereof) and such journey or part thereof was performed in the district or regional division or within four kilometers of it; or

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(d) committed on board any vessel on a voyage within the territorial waters of the Republic, and the said territorial waters adjoin the district or regional division; or

(e) begun or completed within the district or within the regional division,

such person may be tried by the court of the district or of the regional division, as the case may be, as if he had been charged with an offence committed within the district or within the regional division respectively.

With regard to the four kilometers rule, a person may be tried in a particular area for an offence committed in another province but within four kilometers beyond the boundary of the particular area if it is an offence under the common law (implicit in the decision in *Baba* JS 376/33 (G)) and probably also if it is an offence in terms of statutory law operative in both provinces concerned. The court cannot, however, by virtue of this rule, apply statutory law operative in its own area if the act or omission concerned took place in another province where the particular statutory provision is not

applicable, even, it would appear, if there is a similar statutory provision applicable in that other province. In *Baba* (above) the court decided that a person could not be tried in Kimberley, in the (erstwhile) Cape Province, for the offence of resisting the police contrary to the provisions of a Cape Act where the person's act took place in the district of Boshof, in the Free State, within two miles beyond the boundary of the district of Kimberley; the fact that there was a similar Act operative in the Free State did not affect the issue.

The question whether the court could apply statutory law operative in the province where the act or omission took place, but not operative in its own province (eg, in the case of *Baba* (above), whether Baba could have been tried in Kimberley for a transgression of the Free State Act committed in the district of Boshof), has correctly been decided in the negative in *Mpika* JS 253/41 (E). The position is similar if the two offences are the same but in the one area a mandatory minimum sentence must be imposed after conviction while this is not the case in the other area—*Khuzwayo* 1981 (1) SA 481 (N).

Subject to the remarks on extraterritorial jurisdiction below, a South African court does not have jurisdiction to adjudicate upon an offence committed in a foreign state and the four kilometers rule is thus not applicable—*Maseki* 1981 (4) SA 374 (T).

(2) Where it is uncertain in which of several jurisdictions an offence has been committed, it may be tried in any of such jurisdictions.

(3) A person charged with an offence may be tried by the court of any district or any regional division, as the case may be, wherein any act, omission or event which is an element of the offence took place.

(4) A person charged with theft of property or with obtaining property by an offence, or with an offence which involves the receiving of any property by him, may also be tried by the court of any district or regional division, as the case may be, wherein he has or had part of the property in his possession.

(5) A person charged with kidnapping, child-stealing or abduction may also be tried by the court of any district, or of any regional division, through or in which he conveyed or concealed or detained the person kidnapped, stolen or abducted.

(6) Where by any special statutory provision a magistrate's court has jurisdiction in respect of an offence committed beyond the local limits of the district (or of the regional division), such court is not deprived of such jurisdiction by any of the provisions of s 90 of the Magistrates' Courts Act.

(7) Where an accused is alleged to have committed various offences within different districts within the area of jurisdiction of any director of public prosecutions, the latter may in writing direct that criminal proceedings be commenced in a magistrate's court within his area of jurisdiction as if such offence had been committed within the area of jurisdiction of such court. A regional court within whose area of jurisdiction such magistrate's court is situated shall likewise have jurisdiction in respect of such offence if the offence may be tried by a regional court—s 90(8), Act 32 of 1944.

(8) In one instance the accused may even, upon a written order of the director of public prosecutions, be charged in the court of any district or regional division of the province or area for which that director holds office. This may happen when the director of public prosecutions deems it expedient owing to the number of accused involved in any criminal proceedings or with a view to avoiding excessive inconvenience or the disturbance of the public order—s 90(9), Act 32 of 1944.

(9) In terms of the provisions of s 110(1) of the Criminal Procedure Act, if a person is, as far as territorial jurisdiction is concerned, wrongly charged before a particular court, and fails to object timeously, such court will thereby acquire jurisdiction to try him.

(10) There are specific statutory provisions in terms of which a magistrate's court may exercise jurisdiction. Thus s 18 of the Aviation Act 74 of 1962 provides that in respect of any offence under that Act and in respect of any offence committed on a South African aircraft, the offence is deemed for the purpose of criminal jurisdiction to have been committed in any place where the accused happens to be.

(11) Lastly, s 111 of the Criminal Procedure Act confers upon the national director of public prosecutions an unlimited discretion to order a trial to take place in the area of another director of public prosecutions. Note the extension in s 22(3) of Act 32 of 1998—item (4) in 4.2.2.1 above.

4.2.2.2 Preparatory examinations and preliminary enquiries

Section 125 regulates the jurisdiction of magistrates' courts. A preparatory examination is conducted in a magistrate's court within whose area of jurisdiction the offence has allegedly been committed. The director of public prosecutions may, however, if it appears to him expedient on account of the number of accused involved or in order to avoid excessive inconvenience or a possible disturbance of the public order, direct that the preparatory examination be held in another court within the area of his jurisdiction.

In terms of s 43(3)*(c)* of the Child Justice Act the child in conflict with the law and below 18 years of age must appear before a lower court. The procedure of the preliminary enquiry is set out in s 47 of the Act. At the conclusion of the preliminary enquiry the magistrate at such enquiry may order that the matter be diverted in terms of s 52(5) of the Act or that the matter be referred to a child justice court.

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4.3 Jurisdiction in respect of offences committed outside South Africa

The general principle is that the courts of the Republic will exercise jurisdiction with regard to offences committed on South African territory only—cf *Makhutla* 1968 (2) SA 768 (O); *Mathabula* 1969 (3) SA 265 (N); and *Maseki* 1981 (4) SA 374 (T). This position was confirmed by the Constitutional Court in *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC), para [38], where the court stated as follows:

> It is a general rule of international law that the laws of a State ordinarily apply only within its own territory.

However, there are a number of exceptions. The exceptions apply with regard to the following offences or instances:

(1) High treason. By its very nature high treason is an offence which is frequently committed on foreign territory, eg where a South African citizen in wartime happens to be resident in an enemy country and joins the enemy army in order to overthrow the South African government.

(2) With regard to crimes of genocide, crimes against humanity and war crimes, jurisdiction is vested in South African courts as contemplated in s 4(3) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. A written permission of the Director of Public Prosecutions to institute a prosecution is required. Section 4(3) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 provides that any person committing certain offences such as genocide, war crimes and crimes against humanity in terms of this Act, is deemed to have committed the offence in question in the Republic if he, inter alia, is a South African citizen or a permanent resident or is, after the commission, present on South African territory.

(3) Trafficking of persons. Section 12 provides for extraterritorial jurisdiction of South African courts in respect of trafficking of persons as provided for in chapter 2 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013, depending on certain

jurisdictional facts and with the written permission of the Director of Public Prosecutions.

(4) A South African court will have jurisdiction to hear a charge of theft (which is a continuing offence) committed in a foreign state—not because it is regarded as theft in the foreign country, but because an accused is regarded as continuing to appropriate the stolen object with the necessary intention in South Africa—*Kruger* 1989 (1) SA 785 (A).

(5) Offences committed on ships. Here one has to distinguish between, on the one hand, offences committed on South African ships on the open sea or on other ships by South African citizens (dealt with by s 327 of the Merchant Shipping Act 57 of 1951), and, on the other, offences committed within the territorial waters of the Republic and piracy. The territorial waters of a state must by virtue of international law be considered as part of that state, so that legislation in this regard is unnecessary. (Section 90(2) of Act 32 of 1944 now regulates the jurisdiction of magistrates' courts regarding offences committed within adjacent territorial waters. See 4.2.2.1 above.)

(6) Offences committed on aircraft. One has to distinguish between offences committed on South African aircraft, wherever they might be in the world, either in

the air or on land (see s 18 of the Aviation Act 74 of 1962 and Hiemstra 277-8), and certain offences (generally related to hijacking) committed outside the Republic on board aircraft other than South African. In respect of the latter category it is required that—

(a) such aircraft land in the Republic with the offender still on board; or

(b) the principal place of business or permanent residence of the lessee of such aircraft be in the Republic; or

(c) the offender be present in the Republic—s 3(2) of the Civil Aviation Offences Act 10 of 1972.

(7) Offences committed on territory which is subsequently annexed by the Republic—Hiemstra 280.

(8) Offences committed by South African citizens in Antarctica are justiciable in South Africa. For the purposes of the administration of justice, Antarctica is deemed to be situated within the magisterial district of Cape Town—s 2 of the South African Citizens in Antarctica Act 55 of 1962.

(9) Occasionally South African courts may exercise jurisdiction in respect of offences committed beyond South African borders, on account of miscellaneous statutory and other provisions securing jurisdiction of our courts:

(a) The Criminal Procedure Act provides (in s 110A) that if any South African citizen who commits an offence outside the area of jurisdiction of the Republic and who cannot be prosecuted by the courts of the country in which the offence was committed, due to the fact that the person is immune from prosecution as a result of the operation of the provisions of certain international conventions or treaties such as the Privileges and Immunities of the United Nations, 1946; Privileges and Immunities of the Specialised Agencies, 1947; Vienna Convention on Diplomatic Relations, 1961; Vienna Convention on Consular Relations, 1963, is found within the area of jurisdiction of any court in the Republic which would have had jurisdiction to try the offence if it had been committed within its area of jurisdiction, that court shall have jurisdiction to try that offence. The requirements that have to be complied with before such prosecution may be instituted are that the offence must be an offence under the laws of the Republic and that the National Director of Public Prosecutions must instruct that such prosecution be instituted. Embassies have traditionally been regarded as part of the territory of the state represented, but this notion has fallen into disrepute

over the years on account of malpractices (eg harbouring of criminals). The Vienna Convention of 1961 provides for diplomatic immunity from criminal jurisdiction in countries where diplomatic agents represent their own states. Diplomats of course remain subject to the jurisdiction of their home states—s 31 (4) of the said Convention provides: 'The immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state.' Section 110A now regulates such jurisdiction.

(b) The following are further examples of extraterritorial jurisdiction statutorily secured, such as—

(i) Section 6 of the Prevention and Combating of Torture of Persons Act 13 of 2013 provides for extraterritorial jurisdiction to South African courts if an offence in terms of this Act was committed in another

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country by an accused against a fellow South African or an accused who is a South African citizen or resident or present in South Africa or South African territorial waters, irrespective of whether the offence constitutes an offence in such foreign country. The NDPP must direct such prosecution.

(ii) Section 35 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 provides in similar manner for extraterritorial jurisdiction of South African courts even if the corrupt activities were committed outside South African borders. Courts are seized with jurisdiction only if certain jurisdictional facts are proved, such as citizenship, resident or that the accused was present in South Africa.

(iii) Section 90 of the Electronic Communications and Transactions Act 25 of 2002 provides, for example, that a court in the Republic trying an offence in terms of this Act, committed elsewhere, has jurisdiction where the offence was committed by a South African citizen or a person with permanent residence in the Republic, or a person carrying on business in the Republic.

(iv) Some offences, furthermore (eg intentionally gaining unauthorised access to any computer belonging to or under the control of the Department of Correctional Services), will, in terms of s 128(5) of the Correctional Services Act 111 of 1998, be subject to the jurisdiction of the South African courts, even if such an offence was committed outside the Republic, if the accused or the computer concerned *was* in the Republic at some stage.

(v) See also section 15 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.

(vi) In terms of s 11 of the Protection of Information Act 84 of 1982, any act constituting an offence under this Act which is committed outside the Republic by any South African citizen or any person domiciled in the Republic shall be deemed to have been committed in the Republic. Jurisdiction is determined by where the offence was actually committed and also by the place where the accused happens to be. However, an accused's mere presence does not always settle the matter: when an accused is illegally abducted from a foreign state by agents of the South African authorities and subsequently handed over to the South African police, the court before which such abducted person is arraigned has no jurisdiction to try such person—*Ebrahim* 1991 (2) SA 553 (A); *Piliso* 1991 (2) SACR 354 (Tk); *Beahan* 1992 (1) SACR 307 (ZS).

4.4 Jurisdiction with regard to sentencing

4.4.1 General

The fact that the various courts mentioned below have the jurisdiction to impose any of the respective sentences as indicated below does not mean that they may do so whenever they feel like it. The Criminal Procedure Act lays down specific rules with regard to the offences for which, the persons upon whom and the circumstances in which some of these sentences may or may not be imposed. The Child Justice Act, 2008, provides in s 77(1) that a child justice court may not impose a sentence of imprisonment on a child who is under the age of 14 years at the time of

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being sentenced for the offence; and when sentencing a child who is 14 years or older at the time of being sentenced for the offence, a court must only do so as a measure of last resort and for the shortest appropriate period of time. When a court sentences a child to imprisonment in respect of certain offences or circumstances, the period of imprisonment may not exceed 25 years. Apart from that, several Acts of Parliament, ordinances and regulations contain provisions prescribing the minimum or maximum sentences that may be imposed for certain offences. In addition, a whole body of case law has been built up over the years in which guidelines have been laid down concerning the way in which a court should exercise its discretion in sentencing an accused. The rules and guidelines with regard to the exercise by the court of its sentencing discretion will be discussed in more detail in Chapter 19.

4.4.2 Divisions of the High Court of South Africa

The divisions of the High Court may impose the following sentences:
(1) imprisonment, including imprisonment for life;
(2) periodical imprisonment;
(3) declaration as an habitual criminal;
(4) committal to a treatment centre;
(5) a fine;
(6) correctional supervision; and
(7) imprisonment from which the person may be placed under correctional supervision—s 276 of the Criminal Procedure Act.

4.4.3 Regional courts

A regional court may impose the following sentences:
(1) imprisonment not exceeding a period of fifteen years;
(2) periodical imprisonment;
(3) declaration as an habitual criminal;
(4) committal to a treatment centre;
(5) a fine not exceeding the amount determined by the Minister from time to time by notice in the *Gazette* (the amount determined with effect from 1 February 2013 in *GG* 36111 of 30 January 2013 is R600 000);
(6) correctional supervision; and
(7) imprisonment from which the person may be placed under correctional supervision—s 276 of the Criminal Procedure Act.

(Courts of a regional division (regional courts) have increased sentencing jurisdiction in respect of certain statutes. In the case of s 51 of the Criminal Law Amendment Act 105 of 1997, in respect of offences mentioned in Schedule 2 Part 1 of the said Act, the regional court must impose a sentence of life imprisonment if no substantial and compelling circumstances exist which justify a lesser sentence. If an Act has conferred an increased jurisdiction upon the regional court, such sentence may be imposed even if it exceeds this court's ordinary jurisdiction.)

4.4.4 District courts

A district court may impose the following sentences and no other:

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(1) imprisonment not exceeding a period of three years (if an Act has conferred an increased jurisdiction upon the magistrates' courts, these courts may impose such sentences notwithstanding the fact that such punishments exceed the ordinary jurisdiction of the magistrates' courts);
(2) periodical imprisonment;
(3) committal to a treatment centre;
(4) a fine not exceeding the amount determined by the Minister from time to time by notice in the *Gazette* (the amount determined with effect from 1 February 2013 in *GG* 36111 of 30 January 2013, is R120 000);
(5) correctional supervision; and
(6) imprisonment from which the person may be placed under correctional supervision—s 276 of the Criminal Procedure Act.

4.5 Jurisdiction to pronounce upon the validity of laws or the conduct of the President

Section 170 of the Constitution provides that all superior courts shall be competent to pronounce on the validity of any law or conduct of the President. If in any proceedings before a lower court it is alleged that any law or any conduct of the President is invalid on the grounds of its inconsistency with the Constitution, or that any law is invalid on any ground other than its constitutionality, the court shall decide the matter on the assumption that such law or conduct is valid. The party which alleges that a law or conduct of the President is invalid may, however, adduce evidence regarding the invalidity of the law or conduct in question.

Where an accused pleads not guilty in a lower court and his defence is based on the alleged invalidity of a provincial ordinance or a proclamation issued by the President, the accused must be committed for summary trial before a High Court having jurisdiction—s 117 of the Criminal Procedure Act.

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Chapter 3
The prosecution of crime

SE van der Merwe

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The Constitution and this chapter:

Section 9—Equality

9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

See 4.14.1, below

Section 179—Prosecuting authority

See the full text of s 179 as cited in 4.1 below

The Child Justice Act 75 of 2008 and this chapter:

Section 59(2)—Legal consequences of diversion

(2) A private prosecution in terms of section 7 of the Criminal Procedure Act may not be instituted against a child in respect of whom the matter has been diverted in terms of this Act.

See 2 below

Section 41—Diversion by prosecutor before preliminary Inquiry in respect of offences referred to in Schedule 1

(1) A prosecutor may divert a matter involving a child who is alleged to have committed an offence referred to in Schedule 1 and may, for this purpose, select any level one diversion option set out in section 53 (3) or any combination thereof, if the prosecutor is satisfied—

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(a) that the factors referred to in section 52 (1) *(a)* to *(d)* have been complied with; and

(b) in the case of a child who is 10 years or older but under the age of 14 years, that criminal capacity is likely to be proved in terms of section 11.

(2) The diversion referred to in subsection (1) must take place—

(a) in accordance with directives issued by the National Director of Public Prosecutions, as provided for in section 97(4)*(a)*(i)*(bb)*;

(b) subject to subsection (3), after an assessment of the child in accordance with Chapter 5; and

(c) before a preliminary inquiry as provided for in Chapter 7.

(3) If the child has not been assessed, the prosecutor may dispense with the assessment if it is in the best interests of the child to do so: Provided that the reasons for dispensing with the assessment must be entered on the record of the proceedings by the magistrate in chambers referred to in section 42.

(4) If the prosecutor is of the opinion that the child is in need of care and protection as envisaged by section 150 of the Children's Act, he or she must not divert the matter but refer the matter to a preliminary inquiry for consideration of referring it to a children's court.

(5) In order to decide whether to divert the matter or not, the prosecutor must take into account whether the child has a record of previous diversions.

(6) If the prosecutor decides not to divert a matter in terms of this section, he or she must immediately make arrangements for the child to appear at a preliminary inquiry referred to in Chapter 7.

See 4.18.1 below

Section 42—Diversion option to be made order of court

(1) If a matter is diverted in terms of section 41, the child and, where possible, his or her parent, appropriate adult or guardian must appear before a magistrate in chambers, in order to have the diversion option that has been selected by the prosecutor, made an order of court.

(2) The provisions of section 58 apply with the changes required by the context, to a child who fails to comply with any order referred to in subsection (1).

See 4.18.1 below

1 Introduction

In primitive societies all wrongs were private wrongs, and private vengeance could lawfully be taken by the wronged against the wrongdoer—*Black v Barclays Zimbabwe Nominees*

(Pvt) Ltd 1990 (1) SACR 433 (W) 434*e*. This right to exact private vengeance—which had often escalated into blood-feuds between clans or tribes—was gradually displaced by the idea that there had to be some form of officially enforced system of criminal justice in terms of which the guilt of an alleged perpetrator could be established, and in terms of which punishment could be meted out without the direct involvement of the individual victim concerned. There

was a need for what we would today call 'legality' or 'due process of law'. Several factors contributed to this development.

First, societies became progressively more civilised. They began to view private vengeance (personal retaliation, self-help) as a disruptive method of exacting retribution and as a most ineffective means of seeking to restore harmony between wrongdoer and victim, and between wrongdoer and society.

Secondly, the formation of organised forms of government and the development of political units known as states made it possible to transfer 'private vengeance' to a faceless entity which had the necessary resources, and which could create the appropriate structures, publicly to enforce justice on behalf of society, thereby indirectly accommodating or satisfying in a non-personal manner man's primitive but perhaps natural urge to seek retribution. This progress was accelerated when it became clear that there had to be a distinction between a private wrong and a public wrong, the latter being a wrong of such a nature that it required the state to intervene in the public interest. These 'public wrongs' were identified as crimes, and also contributed to the distinction between private and public law.

Thirdly, as soon as the state became responsible for the enforcement of criminal law, it was no longer possible to tolerate self-help. In fact, it then became unlawful to exact private vengeance. See Burchell *Principles of Criminal Law* 3 ed (2005) 19.

Fourthly, the due and proper administration of criminal justice requires that the state should in principle shoulder the prosecutorial task. There can be no fair and equal administration of the criminal justice system if prosecutions for crime are entirely left to the whim, initiatives or resources of individual victims.

This is one of the reasons why in our local criminal justice system it is possible for the prosecuting officials, in the exercise of their discretion to prosecute, to decide to proceed with a prosecution despite the victim's or complainant's wish to have the case withdrawn. Wider public interests are at stake. On the same basis the prosecuting officials may against the wishes of the victim refuse to institute a prosecution. See *Wickham v Magistrate, Stellenbosch and Others* 2016 (1) SACR 273 (WCC) at [82]-[84]. However, to avoid private vengeance, the victim may then in certain circumstances institute a private prosecution (see paras 2 and 5 below).

Fifthly, in most legal systems there are also so-called victimless crimes. In other words, certain human activities have been criminalised on the basis that they are harmful to a larger public interest even though there usually is no readily identifiable victim or complainant. It falls upon the state and its officials to prosecute these crimes where necessary.

Section 179(2) of the Constitution provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings. Section 20 of the National Prosecuting Authority Act 32 of 1998 gives more detailed effect to this constitutional provision. See para 4.3 below. For all practical purposes, it is the state which—through its appointed officials—prosecutes those who transgress the rules of substantive criminal law.

Charge sheets accordingly read 'The State *versus* Jones'. And indictments in the High Court mention that the director of public prosecutions is prosecuting on behalf of the state. When South Africa was still a Union, we followed the fiction which had originated in England, that the formal head of state (the King or the Queen as the case may be) was injured by every crime. Public prosecutions were

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therefore instituted in the name of the King *(Rex)* or the Queen (*Regina*), depending on who reigned at the relevant time. The usual abbreviation used in the law reports up to 31 May 1961 was *R v Jones*. And up to this date the prosecuting authority was commonly known as 'the Crown'. After 31 May 1961 criminal cases have been reported as *State versus Jones*, or as *S v Jones* in abbreviated form. The prosecuting authority is now commonly referred to as 'the State'. In this work we use the terms 'State', 'prosecution', 'prosecutor' and 'public prosecutor' interchangeably; and for the sake of brevity, we simply use *Jones* to denote *R v Jones* or *S v Jones*, as the case may be.

2 Public and private prosecutions

When individuals relinquished their right to private vengeance to the state, they did so on the tacit understanding that the state would dutifully prosecute crime. See Burchell *Principles of Criminal* Law 3 ed (2005) 19. However, most states do not adhere to the principle of compulsory prosecution. Prosecuting officials are vested with a discretion whether to prosecute or not. There are good reasons why prosecuting authorities should have a discretion (see para 4.14.1 below). However, an official refusal to prosecute might occasionally aggrieve an individual who happens to be the victim of a crime (and who, of course, has now been deprived of his ancient right to self-help). In order to avoid a deadlock of this nature and in an attempt to suppress or accommodate man's primitive urge to resort to self-help, some states have in addition to their system of public prosecution also created a system of private prosecution. This is a system in terms of which the aggrieved individual may in certain circumstances in his personal capacity proceed against the alleged perpetrator in an attempt to prove the latter's guilt beyond reasonable doubt in a court of law and have him punished within the ambit of legitimate procedures which were created by the state and which were also available to the state had it not declined to prosecute. The South African Criminal Procedure Act makes provision for private prosecutions in certain limited instances. Private prosecutions are dealt with in para 5 below. Public prosecutions, however, represent the vast majority of prosecutions.

3 Criminal prosecutions and civil actions

Having regard to the evolution from private vengeance to public prosecution, most modern states perceive the commission of a crime as a violation of the public interest. Punishment is in principle sought on behalf of society, and only in an incidental way in respect of an individual who has suffered some personal harm or damages in consequence of a crime. It is therefore considered proper that the state should in principle perform the necessary prosecutorial functions even in those circumstances where an identifiable victim clearly suffered some personal harm to his legitimate interests, for example, the patrimonial (economic) loss suffered by the victim of a theft. But this does not mean that a prosecution—whether public or private—deprives the injured party of any civil remedies he might have. In our example the victim of the theft might still seek to recover his losses in a civil court. This is a private law matter, and does not involve punishment through the application of procedural and substantive criminal law rules. The civil action is a matter between two individuals: the victim as plaintiff and the alleged thief as defendant.

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The civil action is in principle possible irrespective of the outcome of the criminal case. Section 342 of the Act provides that a conviction or an acquittal in respect of any offence shall not bar a civil action for damages at the instance of any person who has suffered damages in consequence of the commission of that offence. The exception to this rule is where the criminal court has ordered a convicted accused to pay compensation to the complainant or to return stolen property. See ss 300 and 301, discussed in greater detail in Chapter 19. The victim (plaintiff) cannot be compensated twice in respect of one and the same loss.

Section 342 also provides that an *acquittal* of an accused shall not bar a civil action. This is not a peculiar provision. It must be understood in the light of the differences between civil and criminal cases. In a criminal court the prosecution must prove its case *beyond reasonable doubt*. The prosecution will be unsuccessful if it fails to meet this standard of proof. But in a civil case the plaintiff will achieve success if the lesser standard of proof *upon a balance of probabilities* is met. To revert to our hypothetical theft case: In the absence of proof beyond reasonable doubt, the alleged thief must be acquitted. But the victim of the theft can, in his capacity as plaintiff in a civil action instituted by him, possibly still achieve success because he need only prove his case on a balance of probabilities (the lesser standard).

The institution of a civil action based on certain facts against a specific person does not preclude the institution of a public (or private) prosecution against the same person, arising out of the same facts. Once again, to return to our theft case: The fact that the victim has instituted a civil action to recover his losses cannot prevent the criminal justice system from taking its course and proceeding with a charge of theft. However, if the victim has (in his capacity as plaintiff in the civil action) successfully recovered his losses, the criminal court can in the event of a conviction not make any compensatory order. It should merely impose some form of punishment and not order compensation or return of property as envisaged by ss 300 and 301.

4 Public prosecutions

4.1 The constitutional provisions and legislative framework

4.1.1 Constitutional provisions

Section 179 of the Constitution (which should be read with Schedule 6 item 18(1) of the Constitution and s 108 of the interim Constitution) provides as follows:

> (1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—
>
> *(a)* a national director of public prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
>
> *(b)* directors of public prosecutions and prosecutors as determined by an Act of Parliament.
>
> (2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
>
> (3) National legislation must ensure that the directors of public prosecutions—
>
> *(a)* are appropriately qualified; and
>
> *(b)* are responsible for prosecutions in specific jurisdictions, subject to sub-s (5).

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> (4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
>
> (5) The national director of public prosecutions—
>
> *(a)* must determine, with the concurrence of the Cabinet members responsible for the administration of justice, and after consulting the directors of public prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;
(c) may intervene in the prosecution process when policy directives are not complied with; and
(d) may review a decision to prosecute or not to prosecute, after consulting the relevant director of public prosecutions and after taking representations within a period specified by the national director of public prosecutions, from the following:
(i) The accused person.
(ii) The complainant.
(iii) Any other person or party whom the national director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.

Section 179 provides the constitutional framework which must govern public prosecutions: Legislative or common-law provisions which conflict with this framework are unconstitutional. Section 179 is not infringed by the provisions of the Military Discipline Supplementary Measures Act 16 of 1999. See *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd and Others v Minister of Defence* 2001 (2) SACR 632 (CC).

4.1.2 The National Prosecuting Authority Act 32 of 1998

Parliament passed the National Prosecuting Authority Act 32 of 1998 (hereafter referred to as 'Act 32 of 1998') in order to give effect to the provisions of s 179 of the Constitution. See *Delport* 2015 (1) SACR 620 (SCA) at [15]; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at [31]; and *Van der Westhuizen* 2011 (2) SACR 26 (SCA) at [5]. Act 32 of 1998 also regulates further matters governing the prosecution of crime at the instance of the state. The whole of the Attorney-General Act 92 of 1992—which previously governed the appointment and essential powers of officials responsible for public prosecutions—was repealed by s 44 of Act 32 of 1998.

The National Prosecuting Authority has been described as 'a legal environment that requires people with legal qualifications to lead and to operate within it' (per Mogoeng CJ in *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC); 2015 (1) BCLR 1 (CC) at [69]).

An important transitional provision is contained in s 45 of Act 32 of 1998: any reference in any law to an attorney-general or deputy attorney-general shall be construed as a reference to a director of public prosecutions or deputy director of public prosecutions. This means, for example, that a reference to an attorney-general in the Criminal Procedure Act must be read as a reference to a director of public prosecutions appointed in terms of Act 32 of 1998. See further *Harksen v Director of Public Prosecutions, Cape of Good Hope* 1999 (2) SACR 272 (C) 280*f-i*.

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4.1.3 The professional independence of the prosecuting authority

In *Yengeni* 2006 (1) SACR 405 (T) at [51] it was said: 'The Constitution guarantees the professional independence of the National Director of Public Prosecutions and every professional member of his staff, with the obvious aim of ensuring their freedom from any interference in their functions by the powerful, the well-connected, the rich and the peddlers of political influence.' In this case the accused (a former member of parliament) had attended a pre-trial meeting with the then National Director of Public Prosecutions and the then Minister of Justice and Constitutional Development. The meeting took place at the Minister's home, where it was informally agreed that should the accused plead guilty to a 'watered-down' charge, the state would not seek a custodial sentence. However, at the trial the regional court did impose a custodial sentence. On appeal it was argued that given the prior informal arrangement the sentence was too severe. After having referred to s 179 of

the Constitution and ss 22(4)*(f)* and 32 of Act 32 of 1998, the court observed as follows (at [57], emphasis added):

> [I]t was indubitably ill-advised for the former National Director of Public Prosecutions to be seen to participate in a discussion with the Minister and the appellant. *The independence of the office that he held, and the fearless and unfettered exercise of the extensive powers that this office confers*, are incompatible with any hint or suggestion that he might have lent an ear to politicians who might wish to advance the best interests of a crony rather than the search for the truth and the proper functioning of the criminal and penal process.

The professional independence of the prosecution must also be assessed in the context of the fact that the Minister has ministerial responsibility—a matter which is discussed in para 4.5.8 below.

4.1.4 Professional independence and private funding of the prosecution: The risk of an unfair trial

In *Bonugli* 2010 (2) SACR 134 (T) the two applicants, charged with fraud, contended that the decision of the Deputy National Director of Public Prosecutions (DNDPP) to appoint two advocates in private practice as prosecutors was unlawful. The two advocates, both members of the Johannesburg bar, had been retained by the complainant to advise whether fraud had been committed by the applicants. The prosecution as well as advocates' fees were, furthermore, funded by the complainant (at 144*b*). The respondents also admitted that, but for the complainant's funding, the prosecution would not have taken place (at 144*b*-*c*). Du Plessis J accepted that s 38(3) of the National Prosecuting Authority Act 32 of 1998 permitted fees of prosecutors appointed in terms of s 38 to be paid by someone other than the state (at 144*f*-*g*). But at 144*g*-*i* Du Plessis J concluded as follows:

> In this case, however, the advocates are paid by the complainant who urged the prosecution after it had been withdrawn, and who is engaged in civil litigation with the trust whereof the first applicant is the only trustee. In my view, a reasonable and informed person would on the basis of these facts already reasonably apprehend that the advocates would not throughout, albeit subconsciously, act without fear, favour or prejudice. In the course of a criminal prosecution the prosecutor must, virtually on a daily basis, take decisions that might seriously impact on the rights and interests of the accused. The potential for a prosecutor paid by the complainant who had urged the prosecution, subconsciously to have undue regard to the interests of the complainant who foots the bill, is self-evident.

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Du Plessis J also took the view that 'it is a requirement of a fair trial that the prosecutor must not only act without fear, favour or prejudice, but also that he must be seen so to act' (at 143*b*-*c*). The fact that a junior member of the staff of the National Prosecuting Authority formed part of the prosecution team could not remedy the matter (at 145*b*-*c*). It was accordingly held that the appointment of the two advocates as prosecutors offended the constitutional fair trial rights of the applicants and was, therefore, unlawful (at 145*c*-*d*). In *Delport* 2015 (1) SACR 620 (SCA) at [37] it was noted, without deciding, that *Bonugli* was implicitly overruled in *Porritt v National Director of Public Prosecutions* 2015 (1) SACR 533 (SCA). It is submitted that *Bonugli* should be understood and interpreted in the context of its own peculiar facts, especially the fact that the prosecution would not have taken place but for the complainant's funding.

The decision of Hartzenberg J in *Tshotshoza* 2010 (2) SACR 274 (GNP) stands on a different footing. In this case four major banks had agreed, in response to a request by the government, to provide financial backing to an initiative that would co-ordinate and centralise the investigation as well as prosecution of cash-in-transit robberies and bank robberies. These criminal activities not only affected banks most immediately, but also had an impact on the public's confidence in the safety situation in the country. The issue was whether a private advocate—remunerated by the banking industry and duly appointed by the Director of Public Prosecutions to prosecute bank robberies and cash-in-transit

robberies—could lawfully prosecute. The appointment, held Hartzenberg J, complied with s 38 of Act 32 of 1998. See para 4.7.1 below. The banking industry as financial sponsor had no direct control over the private advocate acting as prosecutor; the prosecutor concerned also had no direct contact with any specific bank and the banks could not prescribe to the prosecutor that he should prosecute, or how he should prosecute. Hartzenberg J, writing for the full bench, accordingly held that a right-minded person would not have a perception of possible prejudice (at 24). The application of the two applicants to have the prosecutor removed was refused (at 28). The constitutional right to a fair trial was not at risk on account of the manner and funding of the prosecutor's appointment.

In this judgment Hartzenberg J did not reject the decision in *Bonugli* (above). In fact, he noted that in the latter case the perception of possible prejudice was certainly justified (at [7]). He furthermore referred to the following important distinctions between the two cases (at [24]):

> It follows that the argument that the appointment is not in accordance with s 38 of the Act cannot be sustained. As to what the right-minded objective person would make of the mode of payment, it is evident that this matter differs totally from the *Bonugli* matter. That was a matter where the prosecution was based on fraudulent conduct of the accused. The complainant tried to minimise its losses, as caused by the fraud. The complainant was busy with a civil matter. The evidence in the criminal matter would be wholly applicable to the issues in the civil matter. The complainant was conducting what in fact was a private prosecution as if it were a public prosecution. In this matter the individual banks do not have much hope of getting redress for their losses in the case of a successful prosecution. They are not directly involved in the prosecutions, and cannot and do not prescribe to the prosecutor to prosecute, and, if a prosecution commences, how to conduct the prosecution. Their contributions are more of a self-imposed tax and the payment of the prosecutor is much more akin to the payment of public prosecutors who get paid from

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> public funds. A right-minded objective person will not have a perception of possible prejudice.

In *Moussa* 2015 (2) SACR 537 (SCA) it was held that the appointment of 'outside prosecutors', as provided for in s 38 of Act 32 of 1998, is not inconsistent with constitutional provisions and does not violate the constitutional fair trial right of an accused.

Section 38 must also be understood in the context of the following observations in *Tshotshoza* at [19]: 'All over the world, outside prosecutors are engaged to prosecute on behalf of the State. There cannot be objection in this country to the engagement of outside prosecutors in specific cases. There are many reasons why it may become necessary for the NPA to engage outsiders. One thinks of a shortage of staff or of staff with the necessary expertise and experience to prosecute in particular cases.' These observations were also referred to in *Moussa* at [16].

4.2 Structure and composition of the single national prosecuting authority

In the past South Africa had attorneys-general (heads of prosecutions) at various divisions of the High Court. These attorneys-general acted independently of each other. There was no single national prosecuting authority.

Section 2 of Act 32 of 1998—as read with s 179 of the Constitution—established a single national prosecuting authority. See *Moussa* 2015 (2) SACR 537 (SCA) at [18].

The structure of the single prosecuting authority consists of the office of the National Director of Public Prosecutions (see s 3*(a)* of Act 32 of 1998) and the various offices of the prosecuting authority at the High Courts, and is established in terms of s 6(1) of Act 32 of 1998 (see s 3*(b)* of Act 32 of 1998).

In terms of s 4 of Act 32 of 1998, the prosecuting authority comprises the following: *(a)* the National Director of Public Prosecutions (hereafter referred to as the 'NDPP'); *(b)* the Deputy National Directors of Public Prosecutions (hereafter the 'DNDPPs'); *(c)* the Directors of Public Prosecutions (the former attorneys-general and hereafter the 'DPPs'); *(d)* the

Deputy Directors of Public Prosecutions (the former deputy attorneys-general and hereafter the 'DDPPs') and *(e)* prosecutors.

The office of the NDPP (as established in terms of s 5(1)) shall (in terms of s 5(2)) consist of the following: *(a)* the NDPP, who is the head of and controls the office; *(b)* DNDPPs (who may not exceed four in number—s 11(1)); *(c)* investigating directors (see para 4.2.1 below) and special directors (see para 4.2.2 below); and *(d)* other members of the prosecuting authority appointed or assigned to the office of the NDPP.

Section 6(1) establishes offices of the national single prosecuting authority at seats of the High Court. In terms of s 6(2) each of these offices consists of a DPP (or DDPP) who is head of and controls the office concerned; DDPPs; prosecutors and persons contemplated in s 38 (1), ie, persons appointed on an *ad hoc* basis on account of their qualifications and experience to perform services in *specific* cases. If a DDPP is appointed as head of one of these offices, he shall exercise his functions subject to the control and directions of a DPP appointed in writing by the NDPP—s 6(3).

4.2.1 Investigating directorates

The President may, by proclamation in the *Gazette*, establish one or more 'investigating directorates' in the office of the NDPP, in respect of such offences or

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criminal or unlawful activities as are set out in the proclamation (s 7(1) of Act 32 of 1998, as substituted by s 3 of the National Prosecuting Authority Amendment Act 56 of 2008). The latter Act repealed the provisions relating to the Directorate of Special Operations ('DSO' or so-called 'Scorpions') while further amendments to the South African Police Service Act 68 of 1995 ensured that the DSO was replaced by the Directorate for Priority Crime Investigation ('DPCI' or so-called 'Hawks'). In two Constitutional Court decisions several provisions in the amending legislation were found unconstitutional. See *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC); *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC). These two decisions ensured that the DPCI has the operational independence of a constitutionally mandated anti-corruption unit, free from political interference. However, the fact remains that the DPCI is, unlike the DSO, not prosecution-driven: it is a division within the South African Police Service and not under the control of the National Prosecuting Authority.

It should be noted that the Constitutional Court has specifically held that the South African Police Service (SAPS), and in particular the Directorate for Priority Crime Investigation (the 'Hawks') as the specialised unit within the SAPS, has the duty in our domestic law to investigate torture in terms of s 4(1) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. See *National Commissioner of Police Service v Southern African Human Rights Litigation Centre* 2015 (1) SACR 255 (CC); 2015 (1) SA 315 (CC) at [60].

4.2.2 Appointment of special directors

Section 13 of Act 32 of 1998 makes provision for the appointment of special directors.

4.3 The power to institute and conduct criminal proceedings (s 20(1) of Act 32 of 1998)

The above section provides that the power as contemplated in s 179(2) and all other relevant sections of the Constitution to *(a)* institute and conduct criminal proceedings on behalf of the state; *(b)* carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and *(c)* discontinue criminal proceedings, vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic. See generally *Moussa* 2015 (2) SACR 537 (SCA) at [18].

4.4 The authority and hierarchy of power to institute criminal proceedings

The hierarchy of power—within the single national prosecuting authority—is governed by s 20(2) to s 20(6)*(c)* of Act 32 of 1998.

Any DNDPP shall exercise the powers referred to in s 20(1) subject to the control and directions of the NDPP—s 20(2) of Act 32 of 1998.

Subject to the provisions of the Constitution and Act 32 of 1998, any DPP shall, subject to the control and directions of the NDPP, exercise the powers referred to in s 20(1) in respect of *(a)* the area of jurisdiction for which he or she has been appointed; and *(b)* any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the NDPP—s 20(3) of Act 32 of 1998.

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Subject to the provisions of Act 32 of 1998, any DDPP shall, subject to the control and directions of the DPP concerned, exercise the powers referred to in s 20(1) in respect of *(a)* the area of jurisdiction for which he or she has been appointed; and *(b)* such offences in such courts as he or she has been authorised in writing by the NDPP or a person designated by the NDPP—s 20(4) of Act 32 of 1998.

Any prosecutor shall be competent to exercise any of the powers referred to in s 20(1) to the extent that he or she has been authorised thereto in writing by the NDPP, or by a person designated by the NDPP—s 20(5) of Act 32 of 1998. A written authorisation referred to in s 20(5) shall set out *(a)* the area of jurisdiction; *(b)* the offences; and *(c)* the court or courts in respect of which such powers may be exercised—s 20(6) of Act 32 of 1998.

4.5 The National Director of Public Prosecutions (NDPP) and the Deputy National Directors of Public Prosecutions (DNDPPs)

4.5.1 Appointment

The President as head of the national executive appoints the NDPP—s 10 of Act 32 of 1998 as read with s 179(1)*(a)* of the Constitution. In *Democratic Alliance v President of the Republic of South Africa* 2012 (1) SA 417 (SCA) the President's appointment of a NDPP was set aside on account of a failure to make a proper assessment of the candidate, given s 179 and the provisions of s 9(1)*(b)* of Act 32 of 1998. The Supreme Court of Appeal's declaration of invalidity of the President's appointment of the NDPP concerned was confirmed by the Constitutional Court in *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC). It was held that the requirement in s 9(1)*(b)* of Act 32 of 1998, read in its proper constitutional setting, was an objective jurisdictional fact: Any interpretation that the President could subjectively determine the NDPP's qualifications would be inconsistent with s 179(4) of the constitutional guarantee of prosecutorial independence (at 24).

In *Ex parte Attorney-General, Namibia: In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmS) the Namibian Supreme Court warned against the danger of political appointees having control over prosecutorial matters. At 1088F it was said that such interference 'is not the product of a Rechtsstaat and is not compatible with the Grundnorm relating to the separation of powers. It paves the way for executive domination and State despotism. It represents a denial of the cardinal values of the Constitution.'

In *In re: Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) the Constitutional Court was satisfied that appointment of the NDPP by the President did not compromise the independence of the prosecuting authority and did not violate the separation of powers. In para [141] of the judgment it was noted that the prosecuting authority is not part of the judiciary. In para [146] it was pointed out that in terms of s 179 (4) of the Constitution, national legislation must ensure that the prosecuting authority

exercises its function without fear, favour or prejudice: section 179(4) provides a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts. See further paras 4.5.4, 4.5.7 and 4.5.8 below. It is submitted that Act 32 of 1998 is consistent with s 179 of the Constitution. The President may, after consultation with the Minister of Justice and the NDPP, appoint no more than four persons as DNDPPs—s 11(1).

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4.5.2 The qualifications for appointment as NDPP or DNDPP

The power of the President to appoint the NDPP and a DNDPP is qualified by s 9 of Act 32 of 1998. This section provides that any person to be appointed as NDPP or DNDPP must possess qualifications that would entitle him or her to practise in all courts in the Republic and, furthermore, must be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned—s 9(1)*(a)* and *(b)*. A NDPP must—apart from satisfying the requirements of s 9 (1)—also be a South African citizen. See s 9(2).

The requirement that the appointee be a fit and proper person can and must be determined objectively—the President's subjective assessment or personal opinion is insufficient (*Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC)). In *General Council of the Bar of South Africa v Jiba* (unreported, GP case no 23576/2015, 15 September 2016) a DNDPP's conduct was found 'wanting and inconsistent with the conduct of a lawyer who should remain on a roll of advocates' (at [138]). It was also found that she had 'ceased to be a fit and proper person to remain on a roll of advocates' (at [138]). She was accordingly struck from the roll of advocates (at [177.2.1]). An example of the misconduct of the DNDPP concerned was that in earlier litigation her non-disclosure of a memorandum pertinent to a decision not to prosecute had been 'deliberate and was intended to mislead' the presiding judge (at [136.3]). In the absence of a successful appeal against the order to strike her from the roll, the statutory procedures for her suspension and removal from office should commence. See paragraph 4.5.4 below.

4.5.3 Term of office of the NDPP and a DNDPP

The NDPP shall hold office for a non-renewable term of 10 years, but must vacate office on attaining the age of 65—s 12(1). A DNDPP must also vacate his or her office on attaining the age of 65 but is not subject to the 10-year period which applies in respect of the NDPP—s 12 (2) as read with 12(1). In certain circumstances the President may direct that the NDPP or a DNDPP who has attained the age of 65 be retained. Such retention, however, may not exceed a period of two years or periods which in the aggregate exceed two years—and the rule that the term of office of the NDPP may not exceed 10 years remains applicable (s 12 (4)).

4.5.4 The NDPP and a DNDPP: Suspension and removal from office

The independence of the prosecuting authority—as alluded to in para 4.5.1 above—is enhanced by strict rules governing suspension and removal. In order to minimise and prevent possible executive interference in prosecutorial matters, the NDPP and a DNDPP must enjoy strong security of tenure. The same applies to a DPP (see para 4.6.1 below). In terms of s 12(5) of Act 32 of 1998 the NDPP and a DNDPP shall not be suspended or removed from office except in accordance with the provisions of s 12(6), 12(7) and 12(8). The latter section deals with removal from office at the request of the NDPP or a DNDPP. Section 12(6) and 12(7) deal with executive action. Section 12(6)*(a)* provides that the President may provisionally suspend the NDPP or a DNDPP from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and,

subject to the provisions of this subsection, may thereupon remove him or her from office (i) for misconduct; (ii) on account of continued ill-health; (iii) on account of incapacity

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to carry out his or her duties of office efficiently; or (iv) because he or she is no longer a fit and proper person to hold the office concerned. The removal of the NDPP or a DNDPP, the reason therefor and the representations of the NDPP or DNDPP (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session—s 12(6)*(b)*. Parliament shall, within 30 days after the message has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the NDPP or DNDPP so removed, is recommended—s 12(6)*(c)*. The President shall restore the NDPP or DNDPP to his or her office if Parliament so resolves—s 12(6)*(d)*. The NDPP or a DNDPP provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President—s 12(6)*(e)*.

The President shall also remove the NDPP or a DNDPP from office if an address from each of the respective Houses of Parliament in the same session praying for such removal, on any of the grounds referred to in s 12(6)*(a)*, is presented to the President—s 12(7).

Certain provisions relating to the salaries of the NDPP, DNDPPs and DPPs also enhance the independence of the prosecuting authority in that the salaries of these officials are linked to and form percentages of the remuneration that judges receive—s 17. Practically speaking, it means that their income may only be reduced by an Act of Parliament. See also s 18(6) as regards the salaries of DDPPs and prosecutors.

4.5.5 Powers, functions and duties of the NDPP and a DNDPP

The Constitutional Court has described the NDPP's powers as extensive, noting that 'their proper exercise . . . is crucial to the attainment of criminal justice in our country [and] the attainment of an effective criminal justice system is in turn vital to our democracy' (*Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) at [13(e)]). See also [26].

The powers, duties and functions of the NDPP are set out in s 22. In terms of s 22(1) the NDPP, as the head of the prosecuting authority, shall have authority over the exercising of all the powers and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the Constitution, 1996, or any other law. Section 22(2) provides that, in accordance with s 179 of the Constitution, the NDPP *(a)* must determine prosecution policy and issue policy directives as contemplated in s 21 (see further para 4.5.6 below); *(b)* may intervene in any prosecution process when policy directives are not complied with; and *(c)* may review a decision to prosecute or not to prosecute, after consulting the relevant DPP and after taking representations, within the period specified by the NDPP, of the accused person, the complainant and any other person or party whom the NDPP considers to be relevant (see also s 179(5)*(d)* of the Constitution). The words 'any other person' in s 22(2)*(c)* includes an official in the National Prosecuting Authority. See *General Council of the Bar of South Africa v Jiba* (unreported, GP case no 23576/2015, 15 September 2016) at [136.2.2].

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Any DNDPP may exercise or perform any of the functions, powers or duties of the NDPP which he or she has been authorised by the NDPP to exercise or perform—s 23.

Where the NDPP or a DNDPP authorised thereto in writing by the NDPP deems it in the interest of the administration of justice that an offence committed as a whole or partially

within the area of jurisdiction of one DPP be investigated and tried within the area of jurisdiction of another DPP, he or she may, subject to the provisions of s 111 of the Criminal Procedure Act 51 of 1977, in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other DPP—s 22(3).

In terms of s 22(6)*(a)* of Act 32 of 1998 the NDPP must, in consultation with the Minister of Justice and after consultation with the DNDPPs and the DPPs, frame a code of conduct which must be complied with by members of the prosecuting authority. This has been done. This code is known as *The Code of Conduct for Members of the National Prosecuting Authority*. It may from time to time be amended, and must be published in the *Gazette* for general information—s 22(6)*(b)*. See *Van der Westhuizen* 2011 (2) SACR 26 (SCA) at [16]. This code is also available from offices of the prosecuting authority. In *Shaik* 2008 (1) SACR 1 (CC) at [33] the Constitutional Court described the Code as a 'public government document'.

The *United Nations Guidelines on the Role of Prosecutors* are referred to in s 22(4)*(f)* of Act 32 of 1998; and the NDPP is required to bring these guidelines to the attention of the DPPs and prosecutors. See generally *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at [73] n 74.

The NDPP or a person designated by him or her in writing may authorise any competent person in the employ of the public service or any local authority to conduct prosecutions, subject to the control and directions of the NDPP or a person designated by him or her, in respect of such statutory offences, including municipal laws, as the NDPP, in consultation with the Minister of Justice, may determine—s 22(8)*(b)*.

The NDPP or any DNDPP designated by the NDPP shall have the power to institute and conduct a prosecution in any court in the Republic in person—s 22(9).

4.5.6 Prosecution policy and issuing of policy directives

In accordance with ss 179(5)*(a)* and 179(5)*(b)* of the Constitution, the NDPP must—with the concurrence of the Minister of Justice and after consulting the DPPs—determine prosecution policy—s 21(1)*(a)* of Act 32 of 1998. The NDPP must also issue policy directives—s 21(1)*(b)*. The prosecution policy and directives must be observed in the prosecution process—s 21. The NDPP may intervene where these are not observed—s 22(2)*(b)*. See further para 4.14.2 below. In *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 (2) SACR 1 (GP) at [59] it was held that the prosecution policy directives dated 1 June 2014 were also binding on the NDPP. See also generally *Freedom Under Law v National Director of Public Prosecutions* 2014 (1) SA 254 (GNP) at [147]-[148] and [182].

4.5.7 Accountability to Parliament

The prosecuting authority is accountable to Parliament—s 35(1).

A refined prosecutorial system would seek to ensure that there are checks and balances, and that someone who holds such immense prosecutorial powers as the

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NDPP should be accountable. Section 35(2) of Act 32 of 1998 accordingly provides as follows:

(a) The NDPP must submit annually, not later than the first day of June, to the Minister of Justice a report referred to in s 22(4)*(g)*, which report must be tabled in Parliament by the Minister within 14 days, if Parliament is then in session, or if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(b) The NDPP may, at any time, submit a report to the Minister or Parliament with regard to any matter relating to the prosecuting authority, if he or she deems it necessary.

4.5.8 Ministerial responsibility over the prosecuting authority

Closely linked to the prosecuting authority's accountability to Parliament (as set out in para 4.5.7 above) is the provision that the Minister of Justice has the final responsibility over the prosecuting authority—s 33(1). Section 33(2) of Act 32 of 1998 provides as follows:

To enable the Minister to exercise his or her final responsibility over the prosecuting authority, as contemplated in s 179 of the Constitution, the NDPP shall, at the request of the Minister—

(a) furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the NDPP or a DPP in the exercise of their powers, the carrying out of their duties and the performance of their functions;

(b) provide the Minister with reasons for any decision taken by a DPP in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;

(c) furnish the Minister with information with regard to the prosecution policy referred to in s 21(1)*(a)*;

(d) furnish the Minister with information with regard to the policy directives referred to in s 21(1)*(b)*;

(e) submit the reports contemplated in s 34 to the Minister; and

(f) arrange meetings between the Minister and members of the prosecuting authority.

It should be noted that neither s 33 nor any other section in Act 32 of 1998 provides for ministerial control of, or intervention in, the decisions of the NDPP or a DPP. There is a difference between ministerial responsibility and ministerial control and intervention.

In *Zuma v National Director of Public Prosecutions* [2009] All SA 54 (N) it was held (at [207]) that there should be no relationship between the National Prosecuting Authority and the Minister—'certainly insofar as his decisions to prosecute or not to prosecute [are concerned]'. This is an overstatement of the true position, according to the Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at [33]. At [32] it was said that the Constitution vests prosecutorial responsibility in the NPA, but demands that the Minister must exercise final responsibility. The Minister may not interfere with decisions to prosecute or not, but is entitled to be kept informed where public interest or an important aspect of legal or prosecutorial authority is involved (at 32).

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Section 179(6) of the Constitution states that the 'Cabinet minister responsible for the administration of justice must exercise final responsibility over the prosecuting authority.' But given the independence of the National Prosecuting Authority, 'this clearly does not mean that they are beholden to the executive'. See *Nkabinde and Another v Judicial Service Commission* 2016 (4) SA 1 (SCA) at [88] n 31.

Various prosecutorial models, and the extent to which the official who is at the head of prosecutions can be controlled by ministerial interference, are referred to in *Ex parte Attorney-General, Namibia: In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* (cited in para 4.5.1 above).

4.5.9 Written authorisation of NDPP required for prosecution of certain offences

For purposes of certain specified statutory offences, no prosecution may be instituted without the written authorisation of the NDPP. See, for example, s 27(2)*(b)* as read with s 27(2)*(a)* of the Film and Publications Act 65 of 1996. Another example can be found in s 5 (1) as read with ss 1 and 4 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002: crimes of genocide, crimes against humanity and war crimes may not be prosecuted in a South African court without the consent of the NDPP.

Further examples where the written authorisation of the NDPP is required for a prosecution can be found in ss 12(3)*(a)*, 15(2)*(a)* and 61(5) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as well as s 2(4) of the Prevention of Organised Crime Act 121 of 1998. A statutory requirement that a written authorisation (whether it be by the DPP or NDPP) is necessary must be understood in the context of the following observations in *Booysen v Acting National Director of Public Prosecutions* 2014 (2) SACR 556 (KZD) by Gorven J (at [20], emphasis added): 'The purpose is . . . to facilitate an ability to prove that the requisite empowered person has in fact made the decision in question. The existence of writing is a jurisdictional fact required to be in place *before a prosecution can proceed*.' This was said with reference to s 2(4) of the Prevention of Organised Crime Act 121 of 1998.

4.6 The directors of public prosecutions (DPPs)

4.6.1 Appointment, qualifications, term of and removal from office and accountability

The President, after consultation with the Minister of Justice and the NDPP, may appoint a DPP at the seat of each High Court of the Republic—s 13(1)*(a)*.

Qualifications for appointment as a DPP are the same as those for appointment of a NDPP—s 9(1). See further para 4.5.2 above. But a DPP, like a DNDPP, need not be a South African citizen.

A DPP must vacate office at the age of 65—s 14(1). A DPP may, like a DNDPP, be re-appointed for a period which does not exceed (or periods which in the aggregate do not exceed) two years—s 14(2) as read with s 12(4). See also para 4.5.3 above.

Suspension and removal of a DPP must be dealt with as if he or she were the NDPP or a DNDPP—s 14(3) as read with s 12(3), (4), (6), (7), (8) and (9). The suspension and removal of the NDPP and a DNDPP are discussed in para 4.5.4 above.

A DPP must report to the NDPP. Section 34 provides for three situations: (1) A DPP must annually, not later than the first day of March, submit to the NDPP a report

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on all his or her activities during the previous year. (2) The NDPP may at any time request a DPP to submit a report with regard to a specific activity relating to his or her powers, duties or functions. (3) A DPP may, at any time, submit a report to the NDPP with regard to any matter relating to the prosecuting authority, if he or she deems it necessary.

4.6.2 Powers, duties and functions of a DPP and a DDPP

Section 24(1) of Act 32 of 1998 provides that, subject to the provisions of s 179 and any other relevant section of the Constitution, Act 32 of 1998 or any other law, a DPP referred to in s 13(1)*(a)* has, in respect of the area for which he or she has been appointed, the power to *(a)* institute and conduct criminal proceedings and carry out functions incidental thereto as contemplated in s 20(3); *(b)* supervise, direct and co-ordinate the work and activities of all DDPPs and prosecutors in the Office of which he or she is the head; *(c)* supervise, direct and co-ordinate specific investigations; and *(d)* carry out all duties and perform all functions, and exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of Act 32 of 1998.

Section 24(4)*(d)* of Act 32 of 1998 provides that a DPP shall, subject to the directions of the NDPP, be responsible for the day-to-day management of the DDPPs and prosecutors under his or her control.

Where a DPP *(a)* is considering the institution or conducting of a prosecution for an offence; and *(b)* is of the opinion that a matter connected with or arising out of the offence requires further investigation, the DPP may request the provincial commissioner of the police

service for assistance in the investigation of that matter and where the DPP so requests, the provincial commissioner concerned shall, so far as is practicable, comply with the request—s 24(7).

The powers conferred upon a DPP under s 20(1) shall include the authority to prosecute in any court any appeal arising from any criminal proceedings—s 24(8).

Subject to s 20(4) and the control and directions of a DPP, a DDPP at the office of a DPP referred to in s 13(1) has all the powers, duties and functions of a DPP—s 24(9)*(a)*.

A power, duty or function which is exercised, carried out or performed by a DDPP is construed, for the purposes of Act 32 of 1998, to have been exercised, carried out or performed by the DPP concerned—s 24(9)*(b)*.

The appointment of a DDPP is governed by s 15 of Act 32 of 1998.

4.7 Prosecutors

4.7.1 Appointment

The appointment of prosecutors is governed by s 16 of Act 32 of 1998. Prosecutors shall be appointed on the recommendation of the NDPP or a member of the prosecuting authority designated for that purpose by the NDPP, and subject to the laws governing the public service—s 16(1). Prosecutors may be appointed to *(a)* the office of the NDPP; *(b)* offices of the prosecuting authority at the seat of each division of the High Court; *(c)* investigating directorates; and *(d)* lower courts in the Republic. A person not appointed as a prosecutor may not act as such and if he does, the proceedings are a nullity. See generally *Bekker* 1977-9 (BSC) 132 134D.

On the appointment and payment of private practitioners as prosecutors as envisaged in s 38 of Act 32 of 1998, see para 4.1.4 above.

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Any member of the South African Police Service may in general or in any particular instance be required to act as a prosecutor in the lower courts. See s 13(5) of the South African Police Service Act 68 of 1995. This provision is hardly ever employed in practice.

4.7.2 Powers, duties and functions of prosecutors

Section 25 of Act 32 of 1998 determines the powers, duties and functions of prosecutors. Section 25(1) provides that a prosecutor shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her *(a)* under Act 32 of 1998 and any other law of the Republic; and *(b)* by the head of the office or investigating directorate where he or she is employed or a person designated by such head; or *(c)* if he or she is employed as a prosecutor in a lower court, by the DPP in whose area of jurisdiction such court is situated or a person designated by such DPP.

A prosecutor can only exercise powers lawfully given and has a duty not to act arbitrarily (*Reuters Group PLC v Viljoen NO* 2001 (2) SACR 519 (C); for an important qualification as to what happened in this case, see *Editorial note: In re Reuters Group plc v Viljoen NNO* 2002 (6) BCLR (660)).

A prosecutor must act with objectivity and protect the public interest (*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)). See further para 4.16 below. He or she must also 'purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations, even under difficult circumstances' (*Jaipal v S* 2005 (4) SA 581 (CC) at 56).

4.8 The prosecuting authority and the judiciary

Courts have on rare occasions expressed their disapproval of the fact that a prosecution was instituted—*F* 1989 (1) SA 460 (ZH); *Bester* 1971 (4) SA 28 (T).

However, courts can in principle not interfere with a *bona fide* decision of the prosecuting authority. It is irregular to do so—*Dubayi* 1976 (3) SA 110 (Tk). Courts can at most, in the event of a conviction, impose a lenient sentence reflecting their opinion that the prosecution was unwarranted. If convinced of the triviality of the case, the court may acquit the accused—*Kgogong* 1980 (3) SA 600 (A). However, such an acquittal is based on the substantive criminal law principle *de minimis non curat lex* (the law is not concerned with trivialities). And the acquittal should therefore not be seen as interference with the prosecution. But it is, of course, a clear indication that there should never have been a prosecution in the first place—Snyman 1980 *SACC* 313 314.

On the whole, courts are reluctant to comment on the discretion exercised by the prosecuting authority—Richings 1977 *SACC* 143 144.

Courts do not interfere with the prosecuting authority's *bona fide* exercise of its discretion because the prosecuting authority has the power to decide to prosecute and, once an accused is on trial, the accused will have the fullest opportunity to put his defence to the court, to cross-examine prosecution witnesses and to rely on his right not to be convicted unless the prosecution can prove his guilt beyond reasonable doubt based on admissible evidence and presented in terms of a regular procedure. In *Attorney-General of Natal v Johnstone & Co Ltd* 1946 AD 256 at 261 it was said:

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> Now there is no doubt that, in general where it is alleged by the Crown that a person has committed an offence, the proper way of deciding on his guilt is to initiate criminal proceedings against him; and where such proceedings have already commenced, even if the stage of indictment only has been reached, it seems to me that a court which is asked to exercise its discretion by entertaining proceedings for an order expressly or in effect declaring that the accused is innocent would do well to exercise great caution before granting such an order. In most types of cases such an order would be entirely out of place.

Accordingly, a court will as a rule not interdict the prosecuting authority from prosecuting where it has decided to do so—*Allen v Attorney-General* 1936 CPD 302. Nor will it as a rule issue a *mandamus* (court order to act) to compel the prosecuting authority to prosecute—*Gillingham v Attorney-General* 1909 TS 572. The issuing of a mandamus is seen as 'less radical than barring prosecution'. See *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at [38].

It has been held that a court cannot compel the prosecuting authority to decide within a specified period whether it intends prosecuting certain accused—*Wronsky v Prokureur-Generaal* 1971 (3) SA 292 (SWA).

The prosecuting authority's discretion to prosecute, however, does not fall beyond the jurisdiction of a court of law and the latter can intervene where such discretion is *improperly* exercised—*Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order* 1994 (1) SA 387 (C).

In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at [37] it was said: 'A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent.'

The prosecuting authority's discretion can, of course, be reviewed by the courts on the basis of ordinary administrative law grounds of review, for example, where *mala fides* can be proved, or where it can be proved that the prosecuting authority never applied its mind to the matter or acted from an ulterior motive—see generally *Mitchell v Attorney-General, Natal* 1992 (2) SACR 68 (N). Likewise, the courts will on the basis of administrative law principles

be able to interfere where the prosecuting authority exceeds its powers. Control by the courts is also justified on administrative law grounds where a DPP delegates a function which he himself should have performed—*Julius* 1983 (2) SA 442 (C); *Khoele* 1984 (2) SA 480 (O).

The prosecuting authority's decision to decline to prosecute can on constitutional grounds be reviewed. See *Democratic Alliance and Others v National Director of Public Prosecutions* 2012 (2) SA 486 (SCA) at [27]-[30]. Courts will intervene where the decision to prosecute or not is in breach of the principle of equality before the law. See *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 (2) SACR 1 (GP) at [90]. In this case it was also confirmed that a decision to discontinue a prosecution is reviewable on the grounds of legality and rationality (at [49]).

4.9 Extraordinary powers of a DPP

The function of a DPP is of course prosecutorial and not judicial—*Ramgobin* 1985 (4) SA 130 (N) at 130J-131D. Anything that concerns the liberty of a person is in principle something to be determined by the court.

A DPP has in certain limited circumstances the power to detain a prospective State witness for a period of up to seventy-two hours without a judge having so

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ordered—s 185(1)*(b)*, Act 51 of 1977. A State witness can be detained for a longer period on the basis of an order given by a judge in chambers in consequence of a DPP's application—s 185(2), (3), (4).

4.10 Control over local prosecutors

Local public prosecutors are as a rule permitted to exercise their own discretion in deciding whether to prosecute. It is impossible for a DPP (let alone a NDPP) to have full knowledge of each and every criminal matter in his or her jurisdiction. However, there are at least the following formal and informal ways in which a DPP can direct and control the decisions of public prosecutors in his or her jurisdiction:

(1) In practice DPPs issue internal circulars to their prosecutors, providing guidelines to the latter in the exercise of their discretion with regard to certain cases or certain types of crimes. See also s 24(5) of Act 38 of 1998.

(2) A DPP may also, in an internal circular, direct his prosecutors not to prosecute in respect of certain offences without his prior approval. It has been suggested that a prosecution instituted contrary to such an instruction would be null and void. There is some authority to the contrary—*Magistrate, Regional Division* 1972 (3) SA 377 (N). At any rate, all prosecutions must comply with the prosecution policy and policy directives of the NDPP—s 21(1) of Act 32 of 1998. See para 4.5.6 above. In terms of s 22(2)*(b)* the NDPP may intervene in any prosecution where policy directives have not been complied with. It would seem that in such an instance the NDPP may even stop the prosecution. See para 4.14.2 below. In terms of para 1*(f)* in Part 8 of policy directives issued by the NDPP, magistrates and judges (and prosecutors) may not be prosecuted 'without the written authorisation or instruction of the DPP (either in general terms or in any particular case or category of cases)'. See *Thenga* 2012 (2) SACR 628 (NCK) at 36.

(3) Sometimes statutory provisions require that in respect of certain offences no prosecution may be instituted without the written authority of the DPP who has jurisdiction. See, for example, ss 16(2)*(a)* and 38(1)*(c)* of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Prosecutions instituted without such authority are null and void. See also generally *Domingo* 2002 (1) SACR 641 (C) as regards the provisions of s 252A(5)*(b)* of the Act. In *Molefe* 2012 (2) SACR 574 (GNP) a woman was prosecuted for concealment of birth, that is, contravention of

s 113(1) of the General Law Amendment Act 46 of 1935. It was held that a prosecution for this offence had to be authorised in writing by the DPP as required by s 113(3) of this Act and that verbal permission to prosecute was not sufficient (at 5–7).

(4) Complaints made to a DPP by members of the public relating to some decision taken by a local public prosecutor may also draw the attention of the DPP to a specific case. The DPP may then call for the police docket and require the local prosecutor to advance reasons for the decision taken by him. The DPP may then consider the matter afresh and exercise his own discretion. He may confirm the prosecutor's decision, or he may overrule the local prosecutor's withdrawal of a charge, and direct that a prosecution be instituted. He may even stop a prosecution which has already begun but which has not as yet resulted in a conviction—s 6*(b)* of Act 51 of 1977. See also the discussion in para 4.14.2 below.

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(5) Prosecutors should (and often do) refer difficult, sensitive or borderline cases to the DPP concerned, setting out their viewpoints on the particular case and requesting the DPP concerned to take the final decision.

(6) Only a prosecutor authorised thereto in writing by the NDPP may negotiate and enter into a plea and sentence agreement as provided for in s 105A of the Act. See s 105A (1)*(a)* of Act 51 of 1977. See further para 3.2 in Chapter 14 below.

4.11 The prosecution and the police

The Republic of South Africa has a national police force which is an independent government department and which is under the ultimate control of the relevant member of the cabinet. The structure and functions of the department are governed by the South African Police Act 68 of 1995 and ss 205 to 208 of the Constitution. Some of the statutory functions of the police are to investigate any crime or alleged crime and to prevent crime. As far as prosecutions are concerned, the police do in practice exercise a discretion of their own and often refrain from bringing trivial matters and allegations, which are not adequately supported by evidence, to the attention of the public prosecutor. All investigations completed by the police for purposes of a prosecution must be submitted to the prosecuting authorities as the police do not have the final say on whether a prosecution should be instituted. The final decision rests with the DPP concerned or his local public prosecutors, as the case may be. Obviously, the NDPP may also intervene.

This separation between officials who investigate crime and those who decide to prosecute and actually do prosecute crime is an important one. It promotes objectivity and provides the criminal justice system with a process in terms of which the results of a police investigation can (to some extent) be evaluated independently before the grave step of instituting a prosecution is taken.

In practice there is some form of co-operation between the police and prosecutors in the investigation of a case and its preparation for trial. In para 8 of the *Prosecution Policy* issued by the NDPP in terms of s 12(1)*(a)* of Act 32 of 1998 (see para 4.5.6 above) it is stated: 'With regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close co-operation, with mutual respect for the distinct functions and operational independence of each profession.'

The initial investigation is conducted by the police. They do so upon their own initiative or as a result of a complaint received from the public. Or they may do so in consequence of instructions received from the prosecuting authorities. See s 24(4)*(c)*(i) of Act 32 of 1998. The police prepare a docket (file, dossier) for submission to the public prosecutor who takes the decision whether to prosecute or not. The prosecutor, in the exercise of his discretion to prosecute, examines the witnesses' statements and documentary evidence contained in the docket, together with such real evidence as might be available, for example, weapons,

fingerprints and clothing. At this stage the prosecutor may also direct and control the investigation by giving specific instructions to the investigating officer, that is, the police official charged with the investigation of the crime. The prosecutor may, for example, call for further statements from potential State witnesses, or he may direct that certain scientific analyses be done. But he himself does not, in principle, actively participate in any investigative work. The prosecutor should avoid a

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situation where he becomes a potential State witness, as it is most undesirable that a prosecutor in a case should also testify on behalf of the State in the same case—see generally *Mahobe* 1898 NLR 56. Courts have disapproved of the combination in one person of investigator and prosecutor. See *Nakedie* 1942 OPD 162 and *Nigrini* 1948 (4) SA 995 (C). But these two cases should be read in the context of the following valid observations made by Cullinan J in *Sole* 2001 (12) BCLR 1305 (Les) 1338B-G (emphasis in the original):

> To say that a prosecutor should not be an investigator is of course entirely appropriate where the investigation renders the prosecutor a potential witness. In the usual criminal case coming before the courts, the Investigating Officer, as he is known, invariably attends court as a witness, for example to produce a warn and caution statement made before him by the accused, or to produce, say, a firearm or other objects surrendered by or found in the possession of the accused, or to give evidence of a search or of a pointing-out by the accused. These are but examples; the point is that the investigator has become so physically embroiled in the investigation as to render him a potential witness and ergo unfit to prosecute. Examples can be found in the cases of *Nakedie* (supra), where the prosecutor had conducted the raid upon the accused, who were found in possession of illegal beer, or in *Nigrini* (supra) where the accused was charged with attempted extortion in respect of the prosecutor himself. In all such cases, the essential objection was not that the prosecutors were investigators as such, but that they were, because of their physical involvement, potential *witnesses*, to the extent indeed of tendering exhibits. Again, those cases were relatively elementary and uncomplicated cases, where the investigation was a far cry from that in a complex commercial case, such as the present, calling for a sophisticated investigation, and where, as I have observed, the professional services of experienced practitioners are required: indeed that would seem to be the present day commonplace practice. I cannot see that examining bank accounts, if that is the case, which the Crown seeks to produce through the medium of bank officials, settling witnesses' statements, and appearing before an Examining Magistrate, much less representing the Crown at two appeal proceedings, could render the two prosecutors in this case potential witnesses. In brief, I cannot see that the activities of the prosecutors could objectively affect their impartiality or the fairness of the accused's trial.

It is of fundamental importance to the criminal justice system that the police should investigate cases properly and that the prosecutor should present the state's case competently. See generally *Gabaatlhole* 2013 (1) SACR 471 (NCK) at 20; *Sebofi* 2015 (2) SACR 179 (GJ) at [65] and [69]. The need for cooperation between the prosecutor and police is not confined to the investigation and prosecution of the case, but extends to bail matters. See *Lapane v Minister of Police and Another* 2015 (2) SACR 138 (LT) at [49] and [54]. However, it is also true that prosecutorial independence must at all times be maintained.

4.12 The prosecution, the police, the public and the reporting of crime

Obviously, any criminal justice system which employs a system of public prosecutions must to a large extent depend for its effectiveness on the willingness of members of the public to report crime to the authorities. And yet there is *no* general legal duty (as opposed to a possible moral duty) on members of the public to report crime. A legal duty (that is, where non-reporting is punishable) exists only in certain exceptional instances. The only common-law example is that a legal duty rests upon all who owe allegiance to the state to provide information on acts of high treason. There are scattered statutory provisions which also impose a duty to

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report in certain cases. One such example is that any person who has reason to suspect that another person has died of an unnatural cause must report this to a policeman as soon as possible, unless he has reason to believe that such a report was made or will be made by someone else—s 2 of the Inquests Act 58 of 1959. Other examples are: Obligation on certain persons to report corrupt transactions (s 34(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004); duty to report child pornography (s 27(2)*(a)* of the Film and Publications Act 65 of 1996); duty of certain persons to report activities relating to drugs (s 10 of the Drugs and Drug Trafficking Act 149 of 1992). Section 120(2)*(a)* of the Firearms Control Act 60 of 2000 also provides that any person who is aware of the existence of a firearm or ammunition that is not in the lawful possession of any person and fails to report the location of the firearm or ammunition to a police official without delay, is guilty of an offence. Furthermore, s 154 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 criminalises the non-reporting of the commission of sexual offences against children or persons who are mentally disabled. Any person who suspects or knows (or ought reasonably to have known) that a child is the victim of human trafficking is required to report it to a police official. See s 18(1)*(a)* of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

Section 92 of the Child Justice Act 75 of 2008 provides as follows:

> If it comes to the attention of any court official or probation officer that a child has been used by an adult to commit a crime referred to in Schedule 1 or 2 of the Criminal Procedure Act, that adult must be reported to the South African Police Service for the consideration of a prosecution as provided for in section 141(1)*(d)*, read with section 305(1)*(c)*, of the Children's Act, and the fact of the adult's involvement must be taken into account when determining the treatment of the child in the child justice system.

Members of the public might at times, for fear of reprisals, be most reluctant to report the activities of criminals. However, the criminal justice system makes use of a so-called 'informer's privilege' to meet this situation. This privilege is dealt with in greater detail in the course on the law of evidence. For present purposes, it is sufficient to note that the identity of a private individual who has secretly given information to the police concerning the commission of a crime may as a rule not be disclosed in a court of law; and the contents of the individual's communication enjoy a similar protection—Van Niekerk, Van der Merwe & Van Wyk *Privilegies in die Bewysreg* (1984) 260. The purpose of the privilege is 'to encourage information as to the commission of crime by placing the informer in a condition of security'—*Tranter v Attorney-General and the First Criminal Magistrate of Johannesburg* 1907 TS 415 at 425; see also Schwikkard & Van der Merwe *Principles of Evidence* 4 ed (2016) at paragraph 11 4 2. The informer's privilege was held constitutional in *Els v Minister of Safety and Security* 1998 (2) SACR 93 (NC). A police official's unlawful breach of the informer's privilege may lead to a civil action for damages. See *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 (2) SACR 284 (T).

A further method aimed at encouraging a member of the public to come forward and report crime and ultimately to testify if necessary is the witness protection system as created by the Witness Protection Act 112 of 1998.

The mere fact that an individual is under no general duty to report crime does not mean that he may in all instances lawfully refuse to co-operate once it is likely that he could be a potential State witness. As noted earlier, the law generally tolerates

the inaction of the individual in reporting crime. But no criminal justice system can operate effectively in the absence of coercive measures in securing statements from potential State witnesses once a crime has been reported. An example of a measure of this nature can be found in s 205 of the Criminal Procedure Act as discussed in Chapter 8 of this work.

A police official has a general duty to report crime. See s 205(3) of the Constitution, s 13 (2) of the South African Police Service Act 68 of 1995 and *Pakane* 2008 (1) SACR 518 (SCA).

4.13 The prosecution as dominus litis

The prosecution can be described as *dominus litis* ('master of the case'). See *Zuma* 2006 (2) SACR 257 (W) at 265*a*-*b*. However, no exaggerated importance should be given to this concept. It merely means that the prosecution can do what is legally permissible to set criminal proceedings in motion, such as determining the charges and the date and venue of the trial. See *Sehoole* 2015 (2) SACR 196 (SCA) at [10]; *Khalema* 2008 (1) SACR 165 (C) at [22] and [35]. *A* measure of residual control by the courts over decisions taken by the prosecution as *dominus litis* remains essential. Fairness to the accused is an important guideline in exercising this control. The following examples illustrate this point:

(1) In *Khoza* 1989 (3) SA 60 (T) it was held that the prosecution, precisely because it is *dominus litis*, should formulate and consolidate all its charges, in relation to a particular set of facts, to be tried in a single case. It may therefore not proceed in a piecemeal fashion by bringing successive prosecutions on different charges in relation to one broad incident. The case was struck off the roll (that is, the four accused concerned were not acquitted but the court declined to proceed with the case). The procedure adopted by the prosecution was considered unfair.

(2) Similarly, although the prosecution can as *dominus litis* determine the numerical order in which several accused are named in the charge or indictment, the court may, in the interests of justice, right and fairness, order that the sequence in which the accused present their evidence be varied—*Swanepoel* 1980 (2) SA 81 (NC) at 84D. The defence has no right to determine the sequence of State witnesses and the prosecution should therefore not have a final right to determine the sequence of accused who wish to testify as defence witnesses. After all, the adversarial (accusatorial) nature of the criminal trial demands that parties should as far as possible be given equal opportunities in the presentation of their cases—*Mpetha (1)* 1983 (1) SA 492 (C) at 494A–C.

(3) A presiding judicial officer in a criminal case does not have the authority to close the State's case if the prosecutor is unwilling to do so. But if the prosecutor, after an application by him for the postponement of the trial has rightfully been rejected by the court, refuses to adduce evidence or to close the State's case, the judicial officer will continue with the proceedings as if the prosecutor had indeed closed the State's case—*Magoda* 1984 (4) SA 462 (C). This case illustrates, once again, that decisions taken by the prosecution, as *dominus litis*, may be overruled by the court in the interests of fairness to the accused. In this instance the accused's right to a reasonably speedy completion of the trial against him formed the basis upon which the court interfered with the prosecution's right to decide when to close its case.

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4.14 The discretion to prosecute

4.14.1 The exercise of a discretion

South Africa does not, in principle, follow a system of compulsory prosecution.

A prosecutor has a duty to prosecute if there is a *prima facie* case and if there is no compelling reason for a refusal to prosecute. In this context '*prima facie* case' would mean the following: The allegations, as supported by statements and real and documentary evidence available to the prosecution, are of such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict. Sometimes it is asked: Are there reasonable prospects of success? The prosecution, it has been held, does not have to ascertain whether there is a defence, but whether there is a reasonable and probable cause for prosecution—see generally *Beckenstrater v Rottcher and Theunissen*

1955 (1) SA 129 (A) at 137 and *Lubaxa* 2001 (2) SACR 703 (SCA) at 707*i*. The prosecution must at the trial be able to furnish proof beyond a reasonable doubt.

In exercising his discretion, the prosecutor must respect the individual's right not to be harassed by a prosecution which has no reasonable prospects of success. The fact that the prosecutor doubts the strength of the State case is no good ground for fixing an admission of guilt fine in a summons in the hope that the accused might pay the admission of guilt fine and thereby relieve the State of the burden of proving its case—*Eusuf* 1949 (1) SA 656 (N) at 656-7. This is an important point because, as was pointed out in *NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 (1) SA 51 (O) at 53H-54A, many accused persons pay an admission of guilt fine in order to be rid of the worry, inconvenience and expense of fighting a petty criminal charge and not because they are in fact guilty. It is improper for the prosecution to secure a 'successful prosecution' in this manner because the payment of an admission of guilt fine does for criminal record purposes amount to a previous conviction—see generally *NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 (4) SA 738 (A) at 746A.

Occasionally there might be good grounds for refusing to prosecute despite the fact that a *prima facie* case exists. Such grounds may be the triviality of the offence—see generally Snyman 1980 *SACC* 313 at 314; the advanced age or very young age of an accused—Stoker & Van der Merwe 1981 *SACC* 73; where a plea bargain was struck between the prosecution and the defence—*North Western Dense Concrete v Director of Public Prosecutions* 1999 (2) SACR 669 (C); the antiquated nature of the offence—see generally *Steenkamp* 1973 (2) SA 221 (NC); or the tragic personal circumstances of an accused, for example, a father who has through his negligent driving caused the death of his young children—see generally Richings 1977 *SACC* 143. A former DPP has described the discretion to prosecute as—

> a very valuable safeguard, because one has to take into account . . . what the consequences to [an accused] may be, apart from any penalty which a court of law might inflict. If, in our view, the consequences are out of all proportions [sic] to the gravity of the offence committed, we are permitted to exercise our discretion and decline to prosecute [Yutar 1977 *SACC* 135 at 136].

But the fact remains that 'a decision of the prosecuting authority not to prosecute . . . must be made for a good reason' (per Salduker JA in *National Society of the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2016 SACR 308 (SCA) at [25].

Common-law principles and statutory rules governing the prosecutor's decision to prosecute children are dealt with in paras 4.18 to 4.18.6 below.

Paragraph 4*(c)* of the *Prosecution Policy* issued by the NDPP in terms of s 21(1)*(a)* of Act 32 of 1998 (see para 4.5.6 above) provides that once a prosecutor is satisfied that there is sufficient evidence to provide reasonable prospects of a conviction, a prosecution should normally follow, unless 'public interest demands otherwise'. The rest of para 4*(c)* stipulates as follows:

> There is no rule in law which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

When considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including:

The nature and seriousness of the offence:

— The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.
— The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.

— The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.
— The likely outcome in the event of a conviction, having regard to sentencing options available to the court.

The interests of the victim and the broader community:

— The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care should be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted—regardless of a complainant's wish not to proceed.
— The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.
— Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

The circumstances of the offender:

— The previous convictions of the accused, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.
— Whether the accused has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (In this regard the degree of culpability of the accused and the extent to which reliable evidence from the said accused is considered necessary to secure a conviction against others, will be crucial.)
— Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution, particularly in the case of juvenile offenders and less serious matters.
— Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused in the delay.

The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.

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It is important that the prosecution process is seen to be transparent and that justice is seen to be done.

Two fundamental principles of criminal justice govern the exercise of the discretion to prosecute. First, the police and prosecuting authorities should not knowingly allow a pattern of contravention of a certain statute to develop and then, most unexpectedly, arrest and prosecute. This is what happened in *Makwasie* 1970 (2) SA 128 (T), where the conviction was unfortunately confirmed on appeal. Such an approach does not promote legal certainty, offends the principle of legality, is unfair to citizens and undermines the deterrent function of the criminal law—Van Rooyen 1975 *Acta Juridica* 70 83. Secondly, discretionary prosecution is no licence for discriminatory prosecution. This means that in the exercise of the discretion to prosecute there must be no selective enforcement or non-enforcement of the criminal law, amounting to unjustifiable distinctions between persons in similar circumstances. Discriminatory prosecution not only conflicts with the equal protection and due process principles or ideals of the criminal justice system, but also with s 9(1) of the Constitution:

> Every person is equal before the law and has the right to equal protection and benefit of the law.

In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2016 (1) SACR 308 (SCA) at [24] Salduker JA said:

> Thus, all decisions by the prosecuting authority to prosecute or not to prosecute must be taken impartially, without fear, favour or prejudice. They must also adhere to prosecuting policy and policy directives. It goes without saying that the aim of prosecuting policy and policy directives must be to serve the interests of justice for the benefit of the public in general. And decisions to prosecute or not to prosecute may be reviewed, either by the NDPP under the NPA Act or by the courts under the rule of law.

The mere fact that certain conduct might constitute a common-law offence as well as a statutory offence does not mean that the prosecution is obliged to proceed in terms of the relevant statutory offence. See generally *Mostert* 2010 (1) SACR 223 (SCA) at [18] and [19]. There is in principle no requirement that the prosecution *must* charge the accused with the more serious offence. See generally *Sehoole* 2015 (2) SACR 196 (SCA) at [11].

There is a rule of practice in terms of which an accused, or his legal representative acting upon his instructions, may make written representations to a DPP or the local public prosecutor to decline to prosecute.

4.14.2 The distinction between withdrawal of a charge and stopping of the prosecution

The prosecuting authority may withdraw a charge before the accused has pleaded to such a charge—s 6*(a)* of Act 51 of 1977. However, the accused is in these circumstances not entitled to a verdict of acquittal. He may be prosecuted again on the same or related charges, for example, where new evidence is discovered. A prosecutor may withdraw a charge without the consent of his DPP. The reason for this is that a DPP, if dissatisfied with the prosecutor's withdrawal of the charge, may charge the accused afresh.

Before an accused pleads, the prosecution can also withdraw a summons and issue another—*Wolman v Springs Town Council* 1941 TPD 104.

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A DPP may at any time *after an accused has pleaded, but before conviction*, stop the prosecution in respect of that charge. If this is done, the accused is entitled to an acquittal—s 6*(b)* of Act 51 of 1977. This means that in any subsequent prosecution in respect of the same facts, the accused can successfully rely on a plea of previous acquittal (*autrefois acquit*). This plea is dealt with in greater detail in Chapter 14.

However, a public prosecutor may not stop a prosecution without the consent of the DPP or any person authorised thereto by such a DPP—s 6*(b)*; *Van Wyk* 1981 (3) SA 228 (C). The mere fact that a prosecutor indicates to the court that on the evidence as presented in court he is unable to support a conviction does not amount to a stopping of the prosecution—*Bopape* 1966 (1) SA 145 (C). The prosecutor's acceptance of an accused's plea is discussed in Chapter 14.

4.15 Prescription of the right to prosecute

The right to institute a prosecution for any offence shall, unless some other period is expressly provided by law, lapse after the expiration of a period of twenty years from the time when the offence was committed—s 18 of Act 51 of 1997. However, in terms of the same section the following common-law crimes have no prescription period: murder; treason committed when the Republic is in a state of war; robbery, if aggravating circumstances were present; kidnapping; child-stealing. The date of commencement of s 18 is 27 April 1994—s 27 of Act 105 of 1997. Prior to this date, the right to prosecute could not have lapsed in respect of capital crimes. With the abolition of the death penalty, it became necessary to amend s 18. See generally *De Freitas* 1997 (1) SACR 180 (C). The crime of genocide, crimes against humanity and war crimes (as contemplated in s 4 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002) also have no prescription period. See s 18*(g)* of Act 51 of 1977.

The following statutory offences created in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 also do not have a prescription period: rape or compelled rape (ss 3 and 4, respectively, of Act 32 of 2007, read with s 18*(f)* of Act 51 of 1977); and using a child or person who is mentally disabled for pornographic purposes (as contemplated in ss 20(1) and 26(1) of Act 32 of 2007, read with s 18*(i)* of Act 51 of 1977).

In terms of s 18*(h)* of Act 51 of 1977 there is no prescription period in respect of offences as provided for in ss 4, 5 and 7 and involvement in these offences as provided for in s 10 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

4.16 The prosecution and legal ethics

The prosecuting authority must, like the courts, seek to promote a fair criminal justice system. It has been held that the office of the NDPP 'is closely related to the functions of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice' (*Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) at [26]).

A public prosecutor must display the highest degree of fairness to an accused. This duty is for obvious reasons more pronounced in respect of the unrepresented accused—*Mofokeng* 1992 (2) SACR 261 (O) at 264C. However, where an accused has the benefit of legal representation, it is not the function of the prosecutor to call

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evidence which is detrimental to the case for the State, or which advances the case for the accused. See *Van der Westhuizen* 2011 (2) SACR 26 (SCA) at [12]: 'The prosecutor is not obliged to play chess against him- or herself.' The requirement that a prosecutor should act fairly also 'does not mean that he cannot and should not diligently try and obtain all admissible evidence against an accused'—*Tshotshoza* 2010 (2) SACR 274 (GNP) at 26.

Information favourable to the defence must be disclosed—*Van Rensburg* 1963 (2) SA 343 (N). If there is a serious discrepancy between a State witness's oral testimony in court and his earlier written statement made during the investigation of the case, the prosecutor must draw attention to this fact and make the written statement of the witness available to the defence for purposes of cross-examination—*Kamte* 1992 (1) SACR 677 (A). The court must also have access to such a statement.

A prosecutor is obliged to bring to a trial court's attention circumstances and defects rendering an accused's statement inadmissible. See *Mashengoane* 2014 (2) SACR 623 (GP) at [24].

It is not the task of the prosecutor to seek to secure a conviction at all costs. In *Jija* 1991 (2) SA 52 (E) at 68A it was said that a prosecutor 'stands in a special relation to the Court. His paramount duty is not to procure a conviction but to assist the Court in ascertaining the truth . . .' See also *Rozani* 2009 (1) SACR 540 (C) at 549*h*-550*a*). In *Nteeo* 2004 (1) SACR 79 (NC) 81*b*-*g* Kgomo JP said that he embraced the following compendious pronouncements by Gubbay CJ in *Smyth v Ushewokunze* 1998 (3) SA 1125 (ZS) at 1130J-1131E (emphasis added):

> A prosecutor must dedicate himself to the achievement of justice (see *R v Banks* [1916] 2 KB 621 at 623). He must pursue that aim impartially. He must conduct the case against the accused person with due regard to the traditional precepts of candour and absolute fairness. *Since he represents the State, the community at large and the interests of justice in general, the task of the prosecutor is more comprehensive and demanding than that of the defending practitioner* (see *R v Riekert* 1954 (4) SA 254 (SWA) at 261C-E). Like Caesar's wife, the prosecutor must be above any trace of suspicion. As a 'minister of the truth' he has a special duty to see that the truth emerges in court (see *R v Riekert* (supra) at 261F-G; *S v Jija and Others* 1991 (2) SA 52 (E) at 67J-68B). He must produce all relevant evidence to the court and ensure, as best he can, the veracity of such evidence (see *S v Msane* 1977 (4) SA 758 (N) at 759A; *S v N* 1988 (3) SA 450 (A) at 463E). He must state the facts dispassionately. If he knows of a point in favour of the accused, he must bring it out (see *Van Rensburg* 1963 (2) SA 343 (N) at 343F-G; *Phato v Attorney-General, Eastern Cape* 1994 (2) SACR 734 (E) at 757*d*). If he knows of a credible witness who can speak of facts which go to show the innocence of the accused, he must himself call that witness if the accused is unrepresented; and if represented, tender the witness to the defence (see *R v Filanius* 1916 TPD 415 at 417; *S v Nassar* 1995 (1) SACR 212 (Nm) at 218*a*). If his own witness substantially departs from his proof [witness statement], he must, unless there is special and cogent reason to the contrary, draw the attention of the court to the discrepancy, or

> reveal the seriously contradictory passage in the statement to the defending practitioner (see *S v Hassim and Others* (2) 1971 (4) SA 492 (N) at 494B; *S v Masinda* 1981 (3) SA 1157 (A) at 1162F; *S v Xaba* 1983 (3) SA 717 (A) at 728H-729A).

In *Van Huysteen* 2004 (2) SACR 478 (C) Traverso DJP also stressed the importance of the prosecutorial duty that all relevant information should, in the interests of justice, be placed before the court. This duty is 'justified on the ground that the

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prosecution has all the resources of the State, including finances, the police and vital information, at its disposal' (Gubbay CJ in *Smyth v Ushewokunze* (above) at 175B).

In *Van der Westhuizen* 2011 (2) SACR 26 (SCA) Cloete JA said (at [13]):

> I would emphasise, however, that it is not necessarily sufficient for the prosecutor to tender State witnesses to the defence at the end of the State case, nor does the prosecutor necessarily discharge the duty of disclosure by making available the contents of the dossier: if there is evidence which the prosecutor knows or ought reasonably to suspect is or may be destructive of the State case, or which tends or might tend to support the defence case, and which the prosecutor knows or ought reasonably to suspect is not known to the defence, it is the prosecutor's duty to bring this evidence specifically to the attention of the accused's legal representatives. It would therefore, for example, not be necessary for a prosecutor to draw attention to a specific witness's statement favourable to the accused in the dossier made available to the defence, for he who runs may read; but the prosecutor would be obliged to inform the defence that a particular witness, who has not given a statement, might to the defence's advantage be consulted, and why, and also to assist, where necessary, in making such a witness available; and the prosecutor would also be obliged to furnish the defence with a document which is not in the dossier, which favours the accused's case or which is destructive of the State case, which the prosecutor believes or ought reasonably to believe is not in the possession of the defence. But the prosecutor's obligation is not to put the information before the court.

Part of para 3 of the *Prosecution Policy* issued by the NDPP in terms of s 21(1)*(a)* of Act 32 of 1998 (see para 4.5.6 above) provides as follows (emphasis added):

> Prosecutors must at all times act in the interest of the community and not necessarily in accordance with the wishes of the community . . . The prosecutor's *primary* function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, they should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner . . . Members of the Prosecuting Authority *must act impartially and in good faith*. They should not allow their judgement to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender . . . Prosecutors *must be courteous and professional* when dealing with members of the public or other people working in the criminal justice system.

A prosecutor may not interfere with defence witnesses (*Masoka* 2015 (2) SACR 268 (ECP)). It is also irregular for a prosecutor to consult with a state witness who has already been sworn in (*Jacobs* 2007 (1) SACR 474 (C)).

In certain circumstances the grossly improper conduct of the prosecutor may result in an interdict restraining him from participating in the prosecution. See *Smyth v Ushewokunze* 1998 (3) SA 1125 (ZS) and *Jesse v Pratt NO* 2001 (8) BCLR 810 (Z). *Du Toit* 2004 (1) SACR 47 (T) provides an example of an unsuccessful application for the recusal of a prosecutor. See also *Sole* 2001 (12) BCLR 1305 (Les). Performing of prosecutorial functions can make it inevitable that the prosecutor would be perceived to be biased, but this alone cannot justify removal of the prosecutor. See *Porritt & another v National Director of Public Prosecutions* [2015] 1 All SA 169 (SCA) at [11].

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4.17 The prosecution and the assistance of a private legal practitioner

A private practitioner who has no authority to prosecute may not assist the state prosecutor by cross-examining defence witnesses on behalf of the prosecution or by addressing the court on behalf of the prosecution—*Adam Effendi* 1917 EDL 267.

Nevertheless, it would seem as if no irregularity is committed where a private practitioner who was given a watching brief by an interested party renders some other assistance on an *informal* basis to the prosecution, such as suggesting to the prosecutor that certain questions should be put—*Salusbury* 1934 (1) PH H83 (T). But in the final analysis the prosecution must be in full control of the presentation of the case for the State.

4.18 Diversion of the criminal trial

There are certain procedures or methods in terms of which a criminal trial can be avoided—whether partially or as a whole, temporarily or permanently. This can be called diversion of the criminal process. One encounters several such diversions in the law of criminal procedure. Examples are the conversion of a trial into an enquiry with a view to committing an accused to a rehabilitation centre—s 255; and an enquiry into mental illness—ss 77, 78 and 79.

The Child Justice Act 75 of 2008 (which came into operation on 1 April 2010) creates extensive and detailed diversion procedures and options in respect of children. One of the main purposes of diversion in this context is 'to . . . deal with a child outside the formal criminal justice system in appropriate cases' (s 51*(a)* of Act 75 of 2008). Chapter 6 of this Act provides for a diversion by the prosecutor in respect of minor offences. See para 4.18.1 below. Several requirements must be met (s 41) and the prosecutor's diversion option must be made an order of court (s 42). This prosecutorial option can only be exercised before the holding of a preliminary enquiry as envisaged in Chapter 7 of the Act. Where such an enquiry is held, the magistrate may make certain orders, including diversion orders as provided for in Chapter 8 of the Act. See further para 4.18.2 below. This chapter sets out, inter alia, the objectives of diversion (s 51), the consideration of diversion (s 52), the various diversion options (s 53) and the minimum standards applicable to diversion (s 55).

4.18.1 Diversion by prosecutor in respect of minor offences: Chapter 6 (ss 41-42) of the Child Justice Act 75 of 2008

For purposes of the above Act, 'diversion' means 'diversion of a matter involving a child away from the formal court procedures in a criminal matter by means of the procedures established by Chapter 6 and Chapter 8 [of Act 75 of 2008]'. Section 51 of this Act also sets out the objectives of diversion. See Chapter 19 below, which deals with sentencing.

The prosecutor may in certain circumstances initiate, and also play an active role in, matters of diversion as provided for in Act 75 of 2008. Section 41 of this Act provides for diversion by the prosecutor (before a preliminary inquiry as provided for in Chapter 7) in respect of offences referred to in Schedule 1 of the Act. These offences are relatively minor offences. Section 41(1), (2), (3) provides as follows:

> (1) A prosecutor may divert a matter involving a child who is alleged to have committed an offence referred to in Schedule 1 and may, for this purpose, select any level one diversion option set out in section 53(3) or any combination thereof, if the prosecutor is satisfied—

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> *(a)* that the factors referred to in section 52(1)*(a)* to *(d)* have been complied with; and
> *(b)* in the case of a child who is 10 years or older but under die age of 14 years, that criminal capacity is likely to be proved in terms of section 11.
>
> (2) The diversion referred to in subsection (1) must take place—
>
> *(a)* in accordance with directives issued by the National Director of Public Prosecutions, as provided for in section 97(4)*(a)*(i)*(bb)*;
> *(b)* subject to subsection (3), after an assessment of the child in accordance with Chapter 5; and

(c) before a preliminary inquiry as provided for in Chapter 7.

(3) If the child has not been assessed, the prosecutor may dispense with the assessment if it is in the best interests of the child to do so: Provided that the reasons for dispensing with the assessment must be entered on the record of the proceedings by the magistrate in chambers referred to in section 42.

The prosecutor can only invoke s 41 if satisfied, amongst other things, that the child acknowledges responsibility for the offence (s 52(1)*(a)*) without having been unduly influenced to acknowledge such responsibility (s 52(1)*(b)*), that there is a *prima facie* case against the child (s 52(1)*(c)*) and, furthermore, that the child and, if available, his parent (or appropriate adult or guardian) consent to diversion (s 52(1)*(d)*). See s 41(1)*(a)*. See also para 4.18.2 below, where s 52 of Act 75 of 2008 is quoted in full.

Paragraph G6 of the directives of the NDPP, as provided for in s 97(4)*(a)* and referred to in s 41(2)*(a)*, states that a prosecutor's diversion of matters prior to a preliminary inquiry should not take place in, for example, the following circumstances:

(a) The offence is listed in Schedule 1, but the fact or circumstances of the offence are of a serious nature, eg the consequences are very serious.

(b) The child has a previous conviction, previous diversion or pending charge in respect of a similar or more serious offence.

(c) Prosecutors are of the view that the child—

(i) has been abandoned or orphaned and is without any visible means of support;

(ii) displays behaviour which cannot be controlled by the parent or care-giver;

(iii) lives or works on the streets or begs for a living;

(iv) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;

(v) has been exploited or lives in circumstances that expose the child to exploitation;

(vi) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;

(vii) may be at risk if returned to the custody of the parent, guardian or caregiver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;

(viii) is in a state of physical or mental neglect;

(ix) is being maltreated, abused, deliberately neglected or degraded by a parent, a caregiver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is;

(x) is a victim of child labour;

(xi) is in a child-headed household; or

(xii) is due to its conduct not suitable for diversion.

It is submitted that the legal representative of the child has a duty to ensure that prosecutors take proper heed of para G6 of the directives of the NDPP.

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If the prosecutor takes the view that the child is a child in need of care and protection as envisaged by s 150 of the Children's Act 38 of 2005, he must not divert the matter but refer the matter to a preliminary inquiry for consideration of referring the matter to a children's court (s 41(4) of Act 75 of 2008).

The prosecutor must, in deciding whether to divert, take into account the child's record of previous diversions. See s 41(5) of Act 75 of 2008.

The prosecutor's decision to rely on s 41 to divert a matter can only result in a selection of 'any level one diversion option set out in s 53(3), or any combination thereof'. In terms of s 53(3) level one diversions include—

(a) an oral or written apology to a specified person or persons or institution;

(b) a formal caution, with or without conditions;

(c) placement under a supervision and guidance order;

(d) placement under a reporting order;

(e) a compulsory school attendance order;

(f) a family time order;

(g) a peer association order;
(h) a good behaviour order;
(i) an order prohibiting the child from visiting, frequenting or appearing at a specified place;
(j) referral to counseling or therapy;
(k) compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose;
(l) symbolic restitution to a specified person, persons, group of persons or community, charity or welfare organisation or institution;
(m) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored;
(n) community service under the supervision or control of an organisation or institution, or a specified person, persons or group of persons identified by the probation officer;
(o) provision of some service or benefit by the child to a specified victim or victims;
(p) payment of compensation to a specified person, persons, group of persons or community, charity or welfare organisation or institution where the child or his or her family is able to afford this; and
(q) where there is no identifiable person, persons or group of persons to whom restitution or compensation can be made, provision of some service or benefit or payment of compensation to a community, charity or welfare organisation or institution.

If the prosecutor decides not to divert a matter in terms of s 41, he must immediately arrange for the child to appear at a preliminary inquiry as provided for in Chapter 7 of Act 75 of 2008. See s 41(6).

4.18.2 Diversion by the prosecution in terms of Chapter 8 (ss 51 62) of the Child Justice Act 75 of 2008

The above chapter sets out the objectives of diversion (s 51) and provides for consideration of diversion after a preliminary inquiry or during a trial (s 52). The latter section provides as follows:

(1) A matter may, after consideration of all relevant information presented at a preliminary inquiry, or during a trial, including whether the child has a record of previous diversions, be considered for diversion if—

(a) the child acknowledges responsibility for the offence;
(b) the child has not been unduly influenced to acknowledge responsibility;

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(c) there is a *prima facie* case against the child;
(d) the child and, if available, his or her parent, an appropriate adult or a guardian, consent to diversion; and
(e) the prosecutor indicates that the matter may be diverted in accordance with subsection (2) or the Director of Public Prosecutions indicates that the matter may be diverted in accordance with subsection (3).

(2) A prosecutor may, in the case of an offence referred to in Schedule 1, if the matter has not already been diverted in accordance with Chapter 6, or in the case of an offence referred to in Schedule 2, after he or she has—

(a) considered the views of the victim or any person who has a direct interest in the affairs of the victim, whether or not the matter should be diverted, unless it is not reasonably possible to do so; and
(b) consulted with the police official responsible for the investigation of the matter, indicate that the matter may be diverted.

(3) *(a)* The Director of Public Prosecutions having jurisdiction may, in the case of an offence referred to in Schedule 3, in writing, indicate that the matter be diverted if exceptional circumstances exist, as determined by the National Director of Public Prosecutions, in directives issued in terms of section 97(4)*(a)*(iii).

(b) A director of Public Prosecutions may only indicate that a matter may be diverted in terms of paragraph *(a)* after he or she has—

(i) afforded the victim or any person who has a direct interest in the affairs of the victim, where it is reasonable to do so an opportunity to express a view on whether or not the matter should be diverted, and if so, on the nature and content of the diversion option

being considered and the possibility of including in the diversion option, a condition relating to compensation or the rendering of a specific benefit or service and has considered the views expressed; and

(ii) consulted with the police official responsible for the investigation of the matter.

(c) In order to obtain the written indication of the Director of Public Prosecutions in terms of paragraph *(a)*, the inquiry magistrate or child justice court may postpone the matter.

(d) A Director of Public Prosecutions may not delegate his or her power to decide whether a matter may be diverted in terms of paragraph *(a)*.

(4) The written indication referred to in subsection (3) must be handed to the presiding officer at the preliminary inquiry or child justice court and must form part of the record of the proceedings.

(5) If the prosecutor or a Director of Public Prosecutions indicates that the matter can be diverted in terms of subsection (2) or (3), the prosecutor must request the presiding officer at the preliminary inquiry or child justice court to make an order for diversion in respect of the child, in accordance with the provisions of this Chapter.

(6) If the presiding officer does not divert the matter as provided for in subsection (5), he or she must refer the matter to the child justice court to be dealt with in accordance with Chapter 9.

In *MK* 2012 (2) SACR 533 (GSJ) it was held that diversion in terms of s 52(1) of Act 75 of 2008 can take place at any stage of the trial-even after conviction (at 3-4). See also *Gani* NO 2012 (2) SACR 468 (GSJ).

Section 53 in Chapter 8 of Act 75 of 2008 sets out the various diversion orders and distinguishes between level one and level two diversion orders. Level one diversion orders apply to offences referred to in Schedule 1, whereas level two diversion orders apply to all other offences identified in Schedules 2 and 3, that is, the more serious offences. See s 53 (2) of Act 75 of 2008. In terms of s 54(1) the following factors must

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be considered when a diversion option is selected: the choice of diversion option, which must be at the appropriate level in terms of s 53 (s 54(1)*(a)*); the cultural, religious and linguistic background of the child (s 54(1)*(b)*); the educational level, cognitive ability and domestic and environmental circumstances of the child (s 54(1)*(c)*); the proportionality of the recommended or selected option, given the circumstances of the child; the nature of the offence and the interests of society (s 54(1)*(d)*); and, further, the child's age and developmental needs (s 54(1)*(e)*).

Section 54(3) provides that in addition to the diversion options set out in s 53, a prosecutor acting in terms of s 41(1) may—where appropriate and after consideration of all available information—develop an 'individual diversion option' which is in line with the diversion objectives set out in s 51 and the minimum standards as provided for in s 55. The latter section provides as follows as regards minimum standards applicable to diversion:

(1) Diversion options, in keeping with the objectives of diversion must be structured in a way so as to strike a balance between the circumstances of the child, the nature of the offence and the interests of society, and—

(a) may not be exploitative, harmful or hazardous to the child's physical or mental health;
(b) must be appropriate to the age and maturity of the child;
(c) may not interfere with the child's schooling;
(d) may not be structured in a manner that completely excludes certain children due to a lack of resources, financial or otherwise; and
(e) must be sensitive to the circumstances of the victim.

(2) Diversion programmes must, where reasonably possible—

(a) impart useful skills;
(b) include a restorative justice element which aims at healing relationships, including the relationship with the victim;
(c) include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution;

(d) be presented in a location reasonably accessible to the child;
(e) be structured in a way that they are suitable to be used in a variety of circumstances and for a variety of offences;
(f) be structured in a way that their effectiveness can be measured;
(g) be promoted and developed with a view to equal application and access throughout the country, bearing in mind the special needs and circumstances of children in rural areas and vulnerable groups; and
(h) involve parents, appropriate adults or guardians, if applicable.

The rest of the sections in Chapter 8 of Act 75 of 2008 deal with the following matters: Provision and accreditation of diversion programmes and diversion service providers (s 56); monitoring of compliance with diversion orders (s 57); failure to comply with a diversion order (s 58); legal consequences of diversion (s 59); register of children in respect of whom a diversion order has been made (s 60); family group conference (s 61); and victim-offender mediation (s 62).

4.18.3 The Child Justice Act 75 of 2008: Diversion of matters involving Schedule 3 offences and the powers and duties of a DPP

Section 52(3)*(a)* of the above Act provides that in the event of an offence referred to in Schedule 3 to the above Act, a DPP who has jurisdiction may indicate, in writing, that the matter be diverted if exceptional circumstances exist, as determined by the

NDPP in directives issued under s 97(4)*(a)*(iii) of Act 75 of 2008. In para J2 of the directives the NDPP has set out the following circumstances that a DPP must consider:

(a) particular youthfulness;
(b) particularly low developmental level of a child;
(c) presence of particular hardship, vulnerability or handicap (eg where the child heads a household);
(d) victim prefers diversion to trial as he/she does not want to testify in court;
(e) compelling mitigating circumstances such as diminished responsibility;
(f) undue influence exerted upon the child in the commission of the offence (eg child used by adult to commit crime (CUBAC));
(g) witnesses for the prosecution are fragile and/or unwilling to testify; or
(h) to proceed would be potentially damaging to a child witness/victim.

A DPP may not delegate his power to decide whether a matter must be diverted in terms of s 52(3)*(a)* of Act 75 of 2008.

A DPP can only divert a matter in terms of s 52(3)*(a)* where the DPP has consulted the investigating officer (s 52(3)*(b)*(ii)) and considered the views of the victim or any person with a direct interest in the affairs of the victim (as provided for in s 52(3)*(b)*(i)).

Diversion of offences referred to in Schedule 3 of Act 75 of 2008 may only take place upon the written indication of the DPP concerned. See s 52(3)*(a)* of Act 75 of 2008. This power may not be delegated. See s 52(3)*(d)* of Act 75 of 2008.

4.18.4 Criminal capacity of children: The decision to prosecute children and the provisions of the Child Justice Act 75 of 2008

The common-law rules pertaining to the criminal capacity of children who have not yet had their fourteenth birthday at the time of the commission of the crime have been amended by s 7 of the Child Justice Act 75 of 2008 with effect from 1 April 2010. See s 7(3) of Act 75 of 2008.

In terms of the common law an *infans* (a child who has not yet completed his seventh year) is *doli* and *culpae incapax*, that is, lacks criminal capacity, rendering him or her immune from prosecution. However, the present rule is that a child below the age of ten years does not have criminal capacity and cannot be prosecuted for an offence committed by

him or her. See s 7(1) of Act 75 of 2008. Section 9 of Act 75 of 2008 regulates the manner of dealing with such a child outside the criminal justice system.

In terms of the common law an *impubes* (a child who is no longer an *infans* but who has not yet turned fourteen) is rebuttably presumed to be *doli* and *culpae incapax*, that is, to lack criminal capacity unless proved otherwise by the prosecution. The present position is regulated by s 7(2) of Act 75 of 2008. This section determines that a child who is ten years or older but under the age of fourteen years and who commits an offence is presumed to lack criminal capacity, unless the prosecution proves that the child concerned has criminal capacity as set out in terms of s 11 of Act. In *TNS* [2015] 1 All SA 223 (WCC) at [13] n 1 Rogers J explained that a child turns fourteen when he 'has completed 14 years of life (ie including the 14th year itself). At that point the child . . . is aged 14 until the 15th year is completed . . . On my reading of the cases and the old authorities, the presumption of lack of criminal capacity terminates when the child turns 14 . . . This is certainly the effect of s 7 (2) of the Child Justice Act . . .'

Criminal capacity will be present if the prosecution can prove beyond a reasonable doubt that at the time of the commission of an alleged offence the child concerned could appreciate the difference between right and wrong and could, furthermore, act in accordance with that appreciation. See s 11(1) of Act 75 of 2008. Where a prosecutor considers it essential to have the criminal capacity of a child evaluated or assessed, he should request the court to order that it be done by the category of persons identified by the Minister of Justice. See s 11(3) of Act 75 of 2008. There is a prosecutorial directive which provides that where it is unlikely that it will be proved that the child had the necessary criminal capacity, prosecutors should have the child referred to a probation officer and such a child is to be dealt with in the same manner as children under the age of ten years (as provided for in s 9 of Act 75 of 2008). See also s 10(2)*(b)* of Act 75 of 2008.

Where the prosecutor decides in respect of a child above ten but below fourteen that criminal capacity is likely to be proved, he may divert the matter in terms of Chapter 6 of Act 75 of 2008 if the child is alleged to have committed an offence referred to in Schedule 1 of Act 75 of 2008. See s 10(2)*(a)*(i) of Act 75 of 2008 as well as para 4.18.1 above. The alternative is to refer the matter to a preliminary inquiry as provided for in Chapter 7 of the same Act. See s 10(2)*(a)*(ii) of Act 75 of 2008.

4.18.5 Decision to prosecute a child who is ten years or older but under fourteen

In terms of s 10(1) of the Child Justice Act 75 of 2008 a prosecutor who is required to decide whether to prosecute a child in the age category referred to above is obliged to consider various factors. The educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child must be considered (see s 10(1)*(a)*). The prosecutor must also take into account the nature and seriousness of the alleged offence (s 10(1)*(b)*), the impact of the alleged offence on any victim (s 10(1)*(c)*) and the interests of the community (s 10(1)*(d)*). Regard must also be had to a probation officer's report in terms of Chapter 5 of Act 75 of 2008. See s 10(1)*(e)* as read with s 40 of the Act. The prosecutor is also obliged to consider the prospects of establishing criminal capacity in terms of s 11 if the matter were to be referred to a preliminary inquiry in terms of Chapter 7 of Act 75 of 2008. See s 10(1)*(f)*. The appropriateness of diversion (s 10(1)*(g)*) as well as 'any other relevant factor' (s 10(1)*(h)*) must be considered. The open-ended nature of s 10(1)*(h)* makes it clear that common-law principles and guidelines identified in the Prosecution Policy (see para 4.14.1 above) remain relevant.

4.18.6 Withdrawal of cases against children

In terms of para C of the directives issued by the NDPP under s 97(4) of the Child Justice Act 75 of 2008, prosecutors are instructed to take care not merely to withdraw a case against a child in circumstances where the best interests of the child call for some intervention. This directive is consistent with s 28(2) of the Bill of Rights, which provides as follows: 'A child's best interests are of paramount importance in every matter concerning the child.'

5 Private prosecutions

5.1 Introduction

The South African Criminal Procedure Act refers to two forms of private prosecution, namely a private prosecution by an individual on the basis of a certificate

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nolle prosequi (s 7) and a private prosecution under statutory right (s 8). However, in the present chapter it will be shown that the latter is not a true 'private prosecution' even though it is identified as a 'private prosecution' in the Criminal Procedure Act. Unlike a private prosecution in terms of s 7, it does not involve an individual who is aggrieved by the fact that the prosecuting officials have declined to prosecute. See also para 1 and 2 above and cf paras 5.2 and 5.3 below.

5.2 Private prosecution under statutory right

Any body upon which, or person upon whom, the right to prosecute in respect of any offence is expressly conferred by law may institute and conduct a prosecution in respect of such offence in any court competent to try that offence—s 8(1) of Act 51 of 1977. Some municipalities prosecute in terms of this section. However, a body which, or a person who, intends exercising a right of prosecution under s 8(1) shall exercise such right, firstly and only, after consultation with the DPP concerned and, secondly, after the DPP has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution—s 8(2).

A DPP may, under s 8(2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the DPP, and that the DPP may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution—s 8(3). It is clear, therefore, that private prosecutions under statutory right remain under the control of the DPP and NDPP. Large municipalities often have the necessary expertise to conduct prosecutions for contraventions of municipal regulations. In practice it is therefore convenient for a DPP to allow these municipalities to prosecute their regulatory offences in terms of s 8, giving him and his public prosecutors more time to concentrate on crimes of a more serious nature. A s 8 prosecution is reported in the name of the parties, as in *Claymore Court (Pty) Ltd v Durban City Council* 1986 (4) SA 180 (N). In this case it was also held that a prosecution in terms of s 8 must be instituted and conducted, and all process in connection therewith issued, in the name of the prosecutor. This is peremptory in terms of s 10. The NDPP may also in writing authorise any local authority to conduct certain prosecutions. See s 22(8)*(b)* of Act 32 of 1998 as cited in para 4.5.5 above.

5.3 Private prosecution by an individual on a certificate *nolle prosequi*

5.3.1 Introduction

The origin and rationale of having a system in terms of which an aggrieved individual may in certain circumstances institute a private prosecution (that is, proceed in lieu of the state) were discussed in para 2 above. The historical background is dealt with in more detail by

Smit J in *Black v Barclays Zimbabwe Nominees (Pvt) Ltd* 1990 (1) SACR 433 (W). In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 (1) SACR 308 (SCA) at [8] it was pointed out that in terms of national legislation, provisions regulating private prosecutions have been in place for almost a century.

By way of summary, it may be said that an individual's statutory power to institute a private prosecution is a 'safety valve', so to speak, in the machinery of

the law. It is also to some extent an indirect method of controlling corruption or incompetence in the state's prosecutorial services. It has furthermore been said that a—

> system of private prosecution can be justified in terms of both society's interest in increased law enforcement and the individual's interest in vindication of personal grievances. Full participation by the citizen as a private prosecutor is needed to cope with the serious threat to society posed by [the prosecuting authority's] improper action and inaction [Comment (1955) 65 *Yale Law Journal* 209 at 227].

It has also been argued that a system of private prosecutions demonstrates 'the value of citizen/victim participation in the criminal justice system and serves to reinforce . . . the integrity of basic democratic values'—*Private Prosecutions: Working Paper 52 of the Law Reform Commission of Canada* (1986) 4. Private prosecutions are rare but essential.

A system of private prosecution is not an isolated instance of citizen participation in the criminal justice system. Private persons—even though totally disinterested in a matter—must in certain circumstances assist in an arrest when called upon to do so by a police official—s 47. And private persons not personally involved in a case may be called upon and agree to sit as assessors in criminal trials—see, for example, s 93*ter* of the Magistrates' Courts Act 32 of 1944 as discussed in Chapter 13.

A private prosecution must be instituted and conducted in the name of the private prosecutor—s 10(1) of Act 51 of 1977. All process must also be issued in the name of and at the expense of the private prosecutor—s 10(1) and 14. The indictment or summons, as the case may be, must describe the private prosecutor with certainty and precision and must be signed by such prosecutor or his legal representative—s 10(2). A private prosecution is reported in the names of the parties, for example, *Smith v Jones*.

A private prosecutor may withdraw a charge. See *Crookes v Sibisi* 2011 (1) SACR 23 (KZP) at 15, 16 and 20. This may be done despite the fact that s 6*(a)* of the Act only covers public prosecution. See further para 4.14.2 above.

A private prosecution shall—except as otherwise stated in the present chapter—proceed in the same manner as if it were a prosecution at the instance of the state—s 12(1). This means that an accused enjoys all those procedural rights which would have been available to him had he been prosecuted at the instance of the state. He enjoys the additional privilege that he may be brought before the court only by way of summons in the case of a lower court or an indictment in the case of the supreme court—see the proviso in s 12(1).

An accused in a private prosecution is also entitled to the fair trial right as guaranteed in s 35(3) of the Constitution. See *Bothma v Els* 2010 (1) SACR 184 (CC).

5.3.2 Locus standi of a private prosecutor

In any case in which a DPP has declined to prosecute for an alleged offence, the following persons may, subject to certain other procedural requirements, either in person or through a legal representative institute and conduct a prosecution in respect of such offence in any court competent to try that offence:
(1)

any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence—s 7(1)*(a)*; or

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(2) a husband, if the said offence was committed in respect of his wife—s 7(1)*(b)*; or
(3) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence—s 7(1)*(c)*; or
(4) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward—s 7(1)*(d)*.

In the absence of an injury cognisable under s 7(1), there is no room on the part of a private prosecutor for any interest (substantial and peculiar or otherwise) in the issue of the trial—*Phillips v Botha* 1999 (1) SACR 1 (SCA). See also *Singh v Minister of Justice and Constitutional Development* 2009 (1) SACR 87 (N).

Section 7 is not rendered unconstitutional on account of the fact that it precludes juristic persons (as opposed to natural persons) from instituting private prosecutions. See *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 (1) SACR 308 (SCA).

The question whether a private person has in terms of s 7(1)*(a)* 'some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the . . . offence' is a question of law as well as fact. An obvious example is the victim of an alleged theft—*Daly v Solicitor General* 1911 EDC 399. In *Mullins and Meyer v Pearlman* 1917 TPD 639 at 643 and *Ellis v Visser* 1954 (2) SA 431 (T) at 438 it was held that the right to institute a private prosecution does not exist where there is no right of civil redress. However, in *Makhanya v Bailey NO* 1980 (4) SA 713 (T) at 717C it was correctly held that where it is clear that a legal right of a person has been infringed by an offence, then the question of a civil remedy arising from it is no longer a relevant consideration and the provisions of s 7(1)*(a)* would then be satisfied. It is submitted that s 7(1)*(a)* should in principle not be interpreted restrictively. After all, the purpose of a private prosecution is to reduce 'the temptation to an aggrieved person to take the law into his own hands'—*Solomon v Magistrate, Pretoria* 1950 (3) SA 603 (T) at 609H. The state should not have a monopoly of the right to prosecute—Van Zyl Smit 1981 *SACC* 78 at 79. At the same time, however, it is clear that s 7 does place important restrictions on the right to institute a private prosecution. It follows that not every case in which a DPP declines to prosecute will necessarily give rise to a private prosecution—see also generally Morkel and Labuschagne 1980 *SACC* 160 at 168. In *Attorney-General v Van der Merwe and Bornman* 1946 OPD 197 at 201 it was said that restrictions are necessary—

> to prevent private persons from arrogating to themselves the function of a public prosecutor and prosecuting in respect of offences which do not affect them in any different degree than any other member of the public; to curb, in other words, the activities of those who would otherwise constitute themselves public busybodies.

In *Solomon v Magistrate, Pretoria* (above) the court held that it was competent to entertain and grant an application for an order restraining the magistrate and the private prosecutor from continuing with an unfounded prosecution. The onus of proving that the prosecution is unfounded rests on the applicant. *Van Deventer v Reichenberg and Another* 1996 (1) SACR 119 (C) is an example of a case where the High Court interdicted the respondent from instituting an unfounded prosecution.

The Supreme Court of Appeal has held that the High Court's inherent power to

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prevent abuse of its process by frivolous or vexatious proceedings—which is usually asserted in civil proceedings—also applies where the process abused is that provided for in the conduct of private prosecutions—*Phillips v Botha* 1999 (1) SACR 1 (SCA). However, in this case it was held that there was no abuse of process. Even though the court was satisfied that the private prosecutor had played a protracted game of cat-and-mouse with the accused, it was also found that the dominant motive of the private prosecutor was to have justice done by convicting a wrongdoer.

A private prosecutor has the burden of proving his *locus standi* if it is disputed—see generally *Levy v Benatar* 1987 (4) SA 693 (Z). A widow has the necessary peculiar interest—*Mweuhanga v Cabinet of the Interim Government of SWA* 1989 (1) SA 976 (SWA) at 982. Companies and other legal persons do not fall within the ambit of s 7(1)*(a)* —*Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 (4) SA 720 (A).

In *Mullins and Meyer v Pearlman* 1917 TPD 639 a full bench held that only persons who can prove that they have suffered actual damage as a result of the commission of the alleged offence are entitled to institute a private prosecution. The mere apprehension of injury or of an invasion of rights which may possibly cause damage in the future is insufficient.

Two or more persons may not prosecute in the same charge, except where two or more persons have been injured by the same offence—s 10(3); *Williams v Janse van Rensburg (2)* 1989 (4) SA 680 (C).

5.3.3 The certificate nolle prosequi

No private prosecutor wishing to proceed in terms of s 7 can obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces a so-called 'certificate *nolle prosequi*' to the officer authorised by law to issue such process. A certificate *nolle prosequi* is a certificate signed by a DPP and in which he confirms, first, that he has examined the statements or affidavits on which the charge is based and, secondly, that he declines to prosecute at the instance of the state—s 7(2)*(a)*.

A DPP must, at the request of the person intending to prosecute, grant the certificate *nolle prosequi* in every case in which he has declined to prosecute. It would seem as if the DPP is not entitled to investigate whether the person requesting the certificate has the necessary *locus standi* as envisaged in s 7(1)*(a)* to *(d)*. At the trial the accused can raise the lack of *locus standi* of the private prosecutor.

A DPP may refuse to issue a certificate *nolle prosequi* where the applicant is a 'juristic person' and not a 'private person' as required by s 7(1)*(a)*. See generally *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 (1) SACR 308 (SCA) at [7].

In *Solomon v Magistrate, Pretoria* (above) it was held that a DPP cannot be required to particularise or identify the charges on which he declines to prosecute. If the accused can show at the trial that the certificate *nolle prosequi* does not relate to the charges preferred against him by the private prosecutor, he is entitled to a discharge.

A private prosecutor's failure to lodge a certificate *nolle prosequi* as required by s 7(2)*(b)* is a material defect because it amounts to non-compliance with a jurisdictional fact. See *Nundalal v Director of Public Prosecutions KZN* (unreported, KZP case no AR 723/2014, 8 May 2015) at [36] and [40].

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In terms of s 7(2)*(c)* a certificate *nolle prosequi* shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the required process within three months of the date of the certificate.

5.3.4 Security by private prosecutor

No private prosecutor may take out or issue any process commencing the private prosecution unless he deposits the sum of two thousand five hundred rand with the magistrate's court in whose area of jurisdiction the offence was committed—s 9(1). This amount serves as security that the private prosecutor will prosecute the charge to a conclusion without undue delay—s 9(1)*(a)*. The amount is forfeited to the state in the event of such a delay—s 9(3). Forfeiture to the state also takes place where the charge against the accused is dismissed because of the private prosecutor's failure to appear—s 9(3) as read with s 11.

The magistrate's court in whose area of jurisdiction the offence was committed may determine a further amount to be deposited as security for the costs which the accused may incur in respect of his defence to the charge—s 9(1)*(b)*. The accused may, when he is called upon to plead to the charge, apply to the trial court to review the amount which was determined in terms of s 9(1)*(b)*—*Bonadei v Magistrate of Otjiwarongo* 1986 (1) SA 564 (SWA); s 9(2). The trial court must then, before the accused pleads, reassess the amount and may require the private prosecutor to deposit any additional amount, as determined by the court, with the magistrate's court where the initial s 9(1)*(b)* deposit was made—s 9(2) *(a)*. The court may, as an alternative to a further deposit, direct that the private prosecutor enter into a recognisance, with or without sureties, in such additional amount as the court may determine—s 9(2)*(b)*.

The reference to costs in s 9 is concerned only with the actual costs which an accused will probably incur personally in conducting his defence—*Williams v Janse van Rensburg (1)* 1989 (4) SA 485 (C).

5.3.5 Failure of private prosecutor to appear

If the private prosecutor does not appear on the day set down for the appearance of the accused in the magistrate's court or for the trial of the accused, the charge against the accused shall be dismissed unless the court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his control, in which event the court may adjourn the case to a later date—s 11(1). Where the charge is so dismissed, the accused shall forthwith be discharged. He may not in respect of that charge be prosecuted privately again. But the DPP or a public prosecutor with the consent of the DPP may at the instance of the state prosecute the accused in respect of that charge—s 11(2).

5.3.6 Costs of a successful private prosecution

The general rule is that the costs and expenses of a private prosecution must be paid by the prosecutor—s 15(1). But the court may, having regard to all the circumstances of the case, order a person convicted upon a private prosecution to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence—15 (2). It is also possible for the court to order that the costs and expenses of the successful private prosecution, including the costs of an appeal arising from such prosecution, must be paid by the state—

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s 15(2). An order of this nature should be made where the court is convinced that the DPP should not have declined to prosecute at the instance of the state. The taxation of costs is regulated by s 17.

5.3.7 Costs of accused in an unsuccessful private prosecution

Where the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal may order the private prosecutor to

pay to such accused the whole or any part of the costs and expenses incurred by him in connection with the prosecution or the appeal, as the case may be—s 16(1). Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred by him as it may deem fit—s 16(2). A court should be slow in coming to a decision mulcting in costs under s 16(2) if a prosecutor has *bona fide* sought justice in a private prosecution—*Buchanan v Voogt NO* 1988 (2) SA 273 (N). Taxation of costs is also governed by s 17.

5.3.8 Intervention by the State in a private prosecution

A DPP (or a local public prosecutor acting on the instructions of the DPP) may in respect of any private prosecution apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or continued at the instance of the state, as the case may be—s 13. The court must make such an order—s 13. Intervention in terms of s 13 is in the discretion of the DPP. However, where an accused in a private prosecution pleads guilty to the charge, the prosecution must be continued at the instance of the state—s 12(2).

5.3.9 A private prosecution and s 59(2) of the Child Justice Act 75 of 2008

A private prosecution in terms of s 7 of the Criminal Procedure Act may in terms of s 59(2) of Act 75 of 2008 not be instituted against a child in respect of whom the matter has been diverted in terms of Act 75 of 2008.

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Chapter 4
The right to legal assistance

GP Kemp

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The Constitution and this chapter:

The Constitution and this chapter:

Section 35—Arrested, detained and accused persons

(2) Everyone who is detained, including any sentenced prisoner, has the right—

. . .

(b)

to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; . . .

. . .

See 2, below

(3) Every accused person has a right to a fair trial, which includes the right—

. . .

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; . . .

See 1 and 4.1, below

The Child Justice Act 75 of 2008 and this chapter:

Section 80—Requirements to be complied with by legal representatives

(1) A legal representative representing a child must—

(a) allow the child, as far as is reasonably possible, to give independent instructions concerning the case;

(b) explain the child's rights and duties in relation to any proceedings under this Act in a manner appropriate to the age and intellectual development of the child;

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(c) promote diversion, where appropriate, but may not unduly influence the child to acknowledge responsibility;

(d) ensure that the assessment, preliminary inquiry, trial or any other proceedings in which the child is involved, are concluded without delay and deal with the matter in a manner to ensure that the best interests of the child are at all times of paramount importance; and

(e) uphold the highest standards of ethical behaviour and professional conduct.

(2) *(a)* If a presiding officer is of the opinion that a legal representative at any stage during the conduct of any proceedings under this Act, acted contrary to subsection (1), he or she must record his or her displeasure by way of an order which includes an appropriate remedial action or sanction.

(b) A presiding officer who has made any order referred to in paragraph *(a)* must immediately direct the clerk or the registrar of the court to notify—

(i) the relevant law society referred to in section 56 of the Attorneys Act, 1979 (Act 53 of 1979);

(ii) in the case where the legal representative concerned has been employed by Legal Aid South Africa, the Board of Directors of Legal Aid South Africa; or

(iii) in the case of an advocate, the controlling body of which the advocate is a member,

of the order.

See 4.4, below

Section 81—Legal representation at preliminary inquiry

Nothing in this Act precludes a child from being represented by a legal representative at a preliminary inquiry.

See 10.2.3, below

Section 82—Child to be provided with legal representation at State expense in certain instances

(1) Where a child appears before a child justice court in terms of Chapter 9 and is not represented by a legal representative of his or her own choice, at his or her own expense the presiding officer must refer the child to Legal Aid South Africa for the matter to be evaluated by the Board as provided for in section 22(1)*(b)* of the Legal Aid South Africa Act, 2014.

(2) No plea may be taken until a child referred to in subsection (1) has been granted a reasonable opportunity to obtain a legal representative or a legal representative has been appointed.

See 9, below

Section 83—Child may not waive legal representation in certain circumstances

(1) No child appearing before a child justice court may waive his or her right to legal representation.

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(2) If a child referred to in subsection (1) does not wish to have a legal representative or declines to give instructions to an appointed legal representative, the court must enter this on the record of the proceedings and a legal representative must, subject to the provisions of the Legal Aid Manual referred to in section 24(1) of the Legal Aid South Africa Act, 2014, be appointed by Legal Aid South Africa to assist the court in the prescribed manner.

See 4.1, below

1 Introduction and historical background

One of the most important rights of a person suspected of the commission of an offence, whether he has been formally charged with the offence or not, is to be assisted by counsel (attorney or advocate) and friends. This right, of common-law origin, is of exceptional importance since the effective exercise of other rights and the employment of various remedies such as the interdict, *habeas corpus*, civil action for damages, and bail may depend on it. This right may quite correctly be termed 'an accused's most pervasive right'.

Vroman Tractaat de Foro Competenti (1721) 2.4.3 contends that the right to counsel originates in the law of nature and God. It may not be denied anyone, says Vroman—not even irrational animals! He continues: 'Yes, not even (may it be denied) the devil, if he were to appear before the judgment throne' (our translation)—cf *Wessels* 1966 (4) SA 89 (C); *Blooms* 1966 (4) SA 417 (C).

In South Africa, an accused could not always as of right demand that he be defended by an attorney or advocate: it was only in 1819 that a proclamation was issued providing that a person accused of a serious offence had the right, if he so wished, to employ a legal practitioner to defend him (cf *Wessels* (above) at 91G-H).

In 1920 a general right to counsel was accepted, without reference to any authority, by the Appellate Division (as the Supreme Court of Appeal was then called) in *Dabner v SA Railways and Harbours* 1920 AD 583. The court stated:

> That a person who is charged with an offence before any court in judicial proceedings in this country is entitled to appear by [sic] a legal adviser, is a proposition which no one will dispute.

Today this right is entrenched in s 35(2) and (3) of the Constitution as set out above. Furthermore, s 73(1), (2) and (2A)-(2C) of the Criminal Procedure Act confirms this fundamental procedural right to legal representation, while s 73(3) provides for some qualified form of assistance that may be rendered by third parties other than legally qualified counsel.

The right to legal representation is not confined to the accused but is extended to witnesses in appropriate cases.

The effect of s 35(2)*(c)* and (3)*(g)* of the Constitution is that an arrested person, as well as an accused, must be provided with legal representation at the expense of the state if substantial injustice would otherwise result. 'Substantial injustice' is not defined, but in *Lombard* 1994 (3) SA 776 (T) the court stated that, at the least, it means that an accused who is charged with an offence in respect of which he may be sentenced to imprisonment if convicted, and who cannot afford legal representation, should be entitled to legal representation at state expense. Also compare

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Mgcina v Regional Magistrate, Lenasia 1997 (2) SACR 711 (W). An accused must, however, accept the legal representative appointed by the state and has no choice as to the latter's identity—*Vermaas; Du Plessis* 1995 (3) SA 293 (CC).

On legal representation generally, see 1965-1966 *Acta Juridica* 53; 'Fokus' 1989 *SACJ* 47-77; Steytler *The Undefended Accused*.

2 Ethical lawyering

Legal ethics is an important subject that warrants proper attention. The topic of legal ethics is not often found as a stand-alone module or discipline at South African law schools, but should nevertheless be viewed as an integral part of the ethos of theoretical and practical legal training. Legal ethics is examined as part of the admission examinations of the legal profession in South Africa.

In broad terms, legal ethics, or, 'a code of legal ethics', can be defined as 'that system of rules which by mutual consent is observed by members of the legal profession as the standard by which to determine the propriety of their conduct and relationship toward their clients, the courts and other members of the profession'—Robbins *A Treatise Covering Succinctly the Entire Range of Trial Tactics and Legal Ethics* 2 ed (1913) 249.

Lawyers have multiple ethical duties, and failure to adhere to the high standards expected of members of the legal profession is a failure to serve the best interests of the clients concerned—*McLaggan* 2013 (1) SACR 267 (ECG) at [11]; Du Toit et al *Commentary on the Criminal Procedure Act* (2016) 11-5.

An important manifestation of ethical lawyering is lawyers' duty to represent the interests of their clients to the best of their ability, 'even if they privately consider the case to be a hopeless one'—*Negondeni* [2015] ZASCA 132 (unreported, SCA case no 00093/2015, 29 September 2015) at [24].

3 The right to assistance in the pre-trial stage of the criminal procedure

A powerful statement of the importance of outsiders having access to persons who are held in custody is contained in *Li Kui Yu v Superintendent of Labourers* 1906 TS 181 at 188:

> I think it is quite clear that the only way of preventing a person being illegally done away with and illegally treated is to uphold to the fullest extent the right of every person to have any of his friends come and see him who choose to do so. I am not now dealing with solicitors, I am thinking of the ordinary question of friends; I think to prevent the access of friends to any person is a most serious infringement of the liberty of any subject.

The court continued by stating that it is even more serious to withhold access to an attorney. (See also Wides 'An arrested person's right of access to his lawyer—a necessary restatement of the law' 1964 *SALJ* 513.)

In *Mabaso* 1990 (3) SA 185 (A) it was already suggested that the legislature should provide for legislation in terms of which an arrested person should be informed of his right to legal representation upon arrest. This has now been embodied in s 73(2A) of the Criminal Procedure Act.

The right of a detained person to choose and consult with a legal practitioner, and to be *promptly* informed of this right, is now entrenched in s 35(2)*(b)* of the Constitution and s 73 (1) of the Criminal Procedure Act. A person who has been

arrested is in detention from the moment of his arrest and therefore immediately qualifies for this right. Furthermore, the accused may exercise this right at any stage during his detention, whether before, during or after the trial—cf *Melani* 1996 (1) SACR 335 (E).

The arrested person must be informed of this right (s 73(2A)) in such a manner that it can reasonably be supposed that he understood the right and the importance thereof—*Melani* 1996 (1) SACR 335 (E).

The right of a detained person to be informed of this right requires the state to inform him of the right not only *at the time of his arrest*, but also at every further stage of the investigation into the alleged offence where his co-operation is sought, such as when he is being questioned, a statement is taken from him, he makes a confession or is required to take part in an identification parade—*Marx* 1996 (2) SACR 140 (W); *Mhlakaza* 1996 (2) SACR 187 (C); *Mathebula* 1997 (1) SACR 10 (W); and *Agnew* 1996 (2) SACR 535 (C). However, see *Ngwenya* 1998 (2) SACR 503 (W), where the opposite was held. See also *Hlalikaya* 1997 (1) SACR 613 (SE) and *Zwayi* 1997 (2) SASC 772 (Ck), where it was held that if an identification parade by means of photographs is held in the absence of the suspect's legal practitioner, evidence concerning the identification parade will still be admissible. In *Mphala and Another* 1998 (1) SACR 388 (W) the accused were not informed before making confessions that an attorney had been appointed for them and had requested that they should not make statements before consulting with him. The waiver by the accused of their right to legal representation was accordingly held to have been uninformed and therefore invalid.

In *Orrie* 2005 (1) SACR 63 (C) the question before the court was whether suspects, when questioned by the police, can also invoke the rights conferred by s 35 of the Constitution. The court in *Orrie* gave a purposive interpretation of s 35 and found that the pre-trial rights (as protected by s 35) apply also to *suspects*. Strictly speaking, the duty of the police to inform individuals of their right to legal representation applies only from the moment of arrest (see s 73(2A) of the Criminal Procedure Act). The court in *Orrie* assessed the fairness of the criminal process in a holistic way. The court stated as follows, at [67]:

> Section 35 of the Constitution . . . deals with the rights of arrested, detained and accused persons and it is here, in my view, that the rights of a suspect must be found. No provision is made for a suspect to be specifically informed of this status, but it stands to reason that a person must be informed that he or she is a suspect, or at least be aware thereof, in order that he or she can properly consider and exercise his or her rights before interacting with the police.

The right to legal representation includes the right to confidentiality during consultation with the legal practitioner. In the absence of statutory amendments, a detainee therefore has the right to consult with his legal adviser without the conversation being overheard—*Mokoena v Commissioner of Prisons* 1985 (1) SA 368 (W).

4 The right to assistance during the trial

4.1 General

The right to legal representation in criminal trials is now universally recognised in most civilised societies. This fundamental right of an accused is inherent in the

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principle that an accused must have a fair trial—*Davids; Dladla* 1989 (4) SA 172 (N); *Khanyile* 1988 (3) SA 795 (N); *Zuma* 1995 (2) SA 642 (CC). This right is now entrenched in s 73(2) of the Criminal Procedure Act.

4.2 The duty to inform the accused of the right to legal representation

A right is of no use to a person if he is not aware of it. The Constitution accordingly provides in s 35(2)*(b)* that the accused person must be *promptly* informed of the right to choose and be represented by a legal practitioner of his choice (see also s 73(2) of the Criminal Procedure Act). A judicial officer therefore has a duty to inform an unrepresented accused that he has a right to be legally represented. A judicial officer must explain this right and point out to the accused that he has a right to be assisted by a legal representative with whom he can communicate in his own language or, in the exceptional circumstances where this not feasible, through an interpreter—*Pienaar* 2000 (2) SACR 143 (NC).

A failure on the part of a judicial officer to inform an unrepresented accused of his legal rights, including the right to legal representation (depending on the facts in a particular case), can lead to a complete failure of justice—*Radebe* 1988 (1) SA 191 (T); *Mabaso* 1990 (3) SA 185 (A) at 204 (cf in particular the minority judgment of Milne JA: the failure to inform the accused about his right to legal representation automatically invalidates the criminal proceedings); *D* 1997 (2) SACR 671 (C); *Moos* 1998 (1) SACR 401 (W). There is, however, no prejudice (and hence no failure of justice) where the accused would in any event have been convicted, notwithstanding a failure of a judicial officer to inform him of his right to legal representation—*Hlantlala v Dyantyi* 1999 (2) SACR 541 (SCA).

When a court explains to an undefended accused his right to legal representation and the accused, facing a serious charge, elects to appear in person, the court should ask the accused why he wants to appear in person and if it appears that the accused is under some misunderstanding, that has to be put right—*Nkondo* 2000 (1) SACR 538 (W); *Manale* 2000 (2) SACR 666 (NC).

It has long been realised that only to inform the accused about his right to legal representation would be worthless if he is in any event too poor to afford it. It was therefore decided by some courts that the accused should furthermore be informed of his right to legal aid—see the majority decision in *Davids* (above) and cf also *Mthwana* 1989 (4) SA 368 (N). The Constitution now requires that an accused be informed *promptly* that he has a right to have a legal representative assigned to him at state expense if substantial injustice would otherwise result—s 35(3)*(g)*. See also s 73(2A) of the Criminal Procedure Act.

In *Hlantlalala v Dyantyi NO*, above, it was held that the fact that 'no administrative machinery rendering a free legal service' is available in a particular part of the country is untenable, and cannot be proffered as an excuse for denying a section of the South African society, merely because they happen to be in a particular area, rights enjoyed by the rest of the country.

4.3 The duty to afford the accused an opportunity to obtain legal representation

The court must always carefully consider an application by an accused for a postponement in order to enable him to obtain legal representation. A refusal to grant such a postponement may in certain circumstances amount to an irregularity—*Seheri* 1964 (1) SA 29 (A); *Van Wyk* 1972 (1) SA 787 (A).

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Where an accused's legal representative withdraws from the case, the court should ask the accused whether he wishes to have the opportunity to instruct another legal representative and/or whether he is ready to undertake his own defence—failure to do so is irregular and invalidates the proceedings—*Khoali* 1990 (1) SACR 276 (O). The absence of duly instructed counsel may well be due to the indifference of the latter and refusal to grant a postponement will prejudice the accused—*Shabangu* 1976 (3) SA 555 (A); *Gwebu* 1988 (4) SA 155 (W). Where, however, an accused had ample opportunity to obtain legal representation and failed to arrange this, he cannot subsequently attack the proceedings unless he can furnish an acceptable explanation for his failure—*Second* 1970 (1) PH H5 (RA) and cf *Nongila* 1970 (3) SA 97 (E). If at higher instance a refusal to grant a postponement for the purpose of enabling the accused to obtain counsel is held to have been irregular, the irregularity is of the kind that per se must have prejudiced the accused and, accordingly, the conviction will be set aside by the court of higher instance without further ado—cf *Nqula* 1974 (1) SA 801 (E). Cf also *Nel* 1974 (2) SA 445 (NC). However, a request for a postponement of the trial in order to enable the accused to obtain work to pay for the services of the legal representative of his choice is beyond the limits of acceptability—*Swanepoel* 2000 (1) SACR 384 (O).

If an accused person terminates the mandate of his legal representative, the court ought to inquire into the reasons for the termination and, if it appears that it is due to some or other misunderstanding, this has to be put right—*Manale* 2000 (2) SACR 666 (NC). The same applies to an accused facing a serious charge and electing to appear in person—*Nkondo* 2000 (1) SACR 358 (W).

4.4 The role of the legal representative and others in providing the accused with assistance

Apart from assistance by a trained *legal* representative, an accused under the age of 18 years may be assisted by his parent, an appropriate adult or a guardian, in terms of s 73(3) of the Criminal Procedure Act (read with ss 3*(g)*, 38(2), 44(1)*(b)* and 65 of the Child Justice Act 75 of 2008). Such assistance is not synonymous with legal representation and the parent, appropriate adult or guardian has no greater right than a legal representative to decide how a case should be conducted—*Assel* 1984 (1) SA 402 (C). Cf *L* 1988 (4) SA 757 (C) 760 with regard to the nature of assistance by a guardian.

The Criminal Procedure Act further provides that 'any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings'—s 73(3). (It has happened that a magistrate authorised an articled clerk (candidate attorney) to assist an accused in terms of this section.) Assistance in terms of s 73 cannot be foisted on an accused either by a court's order that he has to be represented, or by appointment of a representative for such a purpose if he does not seek it—*L* (above).

A court will not allow the same advocate to defend two accused with interests which conflict in material respects—*Moseli* (1) 1969 (1) SA 646 (O); *Jacobs* 1970 (3) SA 493 (E); *Hollenbach* 1971 (4) SA 636 (NC).

There may be circumstances in which it may even be proper for the representative of the State to direct the attention of his opponent or of the presiding official to

the question whether counsel for the defence should not withdraw from the case because of the conflict of interest between his clients—*Naidoo* 1974 (3) SA 706 (A).

As a general rule an accused is bound by what is done by his legal representative in the execution of his mandate during the course of the trial—*Muruven* 1953 (2) SA 779 (N).

The effect of the entrenchment of the right to legal representation in the Constitution is that a detained or accused person has the right to effective or competent legal representation (see eg *Halgryn* 2002 (2) SACR 211 (SCA) at 216; *Beyers v Director of Public Prosecutions, Western Cape* 2003 (1) SACR 164 (C); *Legal Aid Board (Ex parte) v Pretorius* [2006] JOL 17546 (SCA); *Du Toit* [2005] JOL 15891 (T); *Mofokeng* 2004 (1) SACR 349 (W) and *Chabedi* 2004 (1) SACR 477 (W)). Cf also *Ntuli* 2003 (4) SA 258 (W) and *Mvelase* 2004 (2) SACR 531 (W).

5 Some instances where withdrawal by a legal representative may be required

5.1 Conflict of interest: Two or more accused represented by one lawyer

It happens from time to time that multiple accused persons are represented by the same lawyer. This does not constitute an ethical problem in itself. However, should a conflict of interests arise between two or more of the accused who are represented by the same lawyer, the ethical standard is clear: the lawyer must withdraw from the case and must terminate his or her services in respect of all the accused involved—Du Toit et al *Commentary* 11-42. The court in *Dintwe* 1985 (4) SA 539 (BG) explained the rationale of the complete withdrawal from the case as follows, at 541B-D:

> [If the legal representative] continues to represent one of the accused, he will be obliged to cross-examine the other as well as, possibly, other witnesses, as happened in the present case.
>
> He cannot do this properly without making use of information gained from his former client, the other accused. To make use of such information would amount to a flagrant breach of the confidential attorney-client relationship which the law jealously protects. On the other hand, he may find that, in attempting not to prejudice his former client, he limits his cross-examination to the prejudice of the accused whom he is continuing to represent.

It is prudent for a presiding officer to make enquiries before the commencement of a trial in which a single lawyer appears for multiple accused persons, in order that any possible conflict of interests between any of the lawyer's clients may be disclosed and considered—*Ngculu* [2015] ZASCA 184 (unreported, SCA case no 438/2015, 30 November 2015), at [12].

5.2 Contradictory instructions from client

Where a client misleads his legal representative, or where a client makes it impossible for the legal representative to take proper instructions, such a legal representative will be prudent to withdraw from the case. See Du Toit et al *Commentary* 11-42B. A legal representative who concludes that he or she should withdraw from the case on ethical grounds should rather not inform the court of the reason for the request to withdraw, because that could amount to improper conduct on the part of the legal representative—*Groenewald v Regional Magistrate, Ladysmith* 2001 (1) SACR 343 (N) at 350*d*.

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5.3 Duty of the court in case of a withdrawal by a legal representative

Where a legal representative withdraws from a case, the presiding officer should enquire from the accused whether he or she would like to instruct another legal representative. If the accused elects to forgo the opportunity to instruct another legal representative, the presiding officer should ask whether the accused can conduct his or her own defence—Du Toit et al *Commentary* 11-42B. The position of the indigent accused, or an accused who potentially qualifies for legal assistance at state expense, needs to be considered in this context as well—*Kok* 2005 (2) SACR 240 (NC) at [16].

6 Defending the admittedly guilty

Every law student and every practicing lawyer can expect, sooner or later, the following question from a family member, a friend, or a member of the public: 'Will you defend a guilty person?' The correct answer is, of course, that it is not for the lawyer to decide whether his client is guilty or not. It is the responsibility of the court to determine guilt, based on the evidence presented in court. Having said that, an ethical dilemma is presented in the situation where a client makes a confession to his legal representative either before or during the criminal trial. Paragraph 411 of the Uniform Rules of Professional Ethics of the General Council of the Bar of South Africa provides for the correct ethical position. The legal representative must explain to his or her client that he or she will continue with the case, but subject to the following understanding:

- *First*, counsel may not assert in the criminal proceedings something which he or she knows to be false.
- *Second*, counsel may appropriately argue that the evidence offered by the prosecution is insufficient to support a conviction and may take advantage of any legal matter which might relieve the accused of criminal liability (remember: the onus rests on the State to prove beyond reasonable doubt the guilt of the accused).
- *Third*, counsel may not set up an affirmative case which he or she knows is inconsistent with the confession.
- *Fourth*, if the client, having been so informed, desires counsel to appear on this basis, counsel should continue to hold the brief and act in accordance with the above-mentioned principles.
- *Fifth*, if the client desires counsel to give up the brief, counsel must do so.

7 Competent legal representation

The right to legal representation, as a manifestation of fair trial rights, would be meaningless if it did not protect the right to *competent* legal representation. An analysis of the constitutionalised right to legal representation is more than just a mechanical investigation into the content of a mandate; it involves the substantive quality of the legal services rendered. In *Tandwa* 2008 (1) SACR 613 (SCA) the right was articulated as follows, at [7]:

> Incompetent lawyering can wreck a trial, thus violating the accused's fair trial right. The right to legal representation therefore means a right to competent representation-representation

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> of a quality and nature that ensures that the trial is indeed fair. When an accused therefore complains about the quality of legal representation, the focus is no longer, as before the Constitution, only on the nature of the mandate the accused conferred on his legal representative, or only on whether an irregularity occurred that vitiated the proceedings-the inquiry is into the quality of the representation afforded.

Legal problems are by their nature quite often not very clear-cut, and the correct or most appropriate legal advice not always self-evident. The above-mentioned standard does not imply that when a court disagrees with the submissions of counsel, that in itself would constitute incompetence on the part of the legal representative. But it is equally clear that competent lawyering implies a high standard and a duty always to act in the best interests of the client. Whether a defence in a criminal case was so incompetent that it made the trial unfair is 'a factual question that does not depend upon the degree of *ex post facto* dissatisfaction of the litigant'—*Halgryn* 2002 (2) SACR 211 (SCA) at 216*h*. Indeed, convicted persons are often dissatisfied with the outcome of their cases, but the assessment of whether the legal representation was competent or not involves an objective test, not the subjective misgivings of the disappointed or dissatisfied client—*Louw* 1990 (3) SA 116 (A) at 125D-E.

It is of course not possible to compile an exhaustive list of all potential instances of incompetence. As noted above, it is a factual question, to be determined objectively and with due regard to the circumstances of the case in question. An obvious potential ground to

find that a legal representative did not provide effective legal representation, is a lack of basic legal knowledge. While it is not expected that every practitioner should be an expert in all areas of the law, it can certainly be expected that a practitioner who represents an individual in a criminal matter should be aware of the basic legal frameworks and principles applicable to the situation at hand. In *Negondeni* [2015] ZASCA 132 (unreported, SCA case no 00093/2015, 29 September 2015) the court held that a legal representative's 'apparent lack of awareness about the minimum sentencing provisions . . . is indicative of the fact that the appellant did not have the quality of legal representation that one could reasonably expect, especially in so gravely serious a case'-at [16].

The right to competent lawyering is not limited to the trial itself, but extends to pre-trial legal representation as well. In *Saloman* 2014 (1) SACR 93 (WCC) the court considered the competence of the legal representation during pre-trial questioning of an accused by the police. The accused's attorney was present during the questioning. Regarding the competence of the attorney during the questioning, the court observed as follows, at [18]:

> This evidence, read as a whole, supports first appellant's case that, by his failure to intervene in the interests of his client, [his attorney's] conduct fell well short of that which could reasonably be considered to be effective assistance to a client within the context faced by first appellant. [The attorney] made absolutely no effort to protect his client's constitutional rights. He failed to intervene when the statement which was made by his client to the police deviated significantly from that which had been the product of the consultation between himself and his client. In his own words, he was surprised and shocked at the contents of first appellant's statement to [the police]. He made no attempt to intervene in order to procure an opportunity to consult with his client, pursuant to the altered statement which was being made to [the police] in order, at the very least, to warn his client of the implications of the content of his new statement.

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The decision in *Saloman* illustrates the interconnectedness of the pre-trial and trial processes. Competent lawyering must occur throughout the whole process. The conduct of the attorney in *Saloman* ultimately affected the fairness of the trial itself.

The right to effective legal representation also extends to the post-trial phase of the criminal process, namely appeal and review—*Ntuli* 2003 (1) SACR 613 (W) at 619*f-g*.

8 The legal representative's control of the defence case

8.1 Common law and constitutional principles

For the duration of a legal representative's mandate, he or she is in complete control of the defence case—Du Toit et al *Commentary* 11-47; *Botha* 2013 (1) SACR 353 (ECP). This common-law principle must be applied with due regard to the constitutional right to competent legal representation—cf also 7 above. The common-law principle that the legal representative is in 'complete control' of the defence case is thus qualified by the constitutional rights of the client. The quality of the legal representation must be considered to determine the parameters of the legal representative's control over the defence case. It must be stressed, however, that the legal representative's control over the presentation of the defence case should not without good reason be interfered with. Strategic decisions like the calling of witnesses, cross-examination of state witnesses and so forth are typically matters best dealt with by the legal representative and not by the client.

8.2 The passive defence right, control of the defence case and legal ethics

An accused person has a passive defence right and is under no obligation to assist the prosecution in its case—Du Toit et al *Commentary* 11-50A. Coupled with the passive defence right is the legal representative's common-law right to control the defence case. The passive defence right of the accused and the legal representative's control of the defence case do not absolve the defence lawyer from the general ethical duty which binds every defence counsel. Legal representatives should therefore avoid strategies that are only designed, for

instance, to cause unnecessary questioning, thus causing an excessively long record, or unnecessary technical objections that do not assist to clarify matters—*Motlhabakwe* 1985 (3) SA 188 (NC) at 196E-F. Indeed, control of the defence case does not absolve a legal representative of his or her ethical duty towards the court and the process.

8.3 Legal representative's duty to give advice

The legal representative of the accused controls the presentation of the defence case. This includes advice to the accused on whether the accused should testify in his or her own defence. This can be a very consequential matter and legal representatives should act with due care and consideration for the best interests of their clients. Where a trial results in a conviction, it does not mean that the legal representative's advice was wrong. The test is always: Did the legal representative conduct the case in accordance with the standards of his or her profession, and with due regard to the circumstances of the case? See in general *Tandwa* 2008 (1) SACR 613 (SCA); *Daniels* 2012 (2) SACR 459 (SCA); Du Toit et al *Commentary* 11-51-11-53.

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9 The accessibility of legal representation

9.1 Legal assistance at State expense

The right to counsel, which is provided for in s 73 of the Criminal Procedure Act, and protected under the Constitution, is part of a broader requirement of procedural equality for all citizens, rich and poor. While the rich have always enjoyed their right to purchase their own defence services and have always enjoyed effective remedies, the plight of the indigent accused who is too poor to afford legal services has historically been recognised in the practice of appointing *pro Deo* counsel for accused in certain serious cases: a step forward in making legal services accessible to the poor. Although the practice of appointing *pro Deo* counsel for the indigent has deep and commendable historical roots in South Africa, it must be noted that this practice was inadequate in terms of the provision of legal aid to the poor in South Africa. The situation was compounded by South Africa's socio-political complexities. For historical and critical perspectives on legal aid for the indigent in South Africa, see Abramowitz 1960 *SALJ* 351; Berat 1988 *Georgia Journal of International & Comparative Law* 239. On the *pro Deo* system prior to 1994, see the exposition in *Makhandela* 2007 (2) SACR 620 (W) 625*c-f*.

In order to address the issue of legal aid to the indigent in a more systematic way, the Legal Aid Act 22 of 1969 was adopted to provide for a Legal Aid Board which had as its aims the granting or making available of legal aid to needy persons. The board had the capacity, inter alia, to procure the services of legal practitioners and to stipulate the conditions under which legal aid was to be given.

In *Rudman; Mthwana* 1992 (1) SACR 70 (A) it was stated that a worthy ideal to be pursued in any criminal justice system is the principle that each person who is accused of a serious crime and is not able to afford legal representation should be provided with legal representation at state's expense in order to avoid an unfair trial.

The post-1994 democratic constitutional dispensation required important reforms in the area of legal aid. Section 73 of the Criminal Procedure Act must therefore be read with the Legal Aid South Africa Act 39 of 2014 ('the LASA Act'), which was enacted and builds on the tradition of legal aid in South Africa, but with due regard to the constitutional and democratic norms that should underpin any legal aid dispensation. It entered into force on 1 March 2015 and repeals the Legal Aid Act of 1969. The LASA Act contains important transitional provisions in order to provide for the continuation of legal aid that was provided under the previous Act of 1969. The LASA Act aims to ensure access to justice and the realisation of the right of a person to have legal representation as envisaged In the Constitution. An entity

called Legal Aid South Africa ('LASA'), with a board of directors, is established. It further provides for the creation of various committees by the board of directors and other organisational and institutional matters.

For present purposes, we will focus on the following aspects: The Act provides for the provision of legal aid by direction of the courts in criminal matters, and for the making of regulations that are necessary for the proper and orderly functioning of legal aid In South Africa. In this regard one can note the compilation of the Legal Aid Manual that is also provided for in the Act.

Section 22 of the Act, which should be read with s 73(2A) of the Criminal Procedure Act, is of importance for present purposes. Section 22(1)*(a)* provides for

legal aid by direction of criminal courts. A court in criminal proceedings may only direct that a person be provided with legal representation at state expense, if the court has considered the following:

(1) the personal circumstances of the accused person—s 22(1)*(a)*(i);
(2) the nature and gravity of the charge on which the person is to be tried or of which he has been convicted, as the case may be—s 22(1)*(a)*(ii);
(3) whether any other legal representation at state expense is available or has been provided—s 22(1)*(a)*(iii); and
(4) any other factor which in the opinion of the court should be taken into account—s 22 (1)*(a)*(iv).

Section 22(1)*(b)* provides that, further to the above factors, the court must, subject to s 22 (3), refer the matter, together with any report the court may consider necessary, for the attention of LASA, for evaluation and report by LASA, which must make a recommendation on whether the person concerned qualifies for legal representation. A court may only refer a matter in terms of s 22(1)*(b)* if the person concerned—

(1) has applied to LASA for legal representation at state expense—s 22(3)*(a)*(i);
(2) has been refused legal representation at state expense by LASA—s 22(3)*(a)*(ii); and
(3) has exhausted his or her internal right to appeal within the structures of LASA against the refusal—s 22(3)*(a)*(iii);
(4) has applied for legal representation and has not received any response to the application within a reasonable time—s 22(3)*(b)*; or
(5) has been refused legal representation at state expense by LASA and the court believes there are circumstances that need to be brought to the attention of LASA by the court in a report—s 22(3)*(c)*.

Any decision by LASA relating to the legal practitioner assigned to any person, the fee to be paid by LASA to a practitioner, the number of legal practitioners to be assigned to a person or group of persons, or the contribution (if any) to be paid to LASA by the persons in question, as well as how, and when, the fee is to be paid, is subject to review by the High Court at the instance of the person affected thereby (s 22(4)*(a)*).

Although legal aid is, in principle, available to all accused persons who would normally qualify for legal aid in terms of the Act, it is important to note that no accused person may receive legal representation at state expense if that person has applied for the release of an amount for reasonable legal expenses in terms of s 44(1)*(b)* of the Prevention of Organised Crime Act 121 of 1998 ('POCA'), and where the court has turned down the application due to a lack of full disclosure as required in terms of s 44(2)*(b)* of POCA.

10 Legal representation of children

10.1 General

The Child Justice Act 75 of 2008 came into operation on 1 April 2010. This Act created a new and completely separate criminal justice system for a child suspected of having committed an offence.

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A child, like any adult, has a right to legal representation as provided for in s 35 of the Constitution. The discussion above is therefore equally applicable to children. In this part, the principles that have been specifically designed to cater for the special needs of children who are in conflict with the law will be highlighted.

The Child Justice Act contains provisions regulating access by children in conflict with the law to legal representation during every stage of the criminal process. The Act lays down guiding principles that must be considered in the application of the Act. One of these principles is that the parents, appropriate adults and guardians should be able to assist children in proceedings in terms of the Act and, wherever possible, participate in decisions affecting the children—s 3*(g)*.

In terms of s 80(1) of this Act, a legal representative representing a child must—

(a) allow the child, as far as is reasonably possible, to give independent instructions concerning the case;

(b) explain the child's rights and duties in relation to any proceedings under the Act in a manner appropriate to the age and intellectual development of the child;

(c) promote diversion, where appropriate, but may not unduly influence the child to acknowledge responsibility;

(d) ensure that the assessment, preliminary inquiry, trial or any other proceedings in which the child is involved are concluded without delay and deal with the matter in a manner to ensure that the best interests of the child are always accorded paramount importance; and

(e) uphold the highest standards of ethical behaviour and professional conduct.

Section 82(2) of the Child Justice Act provides that a child who appears before a child justice court may not be required to plead unless he or she has been granted a reasonable opportunity to obtain counsel, or counsel has been appointed to assist the child.

10.2 The right to legal assistance of children in the pre-trial stage of the criminal process

10.2.1 General

Whenever children come into conflict with the law, the Child Justice Act makes provision for special measures to ensure that the best interests of the children receive due recognition in the criminal justice system. During the pre-trial stage of the criminal process the Act makes provision for children to be arrested and detained in certain limited circumstances only. Irrespective of whether a child is arrested and detained or not, the Act requires that a child be assessed by a probation officer and that a preliminary inquiry be held in court to determine whether the matter should be diverted or whether the child should be charged in a child justice court with the offence allegedly committed by him.

10.2.2 Assessment

Before the preliminary inquiry, a probation officer must assess the child—s 34(2) (unless dispensed with by the prosecutor or inquiry magistrate—ss 41(3) and 47(5)) of the Child Justice Act.

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The purpose of an assessment is to—

(a)

establish whether a child may be in need of care and protection in order to refer the child to a children's court in terms of ss 50 or 64;

(b) estimate the age of the child if the age is uncertain;

(c) gather information relating to any previous conviction, previous diversion or pending charge in respect of the child;

(d) formulate recommendations regarding the release or detention and placement of the child;

(e) where appropriate, establish the prospects for diversion of the matter;

(f) in the case of a child under the age of 10 years or a child referred to in s 10(2)*(b)* (a child between the ages of 10 and 14 who is unlikely to have criminal capacity), establish what measures need to be taken in terms of s 9 (eg referral to a children's court, counselling, therapy, etc);

(g) in the case of a child who is 10 years or older but under the age of 14 years, express a view on whether expert evidence referred to in s 11(3) (on the child's criminal capacity or lack thereof) would be required;

(h) determine whether the child has been used by an adult to commit the crime in question; and

(i) provide any other relevant information regarding the child which the probation officer may consider to be in the best interests of the child or which may further any objective which this Act intends to achieve—s 35.

The probation officer must explain the purpose of the assessment to the child, inform the child of his rights in the prescribed manner, explain to the child the immediate procedures to be followed and enquire from the child whether or not he intends acknowledging responsibility for the offence in question—s 39(1).

The probation officer may permit any person (which obviously includes the legal representative of the child) whose presence is necessary or desirable for the assessment to attend the assessment—s 38(3)*(c)*. The probation officer may, at any stage during the assessment, consult (even privately—s 39(3)) with any person who may provide information necessary for the assessment—s 39(2). Any information provided during an assessment is confidential and may only be utilised for a purpose authorised by the Act—s 36(1)*(a)*. Such information is inadmissible as evidence during any bail application, plea, trial or sentencing proceedings in which the child appears—s 36(1)*(b)*.

10.2.3 Preliminary inquiry

A preliminary inquiry in respect of a child is an informal pre-trial procedure which is inquisitorial in nature and may be held in a court or any other suitable place—s 43(1) of the Child Justice Act. In terms of s 81 of the Act, nothing in the Act prevents a child from being represented by a legal representative at a preliminary inquiry.

The objectives of a preliminary inquiry are to—

(a) consider the assessment report of the probation officer, with particular reference to—

(i) the age estimation of the child, if the age is uncertain;

(ii) the view of the probation officer regarding the criminal capacity of the child if the child is 10 years or older but under the age of 14 years and a decision whether an evaluation of the criminal capacity of the child by a suitably qualified person referred to in s 11(3) is necessary; and

(iii) whether a further and more detailed assessment of the child is needed as referred to in s 40(1)*(g)*;

(b) establish whether the matter can be diverted before plea;

(c) identify a suitable diversion option, where applicable;

(d)

establish whether the matter should be referred in terms of s 50 to a children's court (referred to in s 42 of the Children's Act);

(e) ensure that all available information relevant to the child, his circumstances and the offence are considered in order to make a decision on diversion and placement of the child;

(f) ensure that the views of all persons present are considered before a decision is taken;

(g) encourage the participation of the child and his parent, an appropriate adult or a guardian in decisions concerning the child; and

(h) determine the release or placement of a child, pending—

(i) the conclusion of the preliminary inquiry;

(ii) the appearance of the child in a child justice court; or

(iii) the referral of the matter to a children's court, where applicable—s 43(2).

10.2.4 National instruction to the police

As required by s 97(5)*(a)* of the Act, the National Commissioner of Police issued a National Instruction (in terms of s 25 of the South African Police Service Act 68 of 1995) regulating a range of issues. Paragraphs 20-23 of the National Instruction so issued (in *Government Gazette* 33508 of 2 September 2010) provide for a child in conflict with the law to be assisted by his parent, guardian or an appropriate adult and to consult with or have his legal representative present while making an admission, a confession, a pointing-out or appearing as a suspect on an identity parade.

These instructions are internal directives that are binding on police officials and which, if not complied with, may result in internal disciplinary action taken against the responsible police official.

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Chapter 5
The accused: his or her presence as a party

GP Kemp

1 International, comparative and constitutional background
2 Exceptions to the rule
2.1 Trial in absence of accused on account of his misbehaviour
2.2 Absence of accused where there is more than one accused
2.3 Evidence by means of closed-circuit television or similar electronic media
2.4 Postponement of certain criminal proceedings through audiovisual link
2.5 Payment of fine without appearance in court (admission of guilt)—s 57
3 Compounding of minor offences—s 341

The Constitution and this chapter:

Section 34—Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing by a court or, where appropriate, another independent and impartial tribunal or forum.

See 1, below

Section 35—Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right—

(c) to a public trial before an ordinary court;

. . .

(e) to be present when being tried;

. . .

(i) to adduce and challenge evidence . . .

See 1, below

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The Child Justice Act 75 of 2008 and this chapter:

Section 18(2)—Written notice to appear at preliminary inquiry

(2) The provisions of section 56 (1) *(c) of the Criminal Procedure Act relating to an admission of guilt and payment of a fine do not apply to a written notice in terms of this Act*.

See 2.5 below

1 International, comparative and constitutional background

A public trial, in the presence of the accused, is the general norm in criminal procedure. This is the case in most legal systems, and this norm is also protected in a number of International and regional human rights instruments. Article 14(3)*(d)* of the International Covenant on Civil and Political Rights, 1966 (which was signed by South Africa), provides for the right of every accused person '[to] be tried in his presence, and to defend himself in person or through legal assistance of his own choosing . . .'. Other international and regional human rights instruments that provide for some or other variation of the right of the accused to be tried in his or her presence are the European Convention for the Protection of Human Rights and Freedoms (1950), the Arab Charter on Human Rights (2004) and the African Charter on Human and Peoples' Rights (1981). See further Ambos & Poschadel *Utrecht Law Review* 4 (2013) 110. The statutes of the International Criminal Court and other international criminal tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda do not explicitly provide for trials in the absence of the accused—Poels *Netherlands Quarterly of Human Rights* 1 (2005) 76.

The principle that an accused should be present for his or her trial is thus well-established in most jurisdictions. There are exceptions to this general rule, as we will also see with respect to the position in South Africa, below. There are also a growing number of states that accept the notion of *in absentia* trials for certain crimes under international law (for instance war crimes, crimes against humanity and genocide), but even then, trials in the absence of the accused must be the exception and not general practice—Poels 81. The international protection of the accused's right to be tried in his or her presence supports the argument that trials *in absentia* should always be exceptional, even in the context of the most serious crimes under international law. If states find it necessary to try an individual in his or her absence, it is suggested by Poels (at 84) that the following principles should be applied to safeguard the fair trial rights of the accused:

- Where an accused is tried *in absentia* (for whatever reason) the individual should be notified of the initiation of criminal proceedings and should be given a reasonable opportunity to appear in person;
- States that wish to exercise criminal jurisdiction *in absentia* should also be committed to the protection of human rights standards in criminal procedure, and in related matters such as extradition and international co-operation in criminal matters;
- Even in cases of *in absentia* trials, it must be guaranteed that charges are

brought by a public prosecutor that is independent from political, governmental or other extra-legal influence;
- The state where the accused person resides should be given the opportunity to deal with the matters and to provide legal assistance and advice if necessary.

In South Africa, the general rule against trials *in absentia* was written into ss 34 and 35(3) *(c)* and *(e)* of the Constitution, safeguarding access to court and including (as part of the right to a fair trial) the right to a public trial before an ordinary court of law. The principle is also contained in s 158(1) of the Criminal Procedure Act and is scrupulously upheld by the superior courts. (See also *Shinga v The State and Society of Advocates, Pietermaritzburg Bar (intervening as Amicus Curiae)* 2007 (2) SACR 28 (CC).)

The following are examples of the application of this principle:

In *Seedat* 1971 (1) SA 789 (N) the accused was convicted of an offence in terms of the Insolvency Act. Before sentencing the accused, the magistrate called a certain C as an expert witness in regard to certain bookkeeping matters. This step the magistrate took as a result of a discussion which he had with the prosecutor in the absence of the accused and his

legal representative. This procedure, it was held upon appeal, amounted to a serious irregularity offending against the aforementioned basic principle. The court of appeal disregarded C's evidence altogether for purposes of imposing a proper sentence.

In *Radebe* 1973 (4) SA 244 (O) the magistrate altered the suspension order on the accused's driver's licence in his absence. On review it was held that the magistrate acted irregularly.

In *Rousseau* 1979 (3) SA 895 (T) a medical practitioner testified in court. The magistrate thereafter consulted another medical practitioner and obtained an opinion from him concerning the testimony of the medical practitioner. Neither the accused nor his legal representative was present during this consultation. This procedure, it was held, amounted to a serious irregularity and the accused's conviction and sentence were set aside.

In *Madlala* [2001] JOL 8632 (Tk) an application for the cancellation of the bail of the accused was considered in open court but in the absence of the accused and his legal representative. The court held that this was a serious irregularity and set aside the cancellation of the bail.

Note that the above basic principle means more than that an accused must merely *know* what the state witnesses have said; it requires that there should be a *confrontation*: the accused must see them as they testify against him so that he can observe their demeanour, and they must give their evidence in his presence. The denial of this fundamental right of an accused in itself amounts to a failure of justice that will lead to the setting aside of the accused's conviction on appeal or review—s 35(3)*(i)* of the Constitution and *Motlatla* 1975 (1) SA 814 (T). In *Basson* 2000 (2) SACR 188 (T) the court held, however, that evidence from two witnesses could be obtained in the USA by means of a commission in terms of s 2 (1) of the International Co-operation in Criminal Matters Act 75 of 1996, despite the fact that the accused would be unable to be present when the witnesses testified. According to the court, the defence team would be able, 'with the aid of cell phones, telefaxes, computers and the like', to make contact with the accused in South Africa during the hearing. The court did add though that if it would appear that, due to the accused's absence, certain relevant things were not taken up by the defence,

this will have to be taken into account when the evidence thus obtained was eventually evaluated.

There are, however, a number of exceptions to this rule. First, in the case of certain trivial offences, a so-called admission of guilt fine can be paid which will result in the accused being convicted in his absence. Secondly, the accused can, by his behaviour during the trial, make it impossible for the court to carry on with the trial in his presence. Thirdly, circumstances may make it necessary for a witness or accused to testify by means of closed-circuit television or similar electronic media. Fourthly, circumstances may make it necessary for a trial in which there is more than one accused to continue in the absence of one or more co-accused. These cases will now be dealt with in detail.

2 Exceptions to the rule

2.1 Trial in absence of accused on account of his misbehaviour

If the accused conducts himself in such a manner as to render the continuance of the proceedings in his presence impracticable, the court may order him to be removed and may direct that the trial proceed in his absence—s 159(1) of the Criminal Procedure Act. The court will, however, make use of its powers under this section only as a last resort and only if it cannot avoid doing so. The court would prefer to postpone the matter or grant a temporary adjournment and then continue with the case at a later stage in the presence of

the accused. If the court does make use of its powers in terms of s 159(1), it ought first to warn the accused and to note its warning. Even after the accused has been removed, it is advisable to give him a further opportunity and have him brought before the court after the leading of evidence has been completed and to ask him whether he wishes to give any evidence—cf *Mpofu* 1970 (2) SA 162 (R); *Pauline* 1928 TPD 643; *Mokoa* 1985 (1) SA 350 (O) and Hiemstra 418.

2.2 Absence of accused where there is more than one accused

If two or more accused appear jointly at criminal proceedings, the court may, at any time after the commencement of the proceedings, upon application by the accused or his legal representative, authorise the absence of an accused on the following grounds:

(a) that the physical condition of the accused is such that he is unable to attend or that it is undesirable that he should attend the trial; or

(b) that circumstances in connection with the illness or death of a member of the accused's family have arisen which make his absence from the proceedings necessary—s 159(2) *(a)*.

Furthermore, if an accused is absent from the proceedings, whether as a result of his removal in terms of s 159(1) or with or without leave of the court, the court may direct that the proceedings be proceeded with in the absence of the accused concerned. The court will make such an order only if in its opinion the trial cannot be postponed without undue prejudice, embarrassment or inconvenience to the prosecution or any co-accused or any witness—s 159(2).

The court may also, in lieu of directing that the proceedings continue in the absence of the accused, upon the application of the prosecution direct that the

proceedings in respect of the absent accused be separated from the proceedings in respect of the accused who are present. When such accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent and the court shall not be required to be differently constituted—s 159(3).

If the proceedings continue in the absence of the accused he may, if he later again attends the proceedings and has not been legally represented during his absence, examine a witness who testified during his absence and inspect the record of the proceedings. (See also the provisions of s 160(2) and (3)). It is clear that the proceedings in respect of the absent accused may be concluded only after his reappearance and after he has been given the opportunity of leading evidence and closing his case.

2.3 Evidence by means of closed-circuit television or similar electronic media

A court may on its own initiative, or on application by the public prosecutor, the accused or a witness, order that a witness or an accused, if the witness or accused consents thereto, give evidence by means of closed-circuit television or similar electronic media—s 158(2).

Such an order may only be made if facilities for it are readily available or obtainable and if it appears to the court that to do so would—

(a) prevent unreasonable delay;

(b) save costs;

(c) be convenient;

(d) be in the interest of the security of the state or of public safety or in the interests of justice or the public; or

(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings—s 158(3).

The court may, in order to ensure a fair and just trial, make the giving of evidence in this manner subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness—s 158(4). Testimony through an intermediary (s 170A) also allows the prosecutor and accused to question a witness and to observe the reaction of that witness (normally by means of closed-circuit television).

The court should provide reasons for refusal to allow a child complainant below the age of fourteen to give evidence by means of closed-circuit television or similar electronic media—s 158(5).

For further practical guidance one can take note of certain directives by the National Director of Public Prosecutions, issued in terms of s 66(2)*(a)* and *(c)* of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. These directives, which are not in operation yet, provide as follows:

1. The use of closed-circuit television or similar electronic media in court is not limited to child complainants or witnesses, but is available to assist any traumatised complainant or witness to give evidence, regardless of his or her age. The prosecutor should consider this measure in all sexual offences cases, and should as a rule bring such application where the complainants or witnesses are under the biological or mental age of 14 years.

2. The circumstances that should be considered when bringing an application in terms of s 158 include, but are not limited to:
   - *(a)* where the witness is unwilling or unable to testify in the presence of the accused due to fear of the accused;
   - *(b)* where the nature of the offence involved violence;
   - *(c)* where the complainant is acquainted with or related to the accused;
   - *(d)* where the courtroom environment intimidates the witness;
   - *(e)* where the witness may be intimidated as a witness by the accused and/or members of the public;
   - *(f)* where the witness may be part of a witness protection programme in terms of the Witness Protection Act 112 of 1998;
   - *(g)* where the impact of the offence is so severe on the witness that he or she is unable to testify in open court;
   - *(h)* where the quality of the witness's testimony would be compromised should he or she testify in the presence of the accused; and
   - *(i)* where the mental age of the witness requires it.
3. If an application for a child complainant under the age of 14 years is refused and the court fails to provide the reasons as required in terms of s 158(5) of the Criminal Procedure Act, the prosecutor should remind the court to do so.
4. The views of the witnesses should be taken into account and given due weight. Applications need not be made where a witness does not wish for the measure to be applied and where this will not be in the interests of justice.
5. If the application of the measure will cause unnecessary delay, for instance, due to unavailability of intermediaries or CCTV equipment, careful consideration should be given to proceeding without such protective measure.
6. Timeous application should be made to the court to consider the request and where necessary, and expert testimony should be adduced on the potential trauma for a complainant/witness, should a closed-circuit television not be used and the complainant/witness be forced to face the accused person.
7. If required CCTV equipment is not available or not in working order, the prosecutor must take immediate steps to report the situation to the relevant Department of

Justice court manager. If it cannot be resolved at court level it should be reported to the relevant regional office of the department and the Director of Public Prosecutions.

2.4 Postponement of certain criminal proceedings through audiovisual link

Sections 159A to 159D of the Criminal Procedure Act provide for the possibility of postponement of certain criminal proceedings through audio visual link. At present this possibility is limited to certain magisterial districts and correctional facilities. The purpose of this dispensation is to prevent unnecessary delays, expense and inconvenience caused by the daily ritual of transporting awaiting-trial detainees from correctional facilities to court and back, often for the sole purpose of postponement proceedings. An important requirement is that there should be no prejudice caused by the use of the audiovisual link. It is applicable only to a person over the age of 18 years, who has already appeared before a court and whose case has been postponed, who is in custody pending his or her trial, and who is required to appear or to be brought before a court in any subsequent proceedings for a further postponement. It also applies to the consideration of

release on certain forms of bail. Such an individual is not required to appear or be brought physically before the court but may appear before court by audiovisual link and is deemed to be physically before the court, unless the court directs, in the interests of justice, that he or she is to appear or be brought physically before it. Any proceedings by audiovisual link shall be regarded as having been held in the presence of the accused if, during the proceedings, that person is held in custody in a correctional facility, and is able to follow the court proceedings and the court is able to see and hear the accused person by means of audiovisual link. The room or place at the designated correctional facility where the accused person appears through audiovisual link is regarded as being a part of the court.

2.5 Payment of fine without appearance in court (admission of guilt)—s 57

A public prosecutor or the clerk of the court who issues a summons in terms of s 54 to an accused person to appear in court may, if he believes on reasonable grounds that a magistrate's court, on convicting the accused of the offence in question, will not impose a fine exceeding the amount determined by the Minister by notice in the *Government Gazette* (at present R 10 000), endorse the summons to the effect that the accused may admit his guilt in respect of the offence and that he may pay a fine stipulated on the summons in respect of such offence without appearing in court—s 57(1).

After an accused has appeared in court but before he has pleaded, a public prosecutor may, if he believes on reasonable grounds that a magistrate's court, on convicting the accused of the offence he is alleged to have committed, will not impose a fine exceeding the amount determined by the Minister by notice in the *Government Gazette* (at present R10 000), hand to the accused a written notice, or cause such notice to be delivered to the accused by a peace officer, containing an endorsement in terms of s 57 that the accused may admit his guilt in respect of such offence and pay a stipulated fine in respect thereof without appearing in court again—s 57A(1).

A peace officer may, in terms of s 56(1), hand a written notice to an accused person to appear in court. This notice may contain a similar endorsement, provided the peace officer holds a similar belief based on reasonable grounds—s 56(1)*(c)*.

An accused who receives a summons or written notice as mentioned may, without appearing in court, admit his guilt in respect of the offence in question by paying the admission of guilt fine either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court. The summons or written notice may stipulate that the admission of guilt fine must be paid before a date specified—s 57(1). In *Houtzamer* 2015 JDR 0424 (WCC) it was held (at [25]) that, if a date by which the

fine must be paid is not stipulated, the fine can be paid at any time up to the date of appearance. The court also cited s 57(2)*(a)*, which states that an admission of guilt fine may even be accepted by the clerk of the court (though not by the police) after the stipulated date or the date for appearance has expired.

After the clerk of the court concerned has received such a document, he enters it in the criminal record book of the court and the accused is then deemed to have been convicted and sentenced by the court for the offence concerned. Such an

admission of guilt amounts to a previous conviction for the purposes of all offences—*NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 (4) SA 738 (A).

The judicial officer may in certain instances set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course—s 57(7). After the judicial officer has found the documents in order, he is *functus officio* and he may not consider representations by the accused—*Marion* 1981 (1) SA 1216 (T); *Makhele* 1981 (4) SA 956 (NC); *contra Mahabeer* 1980 (4) SA 491 (N); *Shange* 1983 (4) SA 46 (N).

A public prosecutor may also reduce an admission of guilt fine on good cause shown—s 57 (4). Where a prosecutor withdrew a charge after the accused had already paid an admission of guilt fine which was confirmed by the magistrate, the conviction and sentence were set aside on review because of considerations of justice and equity—*Smith* 1985 (2) SA 152 (T).

Although s 57 does not stipulate the kind of offences in respect of which an admission of guilt fine may be set, it has been held that this procedure should in principle be limited to statutory offences and should not be used for offences under the common law—*B* 1954 (3) SA 431 (SWA). However, it is sometimes used in theft cases where the stolen items are of little monetary value—*Mafukidzi* 2015 JDR 0466 (GP); *Dakalo* 2015 JDR 0760 (GP). This procedure is very often (as is generally known to motorists!) used for traffic offences. For the consequences of an accused's failure to appear in court in accordance with a summons in respect of which he could have paid an admission of guilt fine (which he did not pay), see Chapter 7.

Some Acts prohibit the acceptance of admission of guilt fines with regard to certain offences.

3 Compounding of minor offences—s 341

A distinction must be drawn between admission of guilt and compounding of offences. In the case of an admission of guilt, the accused is summoned or a written notice is handed to the accused. The prosecution is therefore actually initiated. By signing an admission of guilt, an accused is deemed to have been convicted and sentenced. Compounding of an offence, on the other hand, means that the offender pays a certain amount to some or other body (for example a municipality) in order not to be prosecuted for some minor offence which he has committed. This procedure is generally used with traffic offences.

Compounding is regulated by s 341 of the Criminal Procedure Act, which limits this procedure to certain minor traffic offences and contraventions of the rules and regulations of local authorities.

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Chapter 6
The exercise of powers and the vindication of individual rights

GP Kemp

1 Introduction
2 The principle of legality in the context of criminal procedure
3 The requirement of reasonableness in the exercise of powers

The Constitution and this chapter:

Section 10—Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

See 1, below

Section 12—Freedom and security of the person

(1) Every person shall have 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;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhumane or degrading way.

See 1, below

Section 14—Privacy

Everyone has the right to privacy, which includes the right not to have—

(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.

See 1, below

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Section 25—Property

(1) No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.

See 1, below

Section 35—Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right— . . .

(h) to be presumed innocent . . .

. . .

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

See 1, below

Section 36—Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Constitution.

See 1, below

The Child Justice Act 75 of 2008 and this chapter:

Section 2—Objects of Act

The objects of this Act are to—

(a) protect the rights of children as provided for in the Constitution;
(b) promote the spirit of ubuntu in the child justice system through—
(i) fostering children's sense of dignity and worth;
(ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;
(iii) supporting reconciliation by means of a restorative justice response; and

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(iv) involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in terms of this Act in order to encourage the reintegration of children;
(c) provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults;
(d) prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion; and
(e) promote co-operation between government departments, and between government departments and the non-governmental sector and civil society, to ensure an integrated and holistic approach in the implementation of this Act.

Section 3—Guiding principles

In the application of this Act, the following guiding principles must be taken into account:

(a)

All consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.

(b) A child must not be treated more severely than an adult would have been treated in the same circumstances.

(c) Every child should, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal and inquisitorial proceedings in terms of this Act, where decisions affecting him or her might be taken.

(d) Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.

(e) Every child should be treated in a manner which takes into account his or her cultural values and beliefs.

(f) All procedures in terms of this Act should be conducted and completed without unreasonable delay.

(g) Parents, appropriate adults and guardians should be able to assist children in proceedings in terms of this Act and, wherever possible, participate in decisions affecting them.

(h) A child lacking in family support or educational or employment opportunities must have equal access to available services and every effort should be made to ensure that children receive similar treatment when having committed similar offences.

(i) The rights and obligations of children contained in international and regional instruments, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

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1 Introduction

The law jealously protects the personality and property rights of individuals. These rights include every person's right to his or her body, freedom, honour, dignity and privacy, as well as his or her rights with regard to property. Accordingly, these interests are fully protected by the Constitution (see ss 10, 12, 14 and 25 quoted immediately above).

Sometimes, however, society's wider interest in the combating of crime necessitates the limitation of these rights. It may, for instance, be necessary to arrest persons and thereby encroach upon their freedom of movement, or to seize property. Despite this, the law constantly strives towards achieving a balance between society's demands, on the one hand, to bring offenders to justice, and, on the other hand, to uphold the personality and property rights of the individual. (The latter, after all, until found guilty in a court of law, is presumed innocent—see s 35(3)*(h)* of the Constitution, quoted above.) To achieve this, the law (and in particular the law of criminal procedure) lays down strict rules with regard to the circumstances in which a limitation of these rights will be permissible to investigate crime or to bring offenders to justice. The constitutionality of these limitations can only be determined by measuring them against the limitation clause in s 36 of the Constitution (quoted above).

Section 36 lays down certain requirements with which such limitations must comply before they can be regarded as constitutional. According to these requirements the limitation—

(a) must be contained in a law of general application; and

(b) must be *reasonable* and *justifiable* in an open and democratic society based on human dignity, equality and freedom.

In considering whether a particular limitation complies with these requirements, a court has to take into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

These factors will indicate whether the limitation can be considered to be *proportional* to the purpose of the limitation. Simply stated, it means that a court will have to determine what purpose the limitation sets out to achieve, whether this purpose is sufficiently important to justify a limitation of the right, whether the limitation will be effective to achieve the purpose and, finally, whether the purpose could be achieved in another, less restrictive, manner. (Cf *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the RSA* 2000 (2) SA 674 (CC) and the Canadian case of *Oakes* [1986] 26 DLR (4th) 201.)

The rules of criminal procedure aim to protect the safety and security of all members of society by enabling the effective investigation of offences to identify offenders and to bring them to justice.

The rules of criminal procedure are very strict in order to prevent arbitrary action by the police or private persons. Persons who act outside the limits laid down by these rules act unlawfully, whether they do so to investigate crime or to bring

offenders to justice or not. Accordingly, in our law it can, as a general rule, be assumed that the search of persons or premises, the seizure of objects and the arrest of persons will invariably be unlawful, unless such action complies with the aforementioned rules or is justified by some ground of justification (such as consent to the search). The consequences of such unlawful conduct are threefold:

(a) Firstly, a person unlawfully arrested or whose property was unlawfully searched or seized may institute a civil claim against the person effecting the arrest, search or seizure and, in some instances, even against his or her employer (eg the state, if the person who acted unlawfully was a state official, such as a police official).
(b) Secondly, in appropriate circumstances an unlawful search, seizure or arrest may even constitute an offence.
(c) Finally, s 35(5) of the Constitution provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. This means that if evidence is obtained during an unlawful search or by unlawfully arresting a person, such evidence will be excluded and may not be taken into account by the court during the trial, if its admission would have one of the aforementioned effects. This may result in the acquittal of the accused.

2. The principle of legality in the context of criminal procedure

Section 1 of the Constitution of South Africa, 1996, entrenches the fact that South Africa is a constitutional democracy, with respect for the rule of law. In Chapter 1 the concepts of due process, legality and the rule of law were discussed with reference to the exercise of state power, specifically state power in the context of the criminal justice system. Before we deal with the requirement of *reasonableness* in the exercise of state power, it is necessary to return briefly to the role of *legality* as a fundamental safeguard against abuse of power.

The principle of legality is one of the pillars of the rule of law. We can, for present purposes, identify three pillars: First, it requires that *organs of state must obey the law*. Second, it is imperative that the *state cannot exercise power unless the law permits it to do so*. Third, laws must be *clear and accessible*. See, Currie & De Waal *The Bill of Rights Handbook* 6th ed (2013) 10-14.

With regard to the first aspect of the rule of law, one can point to the decision in *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA) as an example of a case where government and the executive more broadly were

held to have acted unlawfully in that the relevant organs of state, including the police, failed to arrest and detain President Omar Al-Bashir of Sudan and to transfer him to the International Criminal Court (ICC). At all relevant times there existed international arrest warrants for the arrest of Al-Bashir on charges of genocide, crimes against humanity and war crimes before the ICC. South Africa is a state party to the Rome Statute of the ICC (1998) and is obligated in terms of this multilateral treaty as well as in terms of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 to co-operate with the ICC, which includes the arrest of indicted persons and transfer of such individuals to the ICC in The Hague. Al-Bashir arrived In South

Africa on 13 June 2015 to attend an international summit. However, he was not only allowed to attend the summit, but was also allowed to leave South Africa without being arrested, despite a clear legal duty to do so. The Supreme Court of Appeal held that the relevant organs of state failed to take the necessary steps to arrest and detain Al-Bashir. This failure was inconsistent with South Africa's obligations in terms of the Rome Statute and s 10 of the Implementation Act. This failure was held to be unlawful conduct. Indeed, the relevant organs of state failed to obey the law, thus undermining the first pillar of the rule of law.

The second pillar of the rule of law requires that the state does not exercise power unless the law permits it to do so. The statutory framework that governs criminal procedure is a good example of the kind of restraint that is put on the organs of state. One can think of the provisions of the Criminal Procedure Act that provide for arrest, search, seizure, the ascertainment of bodily features, and so forth. These provisions govern the lawful exercise of state power over persons and property. There are remedies available in law for individuals to enforce their rights and to take action against the state if it acts outside the parameters of the law. In a constitutionalised criminal justice system this aspect of the rule of law goes beyond mere technical observance of the relevant statutory provisions; it also involves a substantive analysis of the norms that should guide state action. Thus, for instance, in *Highstead Entertainment t/a 'The Club' v Minister of Law and Order* 1993 (2) SACR 625 (C) an interdict was granted to prevent future arrests where the *motive* for the future arrests appeared to be unlawful. On the second pillar of the rule of law, see also *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) at [87].

The third pillar of the rule of law—the principle of legality—plays an important role in substantive and procedural criminal law. In substantive criminal law the principle is often referred to in terms of the maxim *nullum crimen, nulla poena sine lege*. This principle entails that 'no person should be subjected to punishment by the State except for conduct that is defined as a crime according to valid and applicable law' —Kemp et al *Criminal Law in South Africa* 2 ed (2015) 17. Legality in the sense that the law must be clear and accessible plays also an important role in procedural criminal law. The requirements for lawful arrest, for instance, or, even more consequential, the use of force (including lethal force) by the state when effecting an arrest (s 49 of the Criminal Procedure Act) should be as clear and accessible as possible, not only to protect individual members of the public against arbitrary and unlawful state power, but also to guide individual police officers and others employed in the criminal justice system. Legality in this sense serves to enable a culture of lawfulness and the respect for the rule of law.

3 The requirement of reasonableness in the exercise of powers

In Chapter 1 mention was made of the policy considerations relating to the requirement of reasonableness of government action that can be gleaned from the judgments of our courts. The application of these principles in practice in the exercise of powers during the pre-trial phase of the criminal process now calls for some explanation.

The various statutory provisions providing for the power to conduct searches, to seize articles and to arrest persons repeatedly refer to 'reasonableness' in their description of the circumstances in which these powers may be exercised. Section

20 of the Criminal Procedure Act provides that certain articles may be seized if they are 'on reasonable grounds believed to be' articles of a certain nature. Section 21*(a)* authorises the issuing of search warrants where it appears from information on oath that there are 'reasonable grounds for believing' that certain articles will be found at a certain place. Section 22*(b)* authorises a police official to conduct a search if he 'on reasonable grounds believes' that certain circumstances exist. In terms of s 24 a person in charge of or occupying premises may conduct a search and seize articles provided he 'reasonably suspects' certain circumstances to exist. Sections 26 and 48 authorise a person to enter premises where he 'reasonably suspects' that a certain state of affairs exists. Sections 41 to 43 empower certain persons to arrest persons 'reasonably suspected' of having committed certain offences. Section 41 authorises peace officers to require that certain persons provide certain information if they are 'reasonably suspected' of having committed offences.

Apart from the above, certain statutory provisions also empower certain persons to use such force as may be 'reasonably necessary' to gain entry to premises (see s 27, which authorises the use of such force as may be 'reasonably necessary' to gain entry to premises, and s 49, in terms of which such force as may be 'reasonably necessary' may be used to overcome resistance against an arrest or to prevent the arrested person from fleeing).

The question is often posed how one is supposed to determine exactly when a suspicion may be said to be a 'reasonable suspicion', or when one could be said to have 'reasonable grounds' to believe that a certain state of affairs exists, or what force would be 'reasonably necessary' to achieve a certain objective. Although it would be impossible to lay down any hard and fast rules in this regard, the following guidelines may be followed:

(1) In each of the aforementioned instances the requirement of reasonableness may be described as a requirement that there be 'reasonable grounds' from which a certain inference can be drawn. It can for instance only be said that force is 'reasonably necessary' to achieve a certain goal if there are 'reasonable grounds' to believe that such force is actually necessary to achieve the goal. A person can furthermore only be said to have a 'reasonable suspicion' that a certain state of affairs exists if he has 'reasonable grounds' to believe that that state of affairs exists. (Cf in general in this regard *LSD v Vachell* 1918 WLD 127 at 134.)

(2) A person will only be said to have 'reasonable grounds' to believe or suspect something or that certain action is necessary if:
   (a) he really 'believes' or 'suspects' it;
   (b) his belief or suspicion is based on certain 'grounds'; and
   (c) in the circumstances and in view of the existence of those 'grounds', any reasonable person would have held the same belief or suspicion.

(3) The word 'grounds', as it is used here, refers to facts. This means that there will only be 'grounds' for a certain suspicion or belief if the suspicion or belief is reconcilable with the available facts. The existence or otherwise of a fact is objectively determined—cf *Van Heerden* 1958 (3) SA 150 (T) at 152 and *Nell* 1967 (4) SA 489 (SWA) at 494. This means that one will have to look at the facts as they really are and not as someone may think they are. To determine what the facts really are, a person will make use of his five senses. This means that

the person will determine the true facts by looking, hearing, smelling, touching and tasting.

To illustrate this: a police official walks down the street. He notices another person approaching him. He observes that the person is smoking. He also observes that the smoke that the person is exhaling is suspended in the air. As he approaches the person, his head moves through the cloud of smoke. Smelling the smoke, he recognises the peculiar sweet smell and realises that he has smelled this before. He remembers that the previous time he smelled this was during a police operation when dagga was found and destroyed by setting it alight. He forms the opinion that the person who exhaled the smoke was in all probability smoking dagga.

What are the facts? 1. The police official saw that the person approaching him was smoking. 2. The police official himself smelled the smoke. 3. The smell reminded him of the smell of dagga being smoked. 4. The police official does not know whether the person is actually smoking dagga—he will only know this once the substance that the person was smoking has been analysed by an expert in a laboratory and confirmed to be dagga.

(4) Once a person has established what the facts really are, he will evaluate them and make an inference from those facts with regard to the existence or otherwise of other facts, which he is at the time, for whatever reason, unable to establish. This means that he will consider the true facts and will then decide whether the true facts are in his view sufficient to warrant a belief that the other facts also exist—cf *Mnanzana* 1966 (3) SA 38 (T) at 43.

In the illustration above, the police official drew an inference that the person was smoking dagga (something he did not know). This belief he formed on account of having seen the person smoking and exhaling the smoke, and having smelled the smoke.

(5) Once he has made the inference that the other facts exist, it can be said that the person himself 'believes' or 'suspects' that such facts exist.

In the illustration above, the police official *believed* that the person was smoking dagga. He did not *know* that the person was smoking dagga. He believed this, based on his past experience of having smelled dagga burning.

(6) However, the mere fact that a certain person believes or suspects that certain facts exist is not sufficient to regard his belief as one based on 'reasonable grounds' as required by law. This will only be the case if it can be said that any reasonable person would have formed the same belief or suspicion in the circumstances—cf *Van Heerden* (above). The words 'any reasonable person', as they are used in this regard, refer to any other person who has more or less the same background knowledge (such as training and experience) as the person who actually entertains the belief or suspicion.

In the illustration above, any police official with the same background, training and experience as the police official in our illustration would most probably have formed the same belief.

(7) A person can therefore be said to have 'reasonable grounds' to believe or suspect something if he actually believes or suspects it, his belief or suspicion is based on facts from which he has drawn an inference, and if any reasonable person would, in view of those facts, have drawn the same inference. This is a

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factual question that will have to be answered with reference to the factual circumstances that are present in each case.

In the illustration above, one may therefore conclude that the belief (that the person was smoking dagga) is a reasonable belief in the circumstances.

In the discussion of the various provisions of the Criminal Procedure Act which provide for powers to search, seize or arrest, it will be pointed out how these guidelines are applied.

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Chapter 7
Securing the attendance of the accused at the trial

M Basdeo, T Geldenhuys, MG Karels

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The Constitution and this chapter:

Section 12—Freedom and security of the person

(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;

See 5.1, below

. . .

(c) to be free from all forms of violence from either public or private sources;

See 5.8, below

(d) not to be tortured in any way;

See 5.8, below

Section 21—Freedom of movement

(1) Everyone has the right to freedom of movement.

See 5.1, below

Section 35

(1) Everyone who is arrested for allegedly committing an offence has the right—

. . .

(b) to be informed promptly—

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

. . .

(d) to be brought before a court as soon as reasonably possible, but not later than—

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not a court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released;

. . .

See 5.5, below

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(2) Everyone who is detained . . . has the right—

(a) to be informed of the reason for being detained;

. . .

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

See 5.2, below

(3) Every accused person has a right to a fair trial, which includes the right—

. . .

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

. . .

See 5.8, below

The Child Justice Act 75 of 2008 and this chapter:

Section 19—Summons

(1) A summons issued in respect of a child in terms of section 54 of the Criminal Procedure Act who is to appear at a preliminary inquiry, must specify the date, time and place of the preliminary inquiry.

(2) *(a)* A summons must be served on a child in the presence of his or her parent, an appropriate adult or a guardian, in which case both the child and parent, appropriate adult or guardian must acknowledge service by way of a signature or mark.

(b) In exceptional circumstances, where it is not possible to serve a summons on a child in the presence of his or her parent, an appropriate adult or a guardian, the summons must be served on the child and a copy of the summons must, as soon as circumstances permit, be served on the parent, appropriate adult or guardian, and both the child and parent, appropriate adult or guardian must acknowledge service by way of a signature or mark.

(3) A police official must, in the prescribed manner—

(a) when serving a summons on the child, parent, appropriate adult or guardian—

(i) inform them of the nature of the allegation against the child;

(ii) inform them of the child's rights;

(iii) explain to them the immediate procedures to be followed in terms of this Act;

(iv) warn the child to appear at the preliminary inquiry on the date and at the time and place specified in the summons and to remain in attendance; and

(v) warn the parent, appropriate adult or guardian to bring or cause the child to be brought to the preliminary inquiry on the date and at the time and place specified in the summons and to remain in attendance; and

(b) immediately but not later than 24 hours after the service of the summons notify the probation officer concerned.

See 2, below

Section 18—Written notice to appear at preliminary inquiry

(1) A police official may, in respect of a child who is alleged to have committed an offence referred to in Schedule 1, hand to the child a written notice provided for in section 56 of the Criminal Procedure Act, but as amended by this section in respect of children, requiring the child to appear at a preliminary inquiry.

(2) The provisions of section 56 (1) *(c) of the Criminal Procedure Act relating to an admission of guilt and payment of a fine do not apply to a written notice in terms of this Act*.

(3) *(a)* A written notice must specify the date, time and place of the preliminary inquiry and be handed to the child in the presence of his or her parent, appropriate adult or guardian, in which case both the child and parent, appropriate adult or guardian must acknowledge receipt by way of a signature or mark.

(b) In exceptional circumstances, where it is not possible to hand a written notice to the child in the presence of his or her parent, an appropriate adult or guardian, the written notice must be handed to the child and a copy must, as soon as circumstances permit, be handed to the parent, appropriate adult or guardian, and both the child and parent, appropriate adult or guardian must acknowledge receipt by way of a signature or mark.

(4) A police official must, in the prescribed manner—

(a) when handing a written notice to the child, parent, appropriate adult or guardian—

(i) inform them of the nature of the allegation against the child;

(ii) inform them of the child's rights;

(iii) explain to them the immediate procedures to be followed in terms of this Act;

(iv) warn the child to appear at the preliminary inquiry on the date, and at the time and place specified in the written notice and to remain in attendance; and

(v)

warn the parent, appropriate adult or guardian to bring or cause the child to be brought to the preliminary inquiry on the date and at the time and place specified in the written notice and to remain in attendance; and

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(b) immediately but not later than 24 hours after handing the written notice to the child, notify the probation officer concerned.

See 3, below

Section 20—Arrest

(1) A child may not be arrested for an offence referred to in Schedule 1, unless there are compelling reasons justifying the arrest, which may include the following circumstances:

(a) Where the police official has reason to believe that the child does not have a fixed residential address;

(b) where the police official has reason to believe that the child will continue to commit offences, unless he or she is arrested;

(c) where the police official has reason to believe that the child poses a danger to any person;

(d) where the offence is in the process of being committed; or

(e) where the offence is committed in circumstances as set out in national instructions referred to in section 97(5)*(a)*(ii).

(2) A warrant of arrest issued under section 43 of the Criminal Procedure Act in respect of a child must direct that the child be brought to appear at a preliminary inquiry.

(3) The police official arresting a child must, in the prescribed manner—

(a) inform the child of the nature of the allegation against him or her;

(b) inform the child of his or her rights;

(c) explain to the child the immediate procedures to be followed in terms of this Act; and

(d) notify the child's parent, an appropriate adult or guardian of the arrest: Provided that if a police official is unable to notify the child's parent, an appropriate adult or guardian of the arrest, the police official must submit a written report to the presiding officer at the preliminary inquiry.

(4) *(a)* A police official, where possible the police official who arrested the child, must immediately, but not later than 24 hours after the arrest, inform the probation officer in whose area of jurisdiction the child was arrested of the arrest in the prescribed manner.

(b) If a police official is unable to inform a probation officer of the arrest, the police official must submit a written report to the inquiry magistrate at the preliminary inquiry, furnishing reasons for non-compliance, as prescribed.

(5) Any child who has been arrested and who remains in custody must, whether or not an assessment of the child has been done, be taken by a police official to the magistrate's court having jurisdiction, in order to deal with the matter in terms of section 5(2) to (4), as soon as possible but not later than 48 hours after arrest, in which case the provisions of section 50(1)*(d)* of the Criminal Procedure Act dealing with—

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(i) ordinary court hours;

(ii) physical illness or other physical condition; and

(iii) arrest outside of the area of jurisdiction of the court,

apply in respect of the expiry of the period of 48 hours.

See 5.5.1, below

Section 46—Failure to appear at preliminary inquiry

A child or his or her parent, an appropriate adult or a guardian, who has been directed to appear at a preliminary inquiry in terms of—

(a) a written notice in terms of section 18;
(b) a summons in terms of section 19;
(c) a written notice by a police official in terms of section 22, read with section 23;
(d) a warning by a presiding officer in terms of section 24(4), (5) or (6),

or is otherwise obliged to appear at a preliminary inquiry and who fails to appear at the inquiry or to remain in attendance at the proceedings must be dealt with in accordance with the provisions of section 24 (7), which apply with the changes required by the context.

See 2, below

1 Introduction

There are various means by which an accused's attendance at the trial may be secured. The most important are a summons, a written notice to appear, an indictment, or the arrest of the accused—s 38 of the Criminal Procedure Act. The rules relating to each of these will now be discussed, whereafter brief reference will be made of the warning to the accused to appear and extradition as a means of ensuring that an accused appears in court in another country.

2 Summons

This is used for a summary trial in a lower court where the accused is not in custody or about to be arrested. In cases where there is no reason to suppose that such an accused will abscond, attempt to hamper the police investigation, or attempt to influence State witnesses, it is preferable to secure his attendance by means of a summons and not to subject him to the indignity of an arrest. An accused may, of course, be arrested even after a summons to appear on a certain date has been served on him. This step may have to be taken when it becomes clear that he will attempt to defeat the ends of justice.

To secure the attendance of an accused at a summary trial in a lower court by means of a summons, the following procedure is followed:

(1) The prosecutor draws up the charge and hands it, together with information relating to the name, address and occupation or status of the accused, to the clerk of the court—s 54(1).
(2) The clerk of the court issues a document (known as a 'summons') containing the charge and the information handed to him by the prosecutor, and specifying the place, date and time for the appearance of the accused in court—s 54(1).

(3) The clerk of the court hands the summons (together with so many copies thereof as there are accused) to a person empowered to serve a summons—s 54(1). (Persons empowered to serve a summons include police officials—s 329).
(4) The summons is served by delivering it to the person named in it or, if he cannot be found, by delivering it at his residence or place of employment or business to a person apparently over the age of sixteen years and apparently residing or employed there—s 54(2)*(a)*. A summons is in force throughout the Republic and may be served anywhere in the Republic—s 328. It may be transmitted by telegraph and service of a telegraphic copy has the same effect as that of the original—s 330. Service must take place at least fourteen days (Sundays and public holidays excluded) before the date fixed for the trial—s 54(3).

A return by the person who served the summons that the service has been effected in terms of s 54(2)*(a)* may, upon the failure of the person concerned to attend the proceedings, be handed in at the trial as *prima facie* proof of service—s 54(2)*(b)*. (See also *Parsons* 2013 (1) SACR 38 (WCC).)

Subject to s 4(2) of the Child Justice Act 75 of 2008, if the person summoned fails to appear at the place on the date and at the time specified or fails to remain in attendance, he is guilty of an offence and liable to punishment of a fine or imprisonment for a period not exceeding three months—s 55(1) of the Criminal Procedure Act. The court may, if satisfied from the return of service that the summons was duly served (cf *Ngcobo* 1966 (1) SA 444 (N) and *Minister van Polisie v Goldschagg* 1981 (1) SA 37 (A)) and that the accused has failed to appear or to remain in attendance, issue a warrant for his arrest. In terms of s 55 (2A), the court must endorse the warrant of arrest to the effect that the accused may admit his guilt in respect of the offence in question and may pay the fine stipulated in the summons without appearing in court. The court may make a further endorsement on the warrant of arrest to the effect that the accused may, upon arrest, admit his guilt in respect of the failure to appear in answer to the summons and pay the amount stipulated on the warrant. The amount so stipulated shall not exceed the amount of the admission of guilt fine that could have been imposed for such an offence.

If an accused fails to pay the admission of guilt as stipulated on the warrant and appears in court on the due date, the court may summarily enquire into his failure to appear. The court may then convict him of the abovementioned offence—unless the accused satisfies the court that his failure was not due to any fault on his part—s 55(2). The proviso to this section, however, provides for the following two instances where the accused need not be arrested in terms of the warrant:

(1) Where it appears to the person executing the warrant that the accused received the summons and that he will appear in court in accordance with a warning under s 72 (see below), he may release the accused on such warning. In this respect, the official thus has a discretion.

(2) Where it appears to the person executing the warrant that the accused did not receive the summons or that the accused has paid an admission of guilt fine in terms of s 57 or that there are other grounds on which it appears that the failure of the accused to appear on the summons was not due to any fault on the part of the accused (for which purpose he may require the accused to

furnish an affidavit or affirmation), he must release the accused on warning under s 72. In this instance the official has no discretion.

If an accused failed to appear on a summons and it was permissible for him in terms of s 57 to admit his guilt in respect of that summons and to pay a fine without appearing in court, s 55(3) provides that, where a warrant of arrest was issued and the accused was arrested in the area of jurisdiction of a magistrate's court other than the district in which the warrant of arrest was issued, such other magistrate's court—if satisfied that the accused has, since the date on which he failed to appear on the summons, admitted his guilt and has paid a fine in respect thereof without appearing in court—may summarily enquire into his failure to appear. Unless the accused satisfies the court that his failure was not due to any fault on his part, s 55(1) (see above) takes effect. (In proceedings in the magistrate's court of the district where he was arrested, it is presumed, upon production of the warrant of arrest, that the accused failed to appear on the summons, unless the contrary is proved—s 55(3)*(b)*). The effect of this section may be illustrated by the following example:

A person (X) commits a minor traffic offence in Town A. Town A is one thousand kilometres away from his home town (Town B). X receives a summons to appear in the

magistrate's court in Town A. The summons makes provision for the accused to pay an admission of guilt fine at the magistrate's court or police station in Town A. X forgets about the summons and fails either to pay the admission of guilt fine or to appear in court on the specified date. A warrant for his arrest is issued. X is arrested in Town B. In terms of this provision X may now pay the admission of guilt fine in Town B and may be tried in the magistrate's court of Town B for his failure to appear in court. It is therefore not necessary to take him to Town A and have his case heard in the court there.

The Child Justice Act makes provision for a summons to appear at a preliminary inquiry to be served on a child who is alleged to have committed an offence—s 19(1). The summons must be served on the child in the presence of his parent, guardian or an appropriate adult and the child and his parent, guardian or an appropriate adult must acknowledge receipt by means of a signature or mark—s 19(2)*(a)*. In exceptional circumstances, where it is not possible to serve a summons on the child in the presence of his or her parent, an appropriate adult or guardian, the summons must be served on the child and a copy must, as soon as circumstances permit, be served on the parent, appropriate adult or guardian, and both the child and parent, appropriate adult or guardian must acknowledge receipt by way of a signature or mark—s 19(2)*(b)*. A police official must, in the prescribed manner (see reg 17 of the Regulations in terms of the Act as published in GN R 251 of 31 March 2010 (*Government Gazette* 33067), when serving a summons on the child, parent, appropriate adult or guardian, inform them of the nature of the allegation against the child and the child's rights, explain to them the immediate procedure to be followed in terms of this Act, warn the child to appear at the preliminary inquiry on the date and at the time and place specified the summons, and to remain in attendance, and warn the parent, appropriate adult or guardian to bring or cause the child to be brought to the preliminary inquiry on the date and at the time and place specified in the summons and to remain in attendance—s 19(3) *(a)*. The police official must also immediately, but not later than 24 hours

after serving the summons on the child, notify the probation officer concerned—s 19(3)*(b)*.

3 Written notice to appear

If a peace officer on reasonable grounds believes that a magistrate's court, on convicting an accused of an offence, whether the accused is in custody or not, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Government Gazette* (at present this amount is R 5 000), he may hand to the accused a written notice—

(1) specifying the name, residential address and occupation or status of the accused;
(2) calling upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question;
(3) containing an endorsement in terms of s 57 that the accused may admit his guilt in respect of the offence and that he may pay a stipulated fine without appearing in court; and
(4) containing a certificate signed by the peace officer that he has handed the original notice to the accused and explained the import thereof to him—s 56(1). (See also subsections (2), (3) and (4) of this section as well as s 57A(4) in respect of the written notice referred to in that section.)

If an accused fails to respond to the written notice in question, the provisions of s 55—with regard to a summons (see above) apply *mutatis mutandis*—s 56(5).

A written notice to appear differs from a summons as follows: *Firstly*, a written notice to appear is prepared, issued and handed directly to the accused by a peace officer, whereas a summons is prepared by the prosecutor, issued by the clerk of the court and served on the accused by a messenger of the court or a police official (see s 329). *Secondly*, whereas a

written notice to appear always offers the accused the option of paying a set admission of guilt fine in order to avoid a court appearance, a summons need not provide this option. The purpose of this procedure is clearly to expedite the course of justice in the case of minor offences.

The Child Justice Act makes provision for a written notice to appear at a preliminary inquiry to be handed to a child who is alleged to have committed an offence referred to in Schedule 1 to that Act—s 18(1). Such a notice may not make provision for the child to admit guilt and pay a fine—s 18(2). The notice must be handed to the child In the presence of his parent, guardian or an appropriate adult and the child and his parent, guardian or an appropriate adult must acknowledge receipt by means of a signature or mark—s 18(3)*(a)*. In exceptional circumstances, where it is not possible to hand a written notice to the child in the presence of his or her parent, an appropriate adult or guardian, the written notice must be handed to the child and a copy must, as soon as circumstances permit, be handed to the parent, appropriate adult or guardian, and both the child and parent, appropriate adult or guardian must acknowledge receipt by way of a signature or mark—s 18(3)*(b)*. A police official must, in the prescribed manner (see reg 16 of the Regulations in terms of the Act, referred to above), when handing a written notice to the child, parent, appropriate adult or guardian, inform them of the nature of the allegation against the child, the child's rights, explain to them the immediate procedure to be

followed in terms of this Act, warn the child to appear at the preliminary inquiry on the date and at the time and place specified in the written notice and to remain in attendance, and warn the parent, appropriate adult or guardian to bring or cause the child to be brought to the preliminary inquiry on the date and at the time and place specified in the written notice and to remain in attendance—s 18(4)*(a)*. The police official must also immediately, but not later than 24 hours after handing the written notice to the child, notify the probation officer concerned—s 18(4)*(b)*.

4 Indictment

At a trial in a superior court the charge is contained in a document known as an indictment, which is drawn up in the name of the director of public prosecutions. The indictment contains the charge against the accused, his name, address, sex, nationality and age. It must be accompanied by a summary of the substantial facts of the case and a list of the names and addresses of state witnesses—s 144(1), (2) and (3).

The indictment, together with a notice of trial, must be served on the accused at least ten days (Sundays and public holidays excluded) before the date of the trial, unless the accused agrees to a shorter period. It is served by handing it to the accused in substantially the same manner as a summons (discussed above)—see s 144(4)*(a)*—or is handed to the accused by the magistrate or regional magistrate who commits him to the superior court for trial. A return of service is *prima facie* proof of the service—s 144(4)*(b)*.

Failure to appear is *mutatis mutandis* governed by s 55(1) and (2).

5 Arrest

5.1 General

Arrest constitutes one of the most drastic infringements of the rights of an individual (eg his right not to be deprived of his freedom arbitrarily or without just cause and his right to freedom of movement (ss 12(1)*(a)* and 21(1) respectively of the Constitution, and cf *Gellman v Minister of Safety and Security* 2008 (1) SACR 446 (W)). It is therefore not surprising that the Criminal Procedure Act lays down strict rules concerning when a person may be arrested.

In terms of the Criminal Procedure Act an arrest should preferably be effected only after a warrant for the arrest has been obtained. It is only in exceptional circumstances that private individuals, or even the police, are authorised to arrest anyone without the authority of a warrant. Any arrest without a warrant which is not specifically authorised by law will be unlawful. Even a police official who executes a warrant for the arrest of a person must exercise proper care in doing so. If he negligently arrests the wrong person, he may, in an action for wrongful arrest, be compelled to pay such person a large amount in damages. Apart from that, should an arrestee challenge the validity of his arrest and detention, the onus to prove the lawfulness thereof is on the arrester or the person who ordered the arrest—*Minister of Law and Order v Parker* 1989 (2) SA 633 (A); *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) and *Ralekwa v Minister of Safety and Security* 2004 (2) SA 342 (T).

However, if a person is authorised to arrest another, a bad motive for the arrest will not make an otherwise lawful arrest unlawful—*Minister van die SA Polisie v Kraatz* 1973 (3) SA 490 (A).

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5.2 The requirements for a lawful arrest

Lawful arrest and lawful continued detention after arrest are based upon four 'pillars':

(1) The first pillar is that the arrest (with or without a warrant) must have been properly authorised, ie there must be a statutory provision authorising the arrest. We shall discuss this requirement in detail under paragraphs 5.3 and 5.4 below.

(2) The second pillar is that the arrester must exercise physical control over the arrestee. He must therefore limit the latter's freedom of movement. Unless the arrestee submits to custody, an arrest is effected by actually touching his person or, if the circumstances so require, by forcibly confining his person—s 39(1). The amount of force that may be used legally will be discussed below.

(3) The third pillar is the informing of the arrestee of the reason for his arrest: s 39(2) requires that an arrester must, at the time of effecting the arrest or immediately thereafter, inform the arrestee of the reason for his arrest or, if the arrest took place by virtue of a warrant, hand the arrestee a copy of the warrant upon demand. This requirement is also entrenched in the Constitution (s 35(2)*(a)*, quoted above).

An arrestee's custody will be unlawful if this requirement is not complied with—see *Kleyn* 1937 CPD 288 and *Ngidi* 1972 (1) SA 733 (N).

The question whether the arrestee was given an adequate reason for his arrest depends on the circumstances of each case, particularly the arrested person's knowledge concerning the reason for his arrest. The exact wording of the charge which will later be brought against the arrestee need not be conveyed at the time of the arrest—*Minister of Law and Order v Kader* 1991 (1) SA 41 (A), and cf *Brand v Minister of Justice* 1959 (4) SA 712 (A).

Although the arrestee's detention will be unlawful if he was not informed of the reason for his arrest at the time of his arrest, his detention will become lawful if he is later informed of the reason—*Nqumba v State President* 1987 (1) SA 456 (E). Detailed information relating to something that the arrestee ought to know need not be given, especially when the arrestee is caught in the act—*Macu v Du Toit* 1982 (1) SA 272 (C) and *Minister of Law and Order v Parker* 1989 (2) SA 633 (A).

If a child is arrested, the police official arresting the child must, in the prescribed manner (see reg 18 of the Regulations in terms of the Child Justice Act), inform the child of the nature of the allegation against him and his rights, explain to the child the immediate procedure to be followed in terms of this Act, and notify the parent or

guardian of the child or an appropriate adult of the arrest—s 20(3) of the Child Justice Act.

(4) The final pillar is the requirement that the arrestee be taken to the appropriate authorities as soon as possible. Section 50(1)*(a)* provides that an arrestee must as soon as possible be brought to a police station or, if the arrest was made in terms of a warrant, to the place stipulated in the warrant. In *Ezekiel v Kynoch* NPD 13.4.1923 (cited in Gardiner & Lansdown 215) a person was detained for 20 hours pending investigation of a theft at a place five kilometres from the police station; this was held to be unlawful, and he was awarded damages. Section 50 will be discussed in detail below.

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In *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) the Supreme Court of Appeal confirmed the aforementioned jurisdictional requirements (pillars) and rejected the interpretation (first laid down in *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T) by Bertelsmann J and subsequently followed in a number of other decisions) that there is a fifth jurisdictional fact, namely that there must have been no less invasive options available in order to bring the suspect before court, before an arrest will be regarded as lawful.

5.3 Arrest with a warrant

5.3.1 General

A warrant for the arrest of a person is a written order directing that the person described in the warrant be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in terms of s 50 (which governs the procedure after arrest)—s 43(2).

Unless it is imprudent or inconvenient in the circumstances to obtain a warrant or the summary arrest of the offender is necessary or advisable in the circumstances, it is desirable that a warrant should be obtained before the liberty of a person is infringed.

5.3.2 The issue of a warrant of arrest

A magistrate or justice of the peace may issue a warrant for the arrest of a person upon the written application of a director of public prosecutions, a public prosecutor or a police officer. Such application must—

(1) set out the offence alleged to have been committed;

(2) allege that such offence was committed within the area of jurisdiction of such magistrate, or in the case of a justice of the peace, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or, where the offence was not committed within his area of jurisdiction, that the person in respect of whom the application is made is known or is on reasonable grounds suspected to be within such area of jurisdiction;

(3) state that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is sought has committed the alleged offence.

A warrant may be issued on any day and remains in force until it is cancelled by the person who issued it or until it is executed—s 43(3).

A warrant of arrest issued under s 43 in respect of a child must direct that the child be brought to appear at a preliminary inquiry—s 20(2) of the Child Justice Act.

A warrant issued in one district is valid in all other districts throughout the Republic without any further formalities having to be complied with—s 328. In terms of s 45, a telegraphic or similar written or printed communication from any magistrate, justice of the

peace or peace officer stating that a warrant has been issued for the arrest of a person shall be sufficient authority to any peace officer to arrest and detain the said person.

If an application is made for a warrant but it is intended to execute such warrant only under certain circumstances, the warrant is not void by virtue of this fact only:

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the official to whom it is issued is not totally deprived of his discretionary powers—*Minister van die SA Polisie v Kraatz* 1973 (3) SA 490 (A) at 509-10; *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 819.

5.3.3 The execution of a warrant of arrest

A warrant of arrest is executed by a peace officer—s 44.

In terms of s 1 (which contains the definitions), 'peace officer' includes a magistrate, justice of the peace, police official, member of correctional services and certain persons declared by the Minister of Justice to be peace officers for specified purposes—cf s 334. 'Police official' means a member of the SA Police Service as defined in s 1 of the South African Police Service Act 68 of 1995.

In *Theobald v Minister of Safety and Security* 2011 (1) SACR 379 (GSJ) at 403, the court held that a warrant of arrest *permits* a peace officer to execute the warrant, but does not place an obligation on him to do so. According to the court, s 44 'does not intend, and was never intended, to preclude a peace officer from exercising a discretion not to effect an arrest in terms of the warrant, should the circumstances require that'.

Sections 46 and 331 make provision for the exemption from liability of a person who is authorised to execute or assist in the execution of a warrant of arrest and who, in the reasonable belief that he is arresting the person mentioned in the warrant, arrests another, or who acts under a warrant which is invalid due to a defect in the substance or form thereof, provided that he has no knowledge of such defect. The arrester is placed in the position he would have been in had the warrant been valid. In the case of the arrest of the wrong person, without the arrester having been negligent, the arresting person is placed in the same position he would have been in had he arrested the correct person. The test is whether a person of ordinary intelligence, who takes reasonable care, would have believed that the arrestee was the person named in the warrant—*Ingram v Minister of Justice* 1962 (3) SA 225 (W) and *Minister van Wet en Orde v Van der Heever* 1982 (4) SA 16 (C). (See s 55(1) of the South African Police Service Act 68 of 1995.)

The Criminal Procedure Act, therefore, does not deprive a person who has been maliciously and wrongfully arrested of his civil remedy of a claim for damages—s 53.

A charge of resisting an arrest made in terms of a warrant will not fail merely because the police officials were not in uniform, provided it appears that the warrant was shown and explained to the arrestee and that he knew or was informed that it was being executed by the police—*Kalase* JS 315/17 (C).

In terms of s 39(2), the person effecting an arrest in terms of a warrant shall, upon the demand (see *Theobald v Minister of Safety and Security* 2011 (1) SACR 379 (GSJ)) of the person arrested, hand him a copy of the warrant—*Minister of Safety and Security v Kruger* 2011 (1) SACR 529 (SCA) at 11. In *Minister van Veiligheid en Sekuriteit v Rautenbach* 1996 (1) SACR 720 (A), it was held that if the person effecting the arrest is not in possession of the warrant of arrest and realises that he will not be able to comply with a demand made in terms of s 39(2), the arrest will be unlawful. In this case the policeman intended to take the arrested person to the police station and hand him the copy of the warrant at the police station. According to the court,

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this would have taken too long and would not have complied with the requirements of s 39 (2).

5.4 Arrest without a warrant

5.4.1 General

Although it is preferable that an arrest be effected only by virtue of a warrant, circumstances may arise where the delay caused by obtaining a warrant will enable the suspect to escape. It is therefore imperative that provision be made for the arrest of suspects without a warrant in certain circumstances.

The protection of the liberties of the individual stretches so far that a public-spirited person who conceives it to be his duty to arrest another person, without first having studied the Criminal Procedure Act, may seem to be embarking on a perilous undertaking. However, the provisions of the Criminal Procedure Act are based on sound common sense and, on the whole, empower persons to arrest in circumstances in which any right-thinking citizen would normally feel morally obliged to intervene on the side of law and order, so that a citizen would be reasonably safe in obeying his instincts in deciding whether or not he should effect an arrest. As was already stated, private individuals and even the police may without a warrant arrest persons believed to have committed an offence only if there are special circumstances justifying this form of arrest.

A study of the rules relating to arrest will show that the powers to arrest of peace officers are wider than those of private individuals, and that wider powers are conferred in respect of the arrest of persons who are caught *in flagrante delicto* (caught in the act) than in respect of persons merely suspected of the commission of an offence. Suspicion sufficient to justify arrest does not refer to a 'hunch' or other such flimsy ground. It must be a reasonable suspicion and the crimes in respect of which arrest upon suspicion is possible are generally of a more serious nature. The nature and content of 'reasonable suspicion' has previously been discussed in Chapter 6.

Before setting out in detail the circumstances in which a person may be arrested without a warrant, a very important general principle on the exercise of the power to arrest, which was laid down by the Supreme Court of Appeal, must be mentioned. In the case of *Tsose v Minister of Justice* 1951 (3) SA 10 (A) it was held that 'If the object of an arrest, though professedly to bring an arrested person before the court, is really not such, but is to frighten or harass and so induce him to act in a way desired by the arrester, without his appearing in court, the arrest is unlawful. But if the object of the arrester is to bring the arrested person before court in order that he may be prosecuted to conviction and so may be led to cease to contravene the law, the arrest is not rendered illegal because the arrester's motive is to frighten and harass the arrested person into desisting from his illegal conduct.' 'Punitive arrest' (ie arrest to punish the offender) is therefore illegal. In Tsose's case the police repeatedly arrested an unlawful squatter on a farm, allegedly with a view to compelling him to leave—cf also *Minister van die SA Polisie v Kraatz* 1973 (3) SA 490 (A) at 507-8 and *Manqalaza v MEC for Safety & Security, Eastern Cape* [2001] 3 All SA 255 (Tk).

The Child Justice Act places limitations on the power to arrest a child. A child (between the ages of 10 and 18) may not be arrested for an offence referred to in Schedule 1, unless there are compelling reasons justifying the arrest—s 20(1).

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'Compelling reasons' include where a police official has reason to believe that the child does not have a fixed address, will continue to commit offences unless arrested, or poses a danger to any person (including himself), or where the offence is in the process of being committed.

The statutory provisions prescribing the circumstances in which an arrest without a warrant may be effected will now be discussed.

5.4.2 The power to arrest without a warrant

5.4.2.1 Powers of peace officers

In terms of s 40 every peace officer may, without a warrant, arrest—

(1) Any person who commits or attempts to commit any offence in his presence (s 40(1)*(a)*)—cf *Loubser* 1977 (4) SA 546 (T); *Gulyas v Minister of Law and Order* 1986 (3) SA 934 (C); *Minister of Safety and Security v Mhlana* 2011 (1) SACR 63 (WCC); *Scheepers v Minister of Safety and Security* 2015 (1) SACR 284 (ECG); and *Mrasi v Minister of Safety and Security* 2015 (2) SACR 28 (ECG).

(2) Any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody (s 40(1)*(b)*)—see *Minister of Safety and Security v Bothma* 2016 (1) SACR 632 (ECG); *Minister of Safety and Security v Kitase* 2015 (1) SACR 181 (SCA); *Mawu v Minister of Police* 2015 (2) SACR 14 (WCC), *Lapane v Minister of Police* 2015 (2) SACR 138 (LT)

Comment

(a) Schedule 1 to the Criminal Procedure Act includes the serious offences and will be discussed in greater detail below. A list of offences in terms of Schedule I is set out as an annexure at the end of the book.

(b) With regard to the provision that a peace officer may arrest someone whom he reasonably suspects of having committed an offence mentioned in Schedule 1 to the Act, the peace officer must be certain that the suspected act does in fact constitute a crime—*Union Government v Bolstridge* 1929 AD 240.

(c) The words 'reasonably suspects' do not imply that there must be a *prima facie* case against the suspect. The section requires only a reasonable suspicion and not a certainty. The suspicion must, however, have a factual basis. The reasonable person would therefore analyse and assess the quality of the information at his disposal critically and he would not accept it lightly or without checking it where it can be checked—*Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE). See further *Mawu v Minister of Police* 2015 (2) SACR 14 (WCC) at [30].

(d) The suspicion must be that of the peace officer. A peace officer cannot merely rely on the suspicion of another person but must form his or her own suspicion—*Ralekwa v Minister of Safety and Security* 2004 (2) SA 342 (T).

(e) The peace officer, when effecting the arrest, need not necessarily have the intention of bringing the arrested person to court to be prosecuted. A reasonable suspicion, coupled with the intention to make further inquiries before deciding whether the case merits prosecution, will suffice. A further investigation is especially necessary in a case where information is

obtained from an informer (whose evidence must be regarded with caution) —*Mabona v Minister of Law and Order* (above). The possibility of an arrested person being released before his appearance in court is not anomalous: it arises from the difference between the test laid down for a lawful arrest without a warrant and the practical requirement of a *prima facie* case for a prosecution—*Duncan v Minister of Law and Order* 1984 (3) SA 460 (T).

(f) Telegraphic information from the police that a warrant has been issued somewhere else is sufficient ground for arrest in terms of this paragraph—*Botha* 17 SC 297.

(g)

As was held in *Tsose's* case (above), the motive of deterring the offender is not in itself sufficient to make the arrest lawful.

(3) Any person who has escaped or who attempts to escape from lawful custody (s 40(1)*(c)*). A 'reasonable suspicion' that a person has escaped is not sufficient for an arrest in terms of this provision. A person who effects an arrest in terms of this provision must *know* that the person he arrests has escaped from lawful custody.

(4) Any person who has in his possession any housebreaking implement or car-breaking implement, as referred to in the General Law Third Amendment Act of 1993, and who is unable to account for such possession to the satisfaction of the peace officer (s 40(1)*(d)*). The possession of housebreaking or car-breaking implements in suspicious circumstances constitutes an offence in terms of the said Act.

(5) Any person who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing (s 40(1)*(e)*).

(6) Any person who is found at any place at night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence (s 40(1)*(f)*). The purpose of the arrest provided for in this provision is to enable the peace officer to conduct an investigation to find out whether the person has committed an offence or not. If it appears that no offence has been committed, the person will have to be released.

(7) Any person who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce (s 40(1)*(g)*).

(8) Any person who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition (s 40(1)*(h)*).

(9) Any person found in a gambling house or at a gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance (s 40(1)*(i)*).

(10) Any person who obstructs him in the execution of his duty (s 40(1)*(j)*).

(11) Any person who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable

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as an offence, and for which he is, under any law relating to extradition of fugitive offenders, liable to be arrested or detained in custody in the Republic (s 40(1)*(k)*). Extradition will be discussed below.

(12) Any person who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic (s 40(1)*(l)*).

(13) Any person who is reasonably suspected of being a deserter from the South African National Defence Force (s 40(1)*(m)*).

(14) Any person who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act (s 40(1)*(n)*). The purpose with the arrest in this instance is to bring the person before the court to enable the court to determine whether the sentence should be imposed or be put into operation.

(15) Any person who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act (s 40(1)*(o)*).

(16) Any person who fails to surrender himself in order that he may undergo periodic imprisonment when and where he is required to do so under an order of court or any law relating to prisons (s 40(1)*(p)*).
(17) Any person who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element (s 40(1)*(q)*).

In terms of s 41 a peace officer is given the further power to call upon any person—
(a) whom he has power to arrest;
(b) whom he reasonably suspects of having committed any offence or of having attempted to commit any offence (ie not only offences listed in Schedule 1 to the Act); or
(c) who may, in his opinion, be able to give evidence in regard to the commission or suspected commission of any offence,

to furnish his full name and address—s 41(1).

If such person fails to furnish his full name and address, the peace officer may forthwith arrest him. If the peace officer reasonably suspects that a false name or address has been given to him, he may arrest such person and detain him for a period not exceeding twelve hours until the name and address so furnished have been verified—s 41(1).

The failure by a person to furnish his name and address in the abovementioned circumstances, and the furnishing of an incorrect or false name and address, constitute offences and are punishable by a fine or imprisonment without the option of a fine for a period of three months—s 41(2).

In the case of *Kleyn* 1937 CPD 288 the accused were charged with (1) using obscene, abusive and threatening language in a public street, and (2) resisting arrest. The State case was stopped by the magistrate in view of the strong evidence in support of the accused's denial and he acquitted them on these charges. The State, however, proceeded with a third charge of assault. The third charge was based on the following facts: The constable who had attempted to arrest the accused on the first charge went to the police station and returned with a sergeant to look for the accused, who were found in a private house. After having spoken to

them, the sergeant demanded their names and addresses. They made no reply. The constable then identified the accused to the sergeant as the persons who had been swearing in the public street and placed his hand on their shoulders and told them he was arresting them for that offence. They refused to accompany the sergeant quietly and he thereupon ordered the constable to handcuff them and remove them. They resisted and, although handcuffed, assaulted the constable. The magistrate convicted and sentenced them on this charge. On appeal it was held that the crime of swearing in the public street had not been committed in the presence of the sergeant who had ordered the arrest or in the presence of the constable and, as no warrant for the arrest was obtained, the arrest was unlawful and the accused were entitled to resist arrest. The magistrate had convicted them on the ground that the arrest was justified since the predecessor to s 41(1) provided that a peace officer may forthwith arrest a person who is reasonably suspected of having committed an offence and who fails to furnish his full name and address to the peace officer on demand. The court rejected the decision of the magistrate since the sergeant who had ordered the arrest *did not purport to act under this section* but had indicated to the accused through the constable that they were being arrested for swearing in a public street and since s 41(1) requires that the arrestee be informed that he is being arrested for failing to furnish his name and address, that section accordingly did not apply. The court pointed out that every man has the right to offer reasonable resistance to unlawful aggression upon his person and, if

unlawfully arrested, is entitled to do anything reasonable to free himself. The court accordingly held that the assault was justified and set aside the conviction.

This case demonstrates the importance attached by the High Court to the personal liberty of the individual. As is clear from this case, a court will only allow a person to be deprived of his personal liberty in those circumstances expressly provided for by the law.

The case of *Kleyn* has been followed in numerous other cases such as *Mahlatse* 1949 (4) SA 455 (O), *Jones* 1952 (1) SA 327 (E) and *Sotiralis* 1950 (4) SA 481 (T). In the latter case it was held that it is no defence, when a person fails to give his name and address on demand, to prove that he had been advised by his legal representative to say nothing—cf *Ndara* 1955 (4) SA 182 (A).

The legislature has shown the same concern for the personal liberty of an individual as the courts. This appears from the fact that the police are not entitled to detain a person for more than 12 hours in order to verify a name and address furnished in terms of s 41(1).

5.4.2.2 Powers of private persons

In terms of s 42 a private person may, without a warrant, arrest the following persons:

(1) Any person who commits or attempts to commit in his presence or whom he reasonably suspects of having committed a Schedule 1 offence—s 42(1)*(a)* (the private person may pursue that person and any other private person to whom the purpose of the pursuit has been made known, may join and assist therein—s 42(2));
(2) Any person whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private

person reasonably believes to have authority to arrest that person for the offence—s 42(1)*(b)*;
(3) Any person whom he is by any law authorised to arrest without warrant in respect of any offence specified in that law (s 42(1)*(c)*). In terms of s 9(1) of the Stock Theft Act 57 of 1959, for instance, a private person may arrest another without a warrant where there is a reasonable suspicion that the latter has committed any one of certain offences created by the Act;
(4) Any person whom he sees engaged in an affray—s 42(1)*(d)* (the aforementioned grounds of arrest are authorised by s 42(1));
(5) The owner, lawful occupier or person in charge of property on or in respect of which any person is found committing any offence, and any person authorised thereto by such owner, etc, may without a warrant arrest the person so found—s 42(3).

The power conferred upon a private citizen to arrest without a warrant should be exercised sparingly and with great circumspection—cf *Martinus* 1990 (2) SACR 568 (A). The tendency of the courts to protect the liberty of the individual is demonstrated in the case of *Morapedi v Springs Municipality* 1946 TPD 105. Here a municipal constable, on finding the appellants unlawfully in possession of liquor, endeavoured to effect an arrest but was forcibly resisted. The appellants were charged with and convicted of obstructing the constable in the execution of his duty. On appeal, the court held that the constable was not a peace officer. Moreover, the constable did not have the power to arrest without a warrant as a private person, as this right extended only to offences involving the *supply* of liquor and not to mere possession.

5.4.2.3 Special statutory powers of certain officials

Section 52 specifically provides that nothing contained in the Act in regard to arrest shall be construed as taking away or diminishing any authority specially conferred by any other law to arrest, detain or place any restraint on any person.

It is impossible to refer to all statutory provisions conferring special powers of arrest on private persons or officials. The following are, however, a few instances:

(1) An environmental management inspector, appointed in terms of the National Environmental Management Act 107 of 1998, may exercise all the powers assigned to a peace officer or to a police official who is not a commissioned officer, in terms of Chapter 2, 5, 7 and 8 of the Criminal Procedure Act—s 31H of the National Environmental Management Act.

(2) An officer of a society for the prevention of cruelty to animals may arrest without a warrant any person reasonably suspected of having contravened a provision of the Animals Protection Act 71 of 1962, if there is reason to believe that the ends of justice will be defeated by the delay in obtaining a warrant—s 8(1)*(b)* of Act 71 of 1962.

(3) An authorised person may under circumstances where there are no other means of ensuring the presence of a person in court, without a warrant arrest any person who has committed or is reasonably suspected to have committed any offence referred to in the Civil Aviation Act 13 of 2009—s 147(1) of the Civil Aviation Act.

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5.5 Procedure after arrest

An arrested person has to be brought to a police station as soon as possible after his arrest. The purpose of bringing an arrestee to a police station is to ensure that he is in the custody of the South African Police 'as soon as possible' and that he be detained by the police for a period not exceeding 48 hours. There is no purpose in bringing an arrested person to a police station unless his further detention is entrusted to the police.

The custody envisaged by s 50 consists of two periods: The first is the period following the arrest but before the arrival at the police station and the second is the period after the arrested person has been brought to the police station. It is the first period which is governed by the words 'as soon as possible'.

Law enforcement officers other than police officials who have the power to arrest in terms of s 40 have no powers of detention in terms of s 50 other than during the first period, that is, until the arrested person is brought to a police station. They cannot assume the power of detention (ie the second period) merely because the South African Police cannot or will not exercise its powers of detention—*Mahlongwana v Kwatinidubu Town Council* 1991 (1) SACR 669 (E) (in this case the arrested person was unlawfully detained overnight in the back of a municipal police van because the police cells at the police station were full).

If an arrestee is not released because no charges are to be brought against him (eg where the police discover that there is indeed nothing irregular about his behaviour), he may not be detained for longer than 48 hours unless he is brought before a lower court. This is called the 'first appearance'. The 'first appearance' in terms of s 50(1) normally does not signify the beginning of the arrested person's trial (see Chapter 14 and cf *Minister of Law and Order v Kader* 1991 (1) SA 41 (A)). At this first appearance he may be remanded in custody pending further investigation or for his trial, or be released on bail or on warning. If he was arrested for some other reason than an alleged offence—eg for not having paid a fine—the court may, at this first appearance, adjudicate upon the cause of the arrest—see *Simango* 1979 (3) SA 189 (T) and *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T). Although a charge need not be put to an accused at his first appearance and he need not plead, it is important that he should know, at least in general terms, why he is being detained—*Ex parte Prokureur-Generaal, Transvaal* 1980 (3) SA 516 (T).

If a person is unlawfully arrested, his detention after the arrest will also be unlawful—*Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at [31]. However, once such person has, in accordance with the provisions of s 50(1), been brought before a court and his further detention has been ordered, the further detention, after the

hearing, will be a lawful detention (cf *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) at [38], where the court stated, however, that it is not our law 'that an arrested person's continued detention, by virtue of an order of court remanding him or her in custody in terms of s 50(1), will automatically render such continued detention lawful'), although the suspect will retain his right to institute an action for damages as a result of the unlawful arrest and initial detention—see *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (SCA).

The 48-hour period is considerably extended by s 50(1)*(d)*(i)-(iii):

If the 48-hour period expires—

(a) on a day which is not a court day, or on any court day after 4 pm (16:00), then the said period is deemed to expire at 4 pm (16:00) on the next court day (this means that if a person is arrested on a Wednesday evening, the 48-hour period is deemed to expire the next Monday at 4 pm (16:00));

(b) on any court day before 4 pm (16:00), then the said period is deemed to expire at 4 pm (16:00) on such court day;

(c) at a time when the arrestee is outside the area of jurisdiction of the court and he is at such time of expiry in transit from the place of detention to the court, then the said period is deemed to expire at 4 pm (16:00) on the next court day after the day on which the arrestee was brought into the court's area of jurisdiction—cf *Hoco v Mtekana* 2010 (2) SACR 536 (EC);

(d) or is deemed to expire at a time when the arrestee cannot, because of his physical illness or other physical condition, be brought before a court, then that court may upon application by the prosecutor order that the arrestee be detained at a place specified by the court (eg a hospital) for such period as the court may deem necessary so that he may recuperate (release on bail or warning, etc may, of course, also be considered—see below) in order to prevent abuse; the application by the prosecutor must set out the circumstances relating to the illness or other condition and must be supported by a certificate from a medical practitioner.

For the purposes of s 50, a 'court day' means a day on which the court in question normally sits as a court—s 50(2).

The court of a district within which the area of a periodical court is situated retains concurrent jurisdiction with the periodical court over such area. If the 48-hour period expires on a day on which the periodical court is not in session, an arrested person ought to be brought before a district court having jurisdiction over the area of the periodical court—*Sias v Minister of Law and Order* 1991 (1) SACR 420 (E); cf s 26 of the Magistrates' Courts Act.

Section 50(3) specifically provides that, subject to subsections (6) and (7), nothing in the section shall be construed as modifying any provisions whereby a person may be released on bail or on a written notice to appear. The police may release certain arrestees even before the 48-hour period lapses—see Chapter 10.

The time limit of 48 hours for detention must be strictly observed and any further detention is unlawful. This was held in *Mtungwa* 1931 TPD 466, where an accused escaped from custody after having been arrested without a warrant and after he had been detained for more than 48 hours. The court held that the accused could not be convicted of the crime of escaping from custody.

The 48 hour rule features prominently in the list of the rights of an arrestee, as guaranteed by the Constitution—see s 35(1)*(d)*, quoted at the beginning of this chapter. The entrenchment of this right in the Constitution emphasises the fact that an arrested person must be brought before a court *as soon as is reasonably possible*. Despite the fact that s 50 of the Criminal Procedure Act seems to allow the detention of an arrested person for 48

hours, the Constitution requires that he either be released or be brought before a court as soon as it is reasonably possible to do so. This can be explained by means of the following example:

If X is arrested at 21:00 on a Wednesday evening and the police make such progress with their investigation that, by 24:00 that same evening, they are satisfied that X is not involved in the commission of the alleged offence and that no

charge will be brought against him, X must immediately be released. If the police continue to detain X until the next Monday and release him just before 16:00 on that Monday (when the 48 hours expire), his further detention after 24:00 on that Wednesday evening will be unlawful. Similarly, if the police make such progress with their investigation that, by 24:00 that same Wednesday evening, they are satisfied that they have sufficient evidence to bring a charge against X, X must be taken to court on Thursday. If X is detained until the Monday before he is taken to court, his detention after Thursday will be unlawful.

5.5.1 Special measures relating to the arrest and treatment of a child suspected of having committed an offence

5.5.1.1 A child below the age of 10 years

A child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence—s 7(1) of the Child Justice Act. A police official who has reason to believe that a child suspected of having committed an offence is under the age of 10 years may not arrest the child, but must, in the prescribed manner (see reg 3 of the Regulations in terms of the Act), immediately hand the child over *(a)* to his parents or an appropriate adult or a guardian; or *(b)* if no parent, appropriate adult or guardian is available or if it is not in the best interests of the child to be handed over to the parent, an appropriate adult or a guardian, to a suitable child and youth care centre, and must notify a probation officer—s 9(1).

A probation officer who receives such a notification from a police official must assess the child as soon as possible but not later than seven days after being notified—s 9(2). The probation officer may, having assessed the child, in the prescribed manner (see regs 5-11 of the above-mentioned Regulations)—

(i) refer the child to the children's court;
(ii) refer the child for counselling or therapy;
(iii) refer the child to an accredited programme designed specifically to suit the needs of children under the age of 10 years;
(iv) arrange support services for the child;
(v) arrange a meeting, which must be attended by the child, his parent, an appropriate adult or a guardian, and which may be attended by any other person likely to provide information for the purposes of the meeting; or
(vi) decide to take no action. If probation officer decides not to take any action, this does not imply that the child is criminally liable for the incident that led to the assessment—s 9(3).

The purpose of the meeting convened by a probation officer is to assist the probation officer to establish more fully the circumstances surrounding the allegations against the child and to formulate a written plan appropriate to the child and relevant to the circumstances—s 9(4).

In the event of a child failing to comply with any obligation imposed on him, including compliance with the written plan, the probation officer must refer the matter to a children's court to be dealt with in terms of the Children's Act—s 9(7).

5.5.1.2 A child above the age of 10 but below the age of 18 years

A child who is 10 years old or older, but below the age of 18 years, has the right not to be detained, except as a measure of last resort, and if detained, only for the

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shortest appropriate period of time; to be treated in a manner and kept in conditions that take account of the child's age; to be kept separately from adults, and with boys separated from girls, while in detention; to family, parental or appropriate alternative care; to be protected from maltreatment, neglect, abuse or degradation; and not to be subjected to practices that could endanger the child's well-being, education, physical or mental health or spiritual, moral or social development—s 28 read with the Preamble to the Child Justice Act 75 of 2008.

The Child Justice Act also places specific limitations on the power to arrest a child. A child (10 years old or older, but below 18) may not be arrested for an offence referred to in Schedule 1 of that Act, unless there are compelling reasons justifying the arrest—s 20(1). 'Compelling reasons' include where a police official has reason to believe that the child does not have a fixed address, will continue to commit offences unless arrested, or poses a danger to any person (including himself), where the offence is in the process of being committed, or in circumstances provided for in para 8(3) of the National Instruction issued by the National Commissioner of Police (published in *GG* 33508 of 2 September 2010). Furthermore, in considering whether or not to arrest the child for an offence referred to in Schedules 2 and 3, a police official must take into account the same considerations (referred to above as 'compelling reasons'—paras 12(2) and 13(2) of the National Instruction).

If a child is arrested by a police official for an offence referred to in Schedule 1, the police official must release the child as soon as possible and before the child appears at the preliminary inquiry, unless *(a)* the child's parent or an appropriate adult or guardian cannot be located or is not available and all reasonable efforts have been made to locate the parent or appropriate adult or guardian; or *(b)* there is a substantial risk that the child may be a danger to any person (including himself)—s 22(1). The police official must release the child into the care of a parent, guardian or appropriate adult and hand a written notice (see para 3 above) to the child—s 18(1). If the child's parent or guardian or an appropriate adult is not present or there is a substantial risk that the child may be a danger to any person (including himself), the police official must consider the options for the release of the child, giving preference to the least restrictive option possible in the circumstances—s 26(1).

If the child cannot be released, the child must, depending on the age of the child and the alleged offence committed by the child, be placed in a suitable child and youth care centre. If placement in a suitable child and youth care centre is not appropriate or applicable, the police official must detain the child in a police cell or lock-up—s 26(2).

If, at any stage before a child's first appearance at a preliminary inquiry, the child has not been released from detention in police custody and is charged, in the case of a child who is *(a)*(i) 10 years or older but under the age of 14 years, with any offence; or (ii) 14 years or older, with an offence referred to in Schedule 1 or 2, the police official must give consideration to the detention of the child in an appropriate child and youth care centre, if a centre is available and there is a vacancy, or if a centre or vacancy is not available, in a police cell or lock-up; or *(b)* 14 years or older, with an offence referred to in Schedule 3, the police official must cause the child to be detained in a police cell or lock-up.

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A presiding officer may, at a child's first or subsequent appearance at a preliminary inquiry or thereafter at a child justice court, order the further detention of the child in *(a)* a child and youth care centre in accordance with s 29; or *(b)* a prison in accordance with s 30, subject to the limitations set out in that section—s 26(3).

If a child has not been released, the police investigating officer must provide the inquiry magistrate with a written report in the prescribed manner (see reg 19 of the Regulations in terms of the Act, referred to above), giving reasons why the child could not be released, with particular reference to the factors referred to in *(a)* or *(b)*—s 22(2).

5.5.2 Detention of awaiting trial prisoners

A person who has been arrested and is in detention while awaiting his trial is known as an 'awaiting trial' prisoner. Such a person has not been convicted by a court of law and must therefore be presumed to be innocent. Awaiting trial prisoners in the detention of the Department of Correctional Services at a correctional facility are detained separately from prisoners who have already been convicted and sentenced. The conditions of detention of awaiting trial prisoners are generally more favourable than those of sentenced prisoners (see Chapters 4 and 5 of the Correctional Services Act 111 of 1998).

In *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) the Constitutional Court held that to detain an awaiting trial prisoner together with sentenced prisoners is unlawful and constitutes a breach of such person's right not to be deprived of freedom arbitrarily or without just cause, which is contained in section 12(1)*(a)* of the Constitution, 1996. The court held further that it amounted to a form of punishment imposed on the awaiting trial prisoner without his having been convicted of an offence.

5.6 The effect of an arrest

The effect of a lawful arrest is that the arrested person will be in lawful custody (unless that custody subsequently becomes unlawful, eg as in *Ezekiel's* case (above)) and may be detained until he is lawfully discharged or released—s 39(3). See also *Nhlabathi v Adjunk-Prokureur-Generaal, Transvaal* 1978 (3) SA 620 (W) and cf *Minister of Justice and Constitutional Development v Zealand* 2007 (2) SACR 401 (SCA), which was set aside in *Zealand v Minister of Justice and Constitutional Development* 2008 (2) SACR 1 (CC).

The fact that an arrest or detention is unlawful will obviously not affect the liability of an accused in so far as the offence is concerned in connection with which he is detained (or has unlawfully been arrested)—*Esta* 1912 TPD 7. In the case of unlawful detention the detainee may apply to the court for an order for his release. A detainee will obviously be unable to bring such an application himself. Such an application may accordingly be brought on his behalf by an interested person, such as a family member, friend, partner, co-member of a society, church or political party—cf *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A). In such an application the question is whether the person concerned is unlawfully being deprived of his liberty.

In dealing with such an application, uncertainty prevailed whether to apply the principles of the *habeas corpus* remedy of English law or the Roman-Dutch *interdictum de libero homine exhibendo*, especially since in terms of the *habeas corpus*

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procedure, the rule existed until recently in English law that a person or interested person against whom an order had been made could not appeal against such an order. In *Kabinet van die Tussentydse Regering van Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A) at 722E the court held that the principles of *habeas corpus* are not part of South African law, that the principles of the *interdictum de libero homine exhibendo* must apply and that parties against whom such orders have been made may appeal against them.

The powers and duties of persons authorised by a warrant to arrest another are co-extensive with such powers and duties of a person arresting another without a warrant in the following respects:

(a) the placing of objects found on the arrested person in safe custody;
(b) the general powers necessary for the purposes of effecting an arrest; and

(c) the right to require third persons to assist in the arrest.

5.7 The duty to arrest

As a general rule there is no obligation on a private individual to arrest someone. The exception to this rule is that every male inhabitant of the Republic between the ages of 16 and 60 is, when called upon by a police official to do so, *required* to assist such police official in arresting and detaining a person—s 47(1). Failure to render assistance is an offence punishable by a fine or imprisonment for a period not exceeding three months—s 47(2).

In *Mgwenya* 1925 TPD 288 it was held that lameness may exempt the accused from criminal liability. *Mens rea* has been held to be an element of the crime of contravening this section. In *Lakier* 1934 TPD 250, a detective endeavouring to retain custody of an arrested person requested the accused, *L*, to assist. *L* had been called to the scene on information that two men were fighting. The detective was in plain clothes, but informed *L* that he was a detective. *L* refused to assist since he believed that he was being bluffed. The person arrested then said he was willing to accompany the detective and *L* then realised his mistake and did thereafter render assistance. The court held on appeal that, assuming that there was a presumption of *mens rea* when *L* first refused assistance, that presumption was refuted by his explanation and subsequent conduct. *L* was therefore acquitted.

In order to secure a conviction under s 47, the State must discharge the onus of proving that the police official had authority to effect the arrest—*Rosenthal* 1927 TPD 470.

An authorised person may call on any person to assist him or her to effect an arrest of a person who has committed or is reasonably suspected of having committed any offence referred to in the Civil Aviation Act 13 of 2009, and may use such force as may in the circumstances be reasonably necessary to overcome resistance or to prevent the person concerned from fleeing—s 147(2) of the Civil Aviation Act.

5.8 Resisting arrest and attempts to flee

5.8.1 Use of force in effecting an arrest

It has already been pointed out that arrest is a drastic method of securing the presence of an accused at his trial. To use force in order to effect an arrest is even more drastic. The law accordingly lays down very strict requirements that must be

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complied with before force may be used in order to effect an arrest and it is not surprising that our courts are very strict in their application of these requirements.

As a general rule, force may not be used in order to effect an arrest. If the person that is to be arrested submits himself or herself to the arrest, force may not be used. The need to use force can therefore only arise in those circumstances in which the use of force is necessary to overcome resistance to the arrest or to prevent the suspect from fleeing. The use of force in order to punish the person who is to be arrested will always be unlawful.

Even though a person is suspected of having committed an offence, he retains his constitutional rights.

In terms of s 12(1)*(c)-(e)* of the Constitution, every person shall have the right to freedom and security of the person, which inter alia includes the right to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhumane or degrading way. Furthermore, in terms of s 35(3)*(h)* every accused person has the right to a fair trial, which includes the right to be presumed innocent.

The use of force in effecting an arrest must accordingly be viewed against this background. Section 49 of the Criminal Procedure Act reads as follows:

49. Use of force in effecting arrest

(1) For the purposes of this section—

(a) **'arrestor'** means any person authorised under this Act to arrest or to assist in arresting a suspect;

(b) **'suspect'** means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and

(c) **'deadly force'** means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if—

(a) the suspect poses a threat of serious violence to the arrestor or any other person; or

(b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.

The words '*reasonably necessary*' (which also appeared in the previous s 49(1)) have been interpreted by our courts to include a proportionality test. According to the Appellate Division (now the Supreme Court of Appeal) in *Matlou v Makhubedu* 1978 (1) SA 946 (A), the degree of force used should be proportional to the *seriousness of the offence* in respect of which the attempt is made to arrest the suspect. This means that the less serious the offence in respect of which the attempt is made to arrest, the less the degree of force that may be used in order to effect the arrest.

In *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) at 293 the Supreme Court of Appeal held that, in the light of the Constitution, the proportionality test referred to in *Matlou v Makhubedu* (above) is too narrow and should

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not only refer to the seriousness of the offence, but should refer to *all the circumstances in which the force is used*. According to the court, this represents a rational and equitable way of balancing the interests of the State, society, the police officers involved, and the fugitive. According to the court:

> It is . . . far better than simply weighing up the seriousness of the offence against the degree of force used, because the latter does not adequately protect the interest of the fugitive, nor does it sufficiently define the circumstances in which police officers in the interests of society are permitted to use force. Is it really appropriate or equitable where an offence committed or presumably committed is of a serious but non-violent nature, for example fraud, to allow a police officer to use potentially lethal force, such as the firing of a shot, at the suspect who is endeavouring to escape and who is unarmed and poses no immediate or foreseeable physical threat to anyone. Or the converse: can it be said that, if the offence is of a non-serious or non-violent nature, but the suspect is armed and poses a threat to the police officer concerned or other citizens, that potentially lethal force may not be used.

This was embodied in the new s 49. In view of this, not only the seriousness of the offence, but all the circumstances, including the seriousness of the offence, whether the suspect is armed, poses a threat to the arrester or another person, is known and can easily be apprehended at a later stage, etc, should be taken into account in determining whether the use of a particular degree of force was justified in the circumstances.

Regarding police dogs, there are no special statutory provisions regulating their use by the police; accordingly, the general principles set out in this study unit apply to their use. Where a suspect was bitten by a police dog in the course of being arrested, in circumstances which did not justify the use of such force, damages were awarded—*Jooste NO v Minister of Police*

1975 (1) SA 349 (E). See also *Minister van Polisie v Chetty* 1977 (2) SA 885 (A) and *Motswana v MEC for Safety and Security* 2008 (1) SACR 404 (NC).

Until recently, the use of deadly force in order to effect an arrest was governed by the previous s 49(2) of the Criminal Procedure Act. This section provided that the killing of a person who is to be arrested for an offence referred to in Schedule 1 to that Act, and who cannot be arrested or be prevented from fleeing by other means than by killing him or her, would be deemed to be justifiable homicide. However, in *Ex Parte: Minister of Safety and Security: In Re S v Walters* 2002 (4) SA 613 (CC) the Constitutional Court declared the previous s 49(2) to be unconstitutional. This section has now been repealed and replaced by the new s 49 (quoted above).

It is a serious matter to kill a person in these circumstances because the person may be completely innocent. If an accused has killed another and claims the protection afforded by s 49, the onus is upon him or her to show on a preponderance of probabilities that the requirements of this section were complied with—*Britz* 1949 (3) SA 293 (A); *Swanepoel* 1985 (1) SA 576 (A). In *Scholtz* 1974 (1) SA 120 (W) at 124 it was pointed out that it is an important aspect of life in a state under the rule of law that the police do not exceed the limits of their powers in terms of s 49. (Cf also *Government of the Republic of South Africa v Basdeo* 1996 (1) SA 355 (A).) Accordingly, every facet of police action under s 49 must be carefully analysed and measured against the requirements of this section.

Not only the killing of a person should be regarded in a serious light. Sometimes force is used which does not result in the death of the person to be arrested, but seriously injures that person or has the potential of seriously wounding or killing

the person. In *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) the Supreme Court of Appeal referred to the use of ‘deadly force’ or ‘potentially lethal force’. According to the court ‘deadly force’ or ‘potentially lethal force’ should be regarded as referring to that degree of force which has the potential of killing the suspect, or force which can be reasonably expected either to kill or seriously to injure the person to be arrested. This principle has now also been embodied in the new s 49.

Our courts have over many years emphasised that an arrester should not indiscriminately have recourse to shooting at a suspect in order to effect an arrest. In *Basson* 1961 (3) SA 279 (T), B, a constable, fired at night at a motor car he had signalled to stop, and wounded one of the passengers. It appeared that the police had been informed of two armed convicts who were fleeing in a stolen Chevrolet motor car. A Ford came past at high speed, and did not react to B and other police officials’ signs to stop. B then fired. According to the court, B could not have had reasonable grounds to believe that the convicts were in the Ford. In terms of a Transvaal Ordinance, it was an offence for the driver of a motor vehicle to refuse or fail to stop if instructed to do so by a police official. The driver of the Ford therefore committed an offence in B’s presence. The court held that there may be circumstances in which it would be lawful to shoot at a motor car in order to arrest persons in that motor car, where the driver had refused or failed to stop. According to the court, however, there was no general power to shoot. The court held that seriously to assault the offender for this type of offence could not be justified. B was therefore found guilty of assault with intent to commit grievous bodily harm—cf too *Oosthuizen* 1961 (1) SA 604 (T) and *Government of the Republic of South Africa v Basdeo* 1996 (1) SA 355 (A).

In *Martinus* 1990 (2) SACR 568 (A) the Appellate Division warned the private citizen to exercise the powers conferred upon him in terms of s 42 and 49 sparingly and with extreme circumspection. The use of a firearm as a method of exercising force to affect an arrest should be resorted to with great caution. A private citizen contemplating the use of force in terms of s 49(1) should bear in mind that his actions will be judged according to the

objective standard of the reasonable man and not according to his own *bona fide* subjective evaluation of the situation. (For a detailed discussion of the use of force in the course of an arrest by a private person (with reference to ss 39, 42 and 49), see *Macu v Du Toit* 1983 (4) SA 629 (A).)

The Constitutional Court in *Ex Parte: Minister of Safety and Security: In Re S v Walters* (above) at 643 stated the law with regard to the use of force in order to effect an arrest as follows:

> In order to make perfectly clear what the law regarding this topic now is, I tabulate the main points:
>
> *(a)* The purpose of arrest is to bring before court for trial persons suspected of having committed offences.
> *(b)* Arrest is not the only means of achieving this purpose, nor always the best.
> *(c)* Arrest may never be used to punish a suspect.
> *(d)* Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.
> *(e)* Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.

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> *(f)* In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.
> *(g)* Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.
> *(h)* Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrester or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.
> *(i)* These limitations in no way detract from the rights of an arrester attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.

5.8.2 The requirements for the use of force

In view of the above, one can assume that our law has now reached a stage in its development in which the following requirements must be complied with before an arrester (the person attempting to effect an arrest) may use force in order to effect the arrest:

(1) The person who is to be arrested (the suspect) must have committed an offence. If the arrester is acting on a suspicion that the suspect has committed an offence, the suspicion must be a reasonable suspicion. In deciding this, the test is objective, ie the circumstances should be such that a reasonable person would also have concluded that the suspect has committed an offence—*Nell* 1967 (4) SA 489 (SWA), *Purcell-Gilpin* 1971 (3) SA 548 (RA).

(2) The arrester must be lawfully entitled to arrest the suspect. The person who arrests or attempts to arrest—with or without a warrant—must have the power to arrest the suspect or to assist in his or her arrest for such offence.

(3) The arrester must attempt to arrest the suspect—cf *Metelerkamp* 1959 (4) SA 102 (E). The arrester cannot use force without any attempt on his part to arrest the offender. The popular belief that the owner of a house may shoot an offender who has trespassed on or broken into his premises and then runs away, after having warned him three times to stop, is erroneous. Such action clearly does not in all circumstances amount to an attempt to arrest.

(4) The arrester must have the intention to arrest the suspect and not to punish the suspect. This means that the arrester must have had the intention of bringing the offender to justice—see *Malindisa* 1961 (3) SA 377 (T). Malindisa had shot and killed a person whom he suspected of having stolen his dagga. He did not have the intention of bringing the accused to justice. He just wanted to get hold of him and deal with him in

his own manner. The court held that Malindisa could not rely upon the protection of this section.

(5) The suspect must attempt to escape by fleeing or offering resistance.

(6) The suspect must be aware that an attempt is being made to arrest him or her and must in some way be informed of the intention and continue to try to flee or resist the attempted arrest despite being aware thereof. The arrester, therefore, may not take it for granted that the arrestee knows that somebody is attempting to arrest him or her. In *Barnard* 1986 (3) SA 1 (A) the deceased discovered that he could cause his pick-up van to make exploding noises by switching the vehicle's engine on and off whilst driving. One night he tore

through the streets of Pietermaritzburg where, shortly before, there had been a terrorist attack on the court building. B, a police official, heard the bangs made by the deceased's vehicle in the vicinity of the court building and hurried over. He was under the impression that terrorists were making their escape in the 'bakkie', gave chase in the police vehicle and fired when the persons in the 'bakkie' failed to react to his signals to stop. The deceased was killed, unaware to the end that he had been pursued. The court held that it must be clear to the person about to be arrested that the arrester is attempting to arrest him or her. B was accordingly held liable.

(7) There must be no other reasonable means available to effect the arrest of the suspect. Whether this requirement has been complied with depends of course upon the facts of each individual case.

When a court has to consider whether there were alternative means available to the arrester to effect the arrest which would have involved a lesser degree of force than shooting at the suspect, there are two considerations, according to *Macu v Du Toit* 1983 (4) SA 629 (A) at 635, that have to be kept in mind: firstly, that a certain action can only be considered to be an alternative if it would be practicable and reasonably effective in order to bring about the detention of the person to be arrested, and, secondly, the time at the arrester's disposal to consider possible alternative lines of action (which is often limited and may call for a rapid decision to prevent the arrestee from escaping).

In *Metelerkamp* De Villiers JP stated that—

> as in the case of self-defence, we as the judges of fact, must get out of the armchairs on the Bench and place ourselves in the position of the accused at the time when the conduct complained of took place.

And further:

> (R)eason is (not) to be disregarded in deciding whether it was possible to arrest the deceased and prevent him from escaping without killing him. What could have been done means what could in reason have been done, having regard to the facts which the killer knew or ought to have known [*Labuschagne* 1960 (1) SA 632 (A) at 635G, and cf *Sambo v Milns* 1973 (4) SA 312 (T) at 317-318].

In *Mazeka v Minister of Justice* 1956 (1) SA 312 (A) Van den Heever JA made this statement:

> Where a fit young man of 24 intends to arrest a person much more than ten years his senior, who has only a few yards start and is admittedly not running very fast, where such a young man promptly avails himself of the *ultima ratio legis* without essaying any other means of effecting an arrest—especially where he has information which points to the likelihood of the arrestee being identified, located and arrested—I do not think it is enough for him to say that he thought there were no other means of preventing the escape.

In *Koning* 1953 (3) SA 220 (T) the accused, who was the warder of a team of convicts, had a reasonable suspicion that one of them was trying to escape. He promptly shot and killed the man to prevent his escaping. The court held that killing the man was by

no means the only way of preventing the escape: the accused could have used his whistle; he could have warned the deceased to stand; he could even have overtaken and run down the deceased with his horse.

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(8) The force used must be directed at the suspected offender. Where A on reasonable grounds suspects B of having committed an offence involving the infliction or threatened infliction of serious bodily harm and B is one of the occupants of a vehicle, among whom there may also be innocent persons, A may not shoot indiscriminately at the occupants—*Government of the Republic of South Africa v Basdeo* 1996 (1) SA 355 (A).

(9) The degree of force that may be used in order to effect the arrest must be reasonably necessary and proportional in all the circumstances.

In *Ex Parte: Minister of Safety and Security: In Re S v Walters* 2002 (4) SA 613 (CC) at 643 the court expounded upon the last mentioned requirement, as cited above:

> In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.
>
> Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.
>
> Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrester or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later. [Cf also *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA).]

When police action is not related to arrest in a criminal procedural sense, the police may not rely on s 49. However, the general common-law defences of necessity and self-defence still remain at their disposal—see textbooks on criminal law and delict, and cf *Chetty* 1977 (2) SA 885 (A) in connection with the use of dogs to control mobs.

5.9 Escape from lawful custody

The effect of an arrest is that the arrestee is in lawful custody and detained until he is lawfully discharged or released from custody—s 39(3).

Escaping from lawful custody or attempting to do so is a serious offence. Section 51 of the Criminal Procedure Act provides that any person who, having been arrested and being in lawful custody (see *Evilio* 2012 (1) SACR 367 (GSJ)) but not having yet been lodged in any prison, police-cell or lock-up, escapes or attempts to escape from such custody shall be guilty of an offence (see *Busuku* 2006 (1) SACR 96 (E) and *Mafora* 2010 (1) SACR 269 (NWM) with regard to the requirement of being 'lodged' and the subsequent distinction between contravention of s 51(1) of the Criminal Procedure Act and s 117*(a)* of the Correctional Services Act 111 of 1998). Any person who rescues or attempts to rescue from lawful custody any other person who has been arrested, but is not yet lodged in any prison or similar place, or who aids such person to escape, or who harbours or conceals or assists in harbouring or concealing him, is likewise guilty of an offence—cf *Mpanza* 1974 (2) SA 298 (N). Before an accused may be convicted it is incumbent upon the State to prove that the person who was assisted by the accused to escape was in lawful custody—*Skwati* 1942 TPD 115; *Kistesamy* 1947 (4) SA 788 (N); *Ngidi* 1972 (1) SA 733 (N).

We have seen that a private person who arrests another must forthwith inform the latter of the reason for the arrest. What is the position now of a person who wants to effect an arrest, touches the body of another and the latter frees himself

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and runs away before the person arresting him has reasonably had the chance to inform him of the charge? It was held in *September* 1959 (4) SA 256 (C) that in this case too the offender was guilty of escape from lawful custody. The informing of the accused of the reason for the arrest is not part of the arrest itself, according to Bloch J, but something which must be done as soon as is reasonably possible after the arrest has been effected.

5.10 Arrest and detention for interrogation

Section 185 of the Criminal Procedure Act contains important provisions relating to the arrest and detention of certain persons. This form of arrest is not directly intended to bring a suspected offender before a court, and does not strictly fall under the type of arrest which forms the subject of this chapter. But because the section regulates, *inter alia*, arrest without a warrant, it may properly be mentioned here.

6 Other methods

Apart from the above four methods for securing the attendance of the accused at the trial (specifically mentioned in the Criminal Procedure Act in this regard), there is also the possibility of release on warning in terms of s 72. If an accused is in custody in respect of an offence and a police official or a court may release him on bail under ss 59 or 60, the police official or court may in lieu of bail and with regard to certain offences (cf s 72(1)) release the accused from custody and warn him to appear before a specified court at a specified time on a specified date. If the accused is under the age of eighteen years, he is placed in the care of the person in whose custody he is, and such person is warned to bring the accused to a specified court on a fixed date. A police official who releases an accused in terms of this section must, at the time of the release of the accused, hand to him a written notice on which must be entered the offence, the court before which and the time and date on which the accused must appear. Strictly speaking, therefore, we only deal with an oral warning in cases where the court releases an accused on warning. Section 72 spells out the consequences of an accused's failure to appear, or the failure of the person in whose custody the accused is to bring him to court.

7 Extradition

Although extradition is, strictly speaking, not a way of securing the attendance of an accused at his trial, it is discussed here since it is a way of ensuring that the accused is handed over to the authorities of another state in order to allow them to take the accused to the court of that state.

This topic will be discussed only in its broadest outline, avoiding detail and technical information.

In terms of international law principles, the government of every sovereign state has exclusive authority over everything happening within the borders of that state. Consequently every state has the right to try crimes committed within its area of jurisdiction. Generally speaking, it has no power to punish persons who have committed crimes in the area of jurisdiction of another (foreign) state.

Therefore, where a person commits a crime in one state and flees to another state and then fails to return of his own accord in an attempt to escape the consequences

of his act, the state where the crime was committed is powerless to act. *Extradition* makes provision for such a person to be extradited to the state in whose area of jurisdiction the crime was committed. In this manner criminals are prevented from escaping liability.

States are not obliged to extradite criminals. An obligation to extradite can only come into being in terms of an agreement. A state may, however, if it deems it proper because of mutual ties of friendship, for example, extradite a criminal to a foreign state on that state's request. Nevertheless a state will not easily extradite its own citizens, except in terms of an agreement to do so.

Extradition agreements or treaties usually have certain corresponding principles:

(1) Extradition is granted only in respect of serious crimes or according to the principles of double criminality, in terms of which extradition is granted only in respect of crimes which are punishable in terms of the law of both states.
(2) A person is not extradited to a foreign state if he is charged with a crime of a political nature.
(3) According to the principle of speciality a person is tried in the state to which he is extradited only for the crime in respect of which he has been extradited except if the extraditing state consents to a further new charge.
(4) Extradition is refused if the crime for which extradition is sought is punishable by the death sentence in terms of the law of the state requesting extradition and if the law of the state to which the request is made does not make provision for the death sentence for such a crime.
(5) An extradition agreement usually contains a *ne bis in idem* rule which corresponds with pleas of *autrefois acquit* and *autrefois convict*.

In South Africa extradition is regulated by the Extradition Act 67 of 1962, which makes provision for the entering into of extradition agreements with foreign states. The procedure to be followed for the extradition of a person or persons in the Republic is set out in ss 4 to 21 of the Act.

A person whose extradition is requested has to be brought before a magistrate, who then conducts an enquiry with a view to the possible extradition of such a person to the state concerned.

In the case of an application by an 'associated state' (an African state with which South Africa has an extradition treaty), the magistrate may make an extradition order directly (provided, of course, that all the requirements are present). In the case of a 'foreign' state, the magistrate refers his finding to the Minister of Justice for the latter's decision.

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Chapter 8
Interrogation, interception and establishing the bodily features of persons

M Basdeo, T Geldenhuys, MG Karels

1 Interrogation
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The Constitution and this chapter:

Section 10—Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

See 3, below.

Section 12—Freedom and security of the person

(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;

. . .

(e) not to be treated in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

. . .

(b) to security in and control over their body; . . .

See 1 and 3, below

Section 14—Privacy

Everyone has the right to privacy, which includes the right not to have—

. . .

(d) the privacy of their communications infringed;

See 2, below

Section 35—Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right—

(a) to remain silent;

. . .

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

(3) Every accused person has a right to a fair trial . . .

See 1, below

The Child Justice Act 75 of 2008 and this chapter:

Section 1—Definitions

'child' means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4 (2);

See 3.1, below

National Instruction 2 of 2010: Children in Conflict with the Law

Section 3—Treatment of Children

3(2) Treatment of a child suspected of having committed an offence

(a) During the first contact with a child suspected of having committed an offence, the member must, if circumstances permit, introduce himself or herself to the child and, if a parent, guardian or an appropriate adult is present, to such person.

(b) The member must explain to the child that he or she is being suspected of having committed the offence. The member must explain this to the child in a language that he or she understands, preferably in the mother tongue of the child, using plain and simple vocabulary to assist the child to have a better understanding of the child justice system and the procedure that will be followed in his or her case. The child must understand that this is a very serious matter.

(c) The member must realise that the child may be overwhelmed and scared in the presence of the Police and must therefore patiently explain the nature of the offence and the procedure that will be followed in his or her case. The member must give enough detail about the matters and allow sufficient time so that the child can absorb the information. The member must encourage the child to ask questions and respond to the questions and satisfy himself or herself that the child understands the information and explanation given. The member may elicit responses from the child by asking questions in order to ensure that he or she understands the information.

(d) A member must not humiliate or intimidate a child and must at all times treat and communicate with the child in a manner which is appropriate to the age, maturity and stage of development of the child. The younger the child, the more patient and

understanding the member must be while communicating with the child. The level of schooling of the child and the child's ability to read and write are also relevant when considering what would be an appropriate manner in which to treat and communicate with the child.

(e) The member must take steps to protect the privacy and dignity of the child and must ensure that discussions with the child and his or her parent or guardian or an appropriate adult (whether at the police station or at the crime scene) take place in private, out of sight and hearing of other persons.

(f) A member who explains to a child and his or her parent, guardian or an appropriate adult, the contents of a notice or procedure must take into account the background of the child, the parent, guardian or appropriate adult and the fact that they may not be conversant with the functioning of the courts and court procedures. The member must explain the contents of the notice or procedure in simple, understandable language and give sufficient details to the child and parent, guardian or appropriate adult. The member must also encourage the child, parent, guardian or appropriate adult to ask questions without interrupting him or her.

See 3, below

1 Interrogation

In terms of s 205 of the Constitution, one of the objects of the South African Police Service is to investigate crime.

It sometimes happens that a crime is committed in the presence of the police or that the police arrive at the scene of a crime after the crime has been committed but before it is reported to the police. Normally, however, the police will become aware that a crime has been committed only once the victim or another member of the public reports it to them.

Once the police become aware that a crime has been committed, an important part of their investigation will consist in asking persons questions in order to obtain information relating to the commission or alleged commission of the offence.

If the police become aware of the commission of an offence when someone reports it to them, they will rely on that person to furnish them with information concerning exactly what happened during the alleged commission of the offence. The police will accordingly also ask such person questions and, in the light of his answers, decide how to proceed with the investigation. A person who reports a crime to the police normally does so voluntarily and will, therefore, in most cases be prepared to co-operate with the police and to answer their questions fully.

If the police become aware of the alleged commission of the offence in some other way, they will also interrogate any person that may possibly have information relating to the commission of the offence.

The police do not need any special power to interrogate. Nothing prohibits the police or anyone else from interrogating another person. There is no need, therefore, for any provision providing the police with special powers of interrogation.

The need for special powers arises only when a person refuses to grant the police access to someone they wish to interrogate, refuses to respond to police questioning or answers the questions but refuses to furnish them with his name and address in order to be subpoenaed to testify in court.

Before the powers conferred on the police in this respect are discussed, it is necessary to point out that there is no general legal duty on persons to furnish information that they may have concerning the commission of an offence to the police. It is only in exceptional circumstances that a person will be under such a legal duty. The only common-law offence in

respect of which such a legal duty exists is high treason. A person who is aware that someone has committed high treason or plans to do so, and who fails to furnish this information to the authorities, will himself be guilty of high treason. In so far as statutory offences are concerned, there are several statutory provisions that require persons who have information relating to specified statutory offences to provide this information to the police. Examples of such provisions are s 10 of the Drugs and Drug Trafficking Act 140 of 1992 and s 7 of the Protection of Information Act 84 of 1982. If a person has information relating to the offences mentioned in these provisions and fails to convey this to the authorities (even without the police requesting him to do so), such a person will be guilty of an offence. Other statutory provisions provide that a person who, upon the request of the authorities, fails to furnish them with any information that he may have relating to certain offences, will be guilty of an offence. An example of such a provision is s 67 of the National Road Traffic Act 93 of 1996.

In discussing the special powers of the police with regard to the interrogation of

persons, it is necessary to distinguish between those powers of the police to interrogate any person (irrespective of whether such person is a potential witness or the person suspected of having committed the offence), and those powers that may be exercised only with regard to possible witnesses or only with regard to persons suspected of having committed offences.

1.1 General powers with regard to interrogation

1.1.1 Entry to premises to interrogate persons: ss 26 and 27

Although the police may question any person regarding an offence that they are investigating, it occasionally happens that the person whom they wish to question is on private premises and the person in charge of the premises refuses to allow the police to enter the premises in order to question him. This may effectively prevent the police from asking the person any questions and thus from obtaining from him any information that he may have. In order to solve this problem, s 26 of the Criminal Procedure Act 51 of 1977 was enacted.

In terms of s 26 a police official may, in the investigation of an offence or alleged offence where he reasonably suspects that a person who may furnish information with regard to any such offence is on any premises, enter such premises without a warrant for the purpose of interrogating such person and obtaining a statement from him. There is, however, the proviso that a police official may not enter any private dwelling without the consent of the occupier thereof.

The reason for the proviso is to prevent a police official from entering a private dwelling without having requested permission to do so. Such conduct may amount to a serious infringement of the privacy of the residents inside such dwelling (see s 14 of the Constitution, quoted above). However, this once again leaves open the possibility that the occupier of the dwelling may refuse the police entry to the premises, which may also hamper the police investigation.

In terms of s 27(1), a police official who may lawfully enter any premises under s 26 may use such force as may be reasonably necessary to overcome any resistance against such entry, including the breaking of any door or window of such premises. In terms of a proviso to the subsection, such a police official shall first audibly demand admission to the premises and state the purpose for which he seeks to enter such premises.

In considering the powers provided for in s 27, it is necessary to draw the attention to s 1, which contains a definition of the word ‘premises’. In terms of this definition ‘premises’ refers not only to land or buildings but also to vehicles, ships and aircraft.

1.1.2 Obtaining the name and address of a person: s 41

As will appear from the discussion below, provision has been made to oblige persons who, despite a request to this effect, refuse to furnish the police with information relating to an offence or alleged offence, or to provide the court with this information, to do so. Apart from this, provision has also been made for persons who are suspected of having committed certain minor offences, in certain circumstances not to be arrested, but to be brought before the court by means of a summons. However, each of these provisions requires that at least the name and address of the person concerned be known. If a person to whom the aforementioned

provisions are applicable refuses to give his name and address to the police upon their request, he will make it impossible to apply the said provisions to him. To prevent this, s 41 confers certain powers on peace officers. (All police officials are regarded as peace officers—s 1.)

In terms of s 41(1) a peace officer is given the power to call upon—

(a) any person whom he has power to arrest;

(b) any person reasonably suspected of having committed any offence or of having attempted to commit any offence (ie not only offences enumerated in Schedule 1 to the Criminal Procedure Act); and

(c) any person who may, in his opinion, be able to give evidence in regard to the commission or suspected commission of any offence,

to furnish his full name and address.

Furthermore, if such person refuses to furnish his full name and address, the peace officer may forthwith arrest him. If the peace officer reasonably suspects that a false name or address has been given to him, he may arrest such person and detain him for a period not exceeding twelve hours, until the name and address so furnished have been verified.

The refusal by a person to furnish his or her name and address in the above-mentioned circumstances, and the furnishing of an incorrect or false address, constitute offences and are punishable by a fine or imprisonment without the option of a fine for a period of three months—s 41(2).

1.1.3 Detention for the purposes of interrogation

In the case of certain serious offences, the legislature has empowered the police to arrest persons and to detain them for the purposes of interrogation. The following is an example of such a provision.

Section 12 of the Drugs and Drug Trafficking Act 140 of 1992 contains drastic powers for the detention of persons for interrogation under a warrant issued by a magistrate. These powers exist with regard to persons suspected of having committed drug offences or of having information relating thereto. Such persons may be detained indefinitely, subject to being brought before a magistrate within 48 hours after arrest and thereafter not less than once every 10 days. Where such a detainee appears before a magistrate in terms of s 12(4)*(a)*, he is entitled to legal representation—s 12(4)*(c)* and (6)*(a)*(ii).

Section 12 of the Drugs and Drug Trafficking Act and all similar provisions constitute limitations on the right not to be detained without trial, which is contained in s 12 of the Constitution (quoted above). Furthermore, they constitute a limitation on the right to a fair trial set out in s 35(3) of the Constitution (quoted above). The Constitutional Court has not yet had the opportunity of expressing itself on the constitutionality of any of these provisions. However, it is doubtful whether they will withstand constitutional scrutiny.

1.2 Powers relating to possible witnesses

A judge of the High Court, a regional court magistrate or a magistrate may, upon the request of a director of public prosecutions or public prosecutor, authorised thereto in writing by the director of public prosecutions, require the attendance before him or her, or before any other judge, regional court magistrate or magistrate,

for examination by the director of public prosecutions or the public prosecutor, authorised thereto in writing by the director of public prosecutions, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: provided that if such person furnishes that information to the satisfaction of the director of public prosecutions or public prosecutor concerned prior to the date on which he is required to appear before the judicial official mentioned, he shall be under no further obligation to appear before such judicial official—s 205(1). Such examination can be conducted privately at any place designated by the judicial official (s 205 (3)) and need not be held in court. If such a person should, however, refuse or fail to give the information, he or she shall not be sentenced to imprisonment as contemplated in s 189, unless the judicial official concerned is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order—s 205(4).

It is not necessary to summon a person to appear; he may be informally requested to appear on a date specified. The advantages of a summons to appear (subpoena) are self-evident—*Matisonn* 1981 (3) SA 302 (A).

Section 205 is specially designed to compel a person to reveal his knowledge of an alleged crime, which knowledge he has refused to disclose to the police. If such a witness refuses to give the necessary information or refuses to answer the questions, the court may, in a summary manner, enquire into such refusal or failure—s 189. The witness is not obliged to answer self-incriminating questions, except where he has been warned in terms of s 204; *Bosman, Kleinschmidt* 1980 (1) SA 852 (A). Section 205 provides for an examination and does not grant the prosecutor the right to cross-examine the witness. The witness is entitled to legal representation—*Smit v Van Niekerk* 1976 (4) SA 304 (E); *Heyman* 1966 (4) SA 598 (A).

The questioning may take place in private. The following sections with regard to witnesses apply *mutatis mutandis* (cf chapter 15): 162 to 165, 179 to 181, 187 to 189, 191 and 204.

In *Smit v Van Niekerk NO* 1976 (4) SA 293 (A) at 304 it was held that if a witness should refuse to answer a question and thus be required in terms of s 189 to show a 'just excuse' for his refusal, he is entitled to the assistance of a legal adviser. In this case it was held that a clergyman does not have a right to silence. Cf also *Nel v Le Roux* 1996 (3) SA 562 (CC).

No witness, however, is obliged to answer self-incriminating questions—s 203.

In terms of s 185, the director of public prosecutions, in certain specified instances, issues a warrant for the arrest and detention of a potential state witness—see chapter 15.

In *Nel v Le Roux* 1996 (3) SA 562 (CC) the Constitutional Court held that, in principle, s 205 is not inconsistent with the Constitution, although the application thereof in a particular case may be inconsistent with the Constitution. According to the court, every case will have to be considered on its own merits.

1.3 Powers relating to suspects and accused

In pre-trial criminal procedure, the right to remain silent (set out in s 35(1)*(a)* of the Constitution, quoted above) must be distinguished from the right not to be questioned. Suspects and accused persons have the former right but not the latter. It was held in *Gosschalk v Rossouw* 1966 (2) SA 476 (C) that once the police have lawfully

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obtained access to a suspect (eg by virtue of lawful arrest or his permission) they may question him within reasonable limits. He is not, however, obliged to answer these questions—*Gosschalk v Rossouw* (above) at 491H and *Weyer* 1958 (3) SA 467 (GW). No adverse inference may be drawn from his silence—cf *Thebus* 2003 (2) SACR 319 (CC).

2 Interception and monitoring

The interception of post and private conversations between persons constitute serious infringements of the privacy of individuals. Strict measures were accordingly laid down to maintain the confidentiality of the post and private conversations, and these are reflected in s 14 of the Constitution, in terms of which every person has the right not to be subject to the violation of private communications.

Since the aforementioned measures to protect the confidentiality of communications sent by the post, by telegram or telephone, may hamper the investigation of crime, express provision was made for certain exceptions. Accordingly, a law enforcement officer may intercept communications in order to prevent serious bodily harm or to determine, in a case of emergency, the location of some person at a given time—see ss 7 and 8 of the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002.

3 Ascertainment of bodily features of persons

Section 1 of Act 6 of 2010 substituted the heading of chapter 3 of the Criminal Procedure Act from the previous 'Ascertainment of Bodily Features of the Accused' to the present 'Ascertainment of Bodily Features of Persons'. The current chapter 3 incorporates six sections, to wit:

(i) Section 36A (inserted by Act 6 of 2010), which provides definitions for purposes of the interpretation of Chapter 3. Many of the definitions were substituted or inserted by the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013, which came into operation on 31 January 2015.
(ii) Section 36B (inserted by Act 6 of 2010)—Powers in respect of fingerprints of accused and convicted persons.
(iii) Section 36C (inserted by Act 6 of 2010)—Fingerprints and body-prints for investigation purposes.
(iv) Section 36D (inserted by Act 37 of 2013)—Powers in respect of buccal samples, bodily samples and crime scene samples. Note that section 36D(1) was not, at the time of writing, operational and will commence at a future date.
(v) Section 36E (inserted by Act 37 of 2013)—Samples for investigation purposes.
(vi) Section 37 (amended by Act 6 of 2010)—Powers in respect of body-prints and bodily appearance of accused and convicted persons

Chapter 3 of the Criminal Procedure Act must be approached bearing in mind ss 10 and 12 (1) and (2) of the Constitution. Section 10 recognises the right to respect for and protection of the dignity of the individual. Section 12(1) protects the freedom and security of the person and proscribes degrading treatment of the individual. Section 12(2) protects the right to security in and control over one's body. Du Toit et al *Commentary on the Criminal Procedure Act* reiterate that Chapter 3 of the Criminal Procedure Act makes serious inroads upon an individual's constitutional rights to

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privacy, dignity and bodily integrity. The identification of suspects through ascertainment of bodily features must however be viewed as a legitimate limitation of rights when properly and lawfully conducted in the pursuance of the interest of justice. Naturally this does not

give the police *carte blanche* insofar as invading the bodily integrity of a suspect is concerned, but it does confer certain powers which, when executed lawfully, are essential tools within a due process system of criminal procedure. For instance, in *Huma* 1996 (1) SA 232 (W) the court held that the taking of fingerprints does not violate the accused's right to remain silent or his right to have his dignity respected and protected, and thus constitutes a lawful limitation of rights in the pursuit of justice. Conversely, in *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D) the court held that the then s 37(2)*(a)* did not authorise the removal of a bullet under general anaesthetic—cf *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C). Regardless of the merits of specific cases it is clear that the ascertainment of bodily features must occur within standards of decency and in a manner that does not subject any person to degrading or humiliating treatment—to accept otherwise would indicate a blatant disregard for the Bill of Rights and rule of law. Chapter 3 of the Criminal Procedure Act provides just such a framework of standards, or guidelines, through the operation of its various provisions which are discussed separately below.

3.1 Section 36A—Interpretation of Chapter 3

The definitions provided by s 36A apply only to the interpretation and application of Chapter 3—in all other cases the default position is provided by s 1 of the Criminal Procedure Act. Section 36A provides content to the proverbial 'who', 'what' and 'why' with regard to the ascertainment of bodily features of a person.

Section 36A*(b)* provides that 'authorised persons' for the purposes of chapter 3 include:

(i) with reference to photographic images, fingerprints or body-prints, any police official or a member of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act 1 of 2011, in the performance of his or her official duties; and

(ii) with reference to buccal samples, any police official or member of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act, who is not the crime scene examiner of the particular case, but has successfully undergone the training prescribed by the Minister of Health under the National Health Act, in respect of the taking of a buccal sample.

Importantly, buccal samples may only be collected by an authorised person of the same gender as the person from whom the sample is collected, which is in line with general standards of decency. Authorised persons may only take buccal or bodily samples with the consent of the person from whom they are required or under authority of section 36D or 36E, which are discussed below. Authorised persons may only collect samples in accordance with regulations made by the Minister of Police and in a designated area deemed suitable for such purposes. The designation of such areas falls to the departmental heads of the police, justice and constitutional development and/or correctional services.

Body prints in the confines of section 36A exclude fingerprints and refers to other prints (such as footprints) but exclude prints of genitalia, buttocks or breasts which

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logically cannot conclusively link a suspect to the commission of a crime (and which would infringe all standards of decency and constitutional protection if included in the definition of body prints).

A bodily sample refers to an intimate or buccal sample where buccal refers to cellular material collected from the inside of a person's mouth, and intimate sample refers to blood, pubic hair or a sample taken from the genitals or anal orifice of a person's body. The importance of the distinction between these three categories lies in the differences in procedure prescribed in order to collect them and, more importantly, the persons authorised to collect such samples. A crime scene sample refers to physical evidence retrieved from a

crime scene or associated place and may include physical evidence taken from the body of a person such as evidence taken from the nails or under the nails of a person.

DNA means deoxyribonucleic acid, which is a biochemical molecule found in the cells of the body, which makes each species unique. Forensic DNA analysis means the analysis of sections of the DNA of a bodily sample or crime scene sample to determine the forensic DNA profile: provided that this does not relate to any analysis pertaining to medical tests or for health purposes or mental characteristics of a person, or to determine any physical information of the person other than the sex of that person. Forensic DNA profile refers to the results obtained from forensic DNA analysis of bodily samples taken from a person or samples taken from a crime scene, providing a unique string of alpha numeric characters to provide identity reference: provided this does not contain any information on the health or medical condition or mental characteristic of a person or the predisposition or physical information of the person other than the sex of that person.

Comparative search means the comparing by the authorised officer of—

(i) fingerprints, body-prints or photographic images taken under any power conferred by this Chapter (Chapter 3 of the Criminal Procedure Act), against any database referred to in Chapter 5A of the South African Police Service Act; and

(ii) forensic DNA profiles derived from bodily samples taken under any power conferred by this Chapter, against forensic DNA profiles contained in the different indices of the NFDD referred to in Chapter 5B of the South African Police Service Act.

3.2 Section 36B—Powers in respect of fingerprints of accused and convicted persons

Section 36B(1) provides that a police official must take, or cause the fingerprints to be taken of any—

(a) person arrested upon any charge related to an offence referred to in Schedule 1;

(b) person released on bail if such person's fingerprints were not taken upon arrest;

(c) person upon whom a summons has been served in respect of any offence referred to in Schedule 1;

(d) person convicted by a court and sentenced to a term of imprisonment without the option of a fine, whether suspended or not, if the fingerprints were not taken upon arrest (note that s 36B(8) prescribes that this category includes all persons convicted of a crime, including those serving a sentence at the time of

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the commencement of the section and any person released on parole prior to the commencement of this section);

(e) person convicted by a court in respect of any offence which the minister has by notice in the *Gazette* declared to be an offence for the purposes of this subsection.

In addition, a police officer may (note the difference from 'must' in s 36B(1)) take or cause fingerprints to be taken from any person arrested on any charge or from a person deemed to have been convicted in respect of any offence under s 57(6).

All fingerprints taken for any of the purposes mentioned above must be stored on a fingerprint database established by the National Commissioner and may form the basis of a comparative search.

3.2.1 Storage of fingerprints

As mentioned above, all fingerprints are stored within a database established by the National Commissioner of Police; however, such storage is subject to the following requirements and limitations:

(i)

any fingerprints taken under any power conferred by s 36B must upon the conviction of an adult person be retained on a database referred to in Chapter 5A of the South African Police Service Act;

(ii) any fingerprints taken under any power conferred by s 36B must upon conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child, as provided for in section 87 of the Child Justice Act; and

(iii) any fingerprints taken under any power conferred by s 36B, in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceedings with reference to such fingerprints or body-prints were instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified.

Retained fingerprints may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution—s 36B(6)(B).

3.2.2 Re-taking of fingerprints

A police official may re-take the fingerprints of any person mentioned in 3.2 above if the fingerprints taken on a prior occasion do not constitute a complete set; fingerprints taken on a previous occasion are of insufficient quality to allow for analysis, comparison or matching, or where the previously taken fingerprints were lost, misfiled or not stored on the database.

3.2.3 Offences in terms of section 36B

Any person who, with regard to any fingerprints, body-prints or photographic images referred to in chapter 3—

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(i) uses or allows the use of those fingerprints, body-prints or photographic images for any purpose that is not related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution; or

(ii) tampers with or manipulates the process or the fingerprints, body-prints or images in question; or

(iii) falsely claims such fingerprints, body-prints or images to have been taken from a specific person whilst knowing them to have been taken from another person or source,

is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years (s 36B(6)*(d)*(i)-(iii)).

3.3 Section 36C—Fingerprints and body-prints for investigation purposes

Unlike s 36B, s 36C focuses on fingerprints and body-prints used for investigative purposes (ie of persons not yet accused or convicted). Section 36C authorises any police official without warrant to take or cause the fingerprints or body-prints to be taken of any individual or group of persons if he on reasonable grounds suspects that the person or one or more of the persons in the group have committed an offence referred to in Schedule 1; or where he believes that the prints will be of use in the inclusion or exclusion of suspects in the particular investigation. In line with the purpose of this section the prints so taken may be used for investigative and comparative search purposes.

As in the case of section 36B, the prints so taken may be stored within a database established by the National Commissioner of Police; however, such storage is subject to the following requirements and limitations:

(i) any fingerprints taken under any power conferred by s 36C must upon the conviction of an adult person be retained on a database referred to in Chapter 5A of the South African Police Service Act;

(ii) any fingerprints taken under any power conferred by s 36C must upon conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child, as provided for in section 87 of the Child Justice Act; and

(iii) any fingerprints taken under any power conferred by s 36C in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceeding with reference to such fingerprints or body-prints were instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified of such event as referred to in this paragraph.

All prints taken in terms of s 36C which are retained may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution.

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3.4 Section 36D—Powers in respect of buccal samples, bodily samples and crime scene samples

Section 36D(1) (which at the time of writing was not yet in operation) places a duty on authorised persons to take a buccal sample or to cause the taking of any other bodily sample (other than a buccal sample) by a registered medical practitioner or nurse defined in the National Health Act from any person—

(i) after arrest but before appearance in court to be formally charged for any offence referred to in Schedule 8;

(ii) released on bail in respect of any offence referred to in Schedule 8, if a buccal sample or a bodily sample of that person was not taken upon his or her arrest;

(iii) upon whom a summons has been served in respect of any offence referred to in Schedule 8;

(iv) whose name appears on the National Register for Sex Offenders; or

(v) charged or convicted by a court in respect of any offence which the minister has by notice in the *Gazette*, and after notification of Parliament, declared to be an offence for the purposes of this subsection.

Section 36D(2) provides that an authorised person may (note the change from the duty created by s 36D(1)) take a buccal sample or to cause the taking of any other bodily sample (other than a buccal sample) by a registered medical practitioner or nurse defined in the National Health Act from any person—

(i) after arrest but before appearance in court to be formally charged in respect of any offence;

(ii) released on bail in respect of any offence, if a buccal sample or bodily sample was not taken upon his or her arrest;

(iii) upon whom a summons has been served in respect of any offence;

(iv) whose name appears on the National Register for Sex Offenders; or

(v)

charged or convicted by a court in respect of any offence which the minister has by notice in the *Gazette*, and after notification of Parliament, declared to be an offence for the purposes of this subsection.

The persons identified in s 36D(1) and 36D(2) may request to take a buccal sample themselves, in which case the process must be supervised by the authorised person. The self-swabbing is restricted to buccal samples and does not extend to other bodily or intimate samples which can only be taken by a registered medical practitioner or nurse as defined within the National Health Act 61 of 2003, in accordance with strict regard to standards of decency.

Any bodily sample taken under this section must be furnished by the Station Commander to an authorised officer within 30 days who then carries out DNA analysis in terms of chapter 5B of the South African Police Services Act. Buccal samples and bodily samples may be re-taken if the original sample was not suitable or insufficient for the purposes of DNA analysis. The forensic DNA profile derived from samples in terms of this section may be used to conduct a comparative search.

3.5 Section 36E—Samples for investigation purposes

An authorised person may take a buccal sample of a person or a group of persons, or supervise the taking of a buccal sample from a person who is required to submit

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such sample and who requests to do so himself or herself if there are reasonable grounds to—

(i) suspect that the person or that one or more of the persons in that group has committed an offence referred to in Schedule 8; and
(ii) believe that the buccal sample, or the results of the forensic DNA analysis thereof, will be of value in the investigation by excluding or including one or more of those persons as possible perpetrators of the offence.

If a person does not consent to the taking of a buccal sample under this section, a warrant may be issued by a judge or a magistrate if it appears from written information given by the authorised person on oath or affirmation that there are reasonable grounds for believing that—

(i) any person from whom a buccal sample is required has committed an offence listed in Schedule 8; and
(ii) the sample, or the results of an examination thereof, will be of value in the investigation by excluding or including that person as a possible perpetrator of the offence.

3.6 Section 37—Powers in respect of body-prints and bodily appearance of accused and convicted persons

Section 37 of the Criminal Procedure Act regulates the obtaining of data through the following means: finger-, palm- and foot-printing; conducting identity parades; ascertaining of bodily features; taking of blood samples; and taking of photographs.

Note that only suspects or accused persons or convicted persons may be finger-, palm- or foot-printed. Only medical or nursing staff may take blood samples. See also s 335B, which provides that, in certain circumstances, a medical examination may be conducted on a minor even without the permission of his parents or guardian.

The Criminal Law (Forensic Procedures) Amendment Act 6 of 2010 regulates the taking, usage, storing, retention and destruction of *fingerprints*, *body-prints* and *photographic images* and the keeping of databases, and authorises *comparative searches* against other

databases and security measures relating to the integrity of information stored on the databases.

A person's handwriting is the creation of a learned ability and cannot be described as a bodily feature or characteristic—*Fraser* [2005] 2 All SA 209 (N).

In terms of common-law principles, a person may be subjected to a 'voice identification parade'. The administering of a so-called 'truth serum', however, is impermissible. The courts have laid down extensive guidelines for the conduct of identity parades. (The evidentiary aspects relating to the matters discussed here are dealt with in textbooks on the law of evidence.)

Finally, s 37 provides for the destruction of data if a person is acquitted or criminal proceedings are not continued.

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Chapter 9
Search and seizure

M Basdeo, T Geldenhuys, MG Karels

1 Introduction
2 Articles that are susceptible to seizure
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The Constitution and this chapter:

Section 12—Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right—

. . .

(e) not to be treated in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

. . .

(b) to security in and control over their body; . . .

See 1, below

Section 14—Privacy

Everyone has the right to privacy, which includes the right not to have—

(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; . . .

See 1, below

Section 35(5)—Exclusionary rule

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

See 1, below

The Child Justice Act 75 of 2008 and this chapter:

Section 1—Definitions

'child' means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2);

See 3.1, below

National Instruction 2 of 2010: Children in Conflict with the Law

3—Treatment of Children

3(2) Treatment of a child suspected of having committed an offence

(a) During the first contact with a child suspected of having committed an offence, the member must, if circumstances permit, introduce himself or herself to the child and, if a parent, guardian or an appropriate adult is present, to such person.
(b) The member must explain to the child that he or she is being suspected of having committed the offence. The member must explain this to the child in a language that he or she understands, preferably in the mother tongue of the child, using plain and simple vocabulary to assist the child to have a better understanding of the child justice system and the procedure that will be followed in his or her case. The child must understand that this is a very serious matter.
(c) The member must realise that the child may be overwhelmed and scared in the presence of the Police and must therefore patiently explain the nature of the offence and the procedure that will be followed in his or her case. The member must give enough detail about the matters and allow sufficient time so that the child can absorb the information. The member must encourage the child to ask questions and respond to the questions and satisfy himself or herself that the child understands the information and explanation given. The member may elicit responses from the child by asking questions in order to ensure that he or she understands the information.
(d)

A member must not humiliate or intimidate a child and must at all times treat and communicate with the child in a manner which is appropriate to the age, maturity and stage of development of the child. The younger the child, the more patient and understanding the member must be while communicating with the child. The level of schooling of the child and the child's ability to read and write are also relevant when considering what would be an appropriate manner in which to treat and communicate with the child.

(e) The member must take steps to protect the privacy and dignity of the child and must ensure that discussions with the child and his or her parent or guardian or an appropriate adult (whether at the police station or at the crime scene) take place in private, out of sight and hearing of other persons.

(f) A member who explains to a child and his or her parent, guardian or an appropriate adult, the contents of a notice or procedure must take into account the background of the child, the parent, guardian or appropriate adult and the fact that they may not be conversant with the functioning of the courts and court procedures. The member must explain the contents of the notice or procedure in simple, understandable language and give sufficient details to the child and parent, guardian or appropriate adult. The member must also encourage the child, parent, guardian or appropriate adult to ask questions without interrupting him or her.

See 3, below

1 Introduction

At first glance the searching of persons and premises, seizure and related matters seem to go against the spirit and content of ss 12 and 14 of the Constitution, quoted above. The right to security and privacy flows from the value placed on human

dignity by s 10 of the Constitution (see *Minister of Police v Kunjana* [2016] ZACC 21). Privacy is however not an absolute right (see *Bernstein v Bester* 1996 (2) SA 751 (CC)). Consequently, in terms of s 36 of the Constitution, these rights may be limited by reasonable and justifiable limitations imposed by law of general application. (Section 36 is included in the appendices at the end of this book.) Search, seizure, etc are regulated by chapter 2 (s 19 *et seq*) of the Criminal Procedure Act 51 of 1977.

The Criminal Procedure Act embodies the general provisions with regard to searching; specific provisions are contained in many other Acts. It is impossible to refer to all these Acts. Section 19 of the Criminal Procedure Act states explicitly that chapter 2 of the Act shall not derogate from any power conferred by any other Act to enter any premises or to search any person, container or premises or to seize any matter, to declare any matter forfeited or to dispose of any matter.

2 Articles that are susceptible to seizure

The Criminal Procedure Act confers powers to search only where the object of the search is to find a certain person or to seize an article which falls into one of three classes of articles, including documents, which may be seized by the state in terms of the provisions of the Criminal Procedure Act. These are—

(1) articles which are concerned in or are on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere—s 20*(a)*;

(2) articles which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere—s 20*(b)*; or

(3) articles which are intended to be used or are on reasonable grounds believed to be intended to be used in the commission of an offence—s 20*(c)*.

Under normal circumstances an article or document falling into one of the abovementioned categories may be seized by the state. The only exceptions relate to documents which are privileged and in respect of which the holder of the privilege has not yet relinquished his privilege. An example of this would be where the document consists of a communication between an attorney and his or her client. Such a document is subject to legal professional privilege and may not be handed in to the court without the consent of the client. If the state had the power to seize such a document the whole object of the privilege would be defeated. In *Prinsloo v Newman* 1975 (1) SA 481 (A) at 493F-G and *SASOL III (Edms) Bpk v Minister van Wet en Orde* 1991 (3) SA 766 (T) it was accordingly held that such a document may not be seized.

ß Search in terms of a search warrant

3.1 General rule

Searches and seizures should, whenever possible, be conducted only in terms of a search warrant, issued by a judicial officer such as a magistrate or judge—cf the wording of s 21(1). This will ensure that an independent judicial officer stands between the citizen and the law enforcement official (police official)—*Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) at 172. For this reason the provisions governing the issue of search warrants require that the

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judicial officer must himself decide whether or not there are 'reasonable grounds' for the search.

3.2 The discretion of a judicial officer to issue a warrant

In deciding whether there are reasonable grounds for the search, the judicial officer exercises a discretion similar to the discretion he or she exercises in granting bail, remanding a case or sentencing an accused, and so forth. This discretion must be exercised in a judicial manner. This simply means that he must exercise the discretion in a reasonable and regular manner, in accordance with the law and while taking all relevant facts into account—*Ismael v Durban City Council* 1973 (2) SA 362 (N). Before issuing a search warrant he must therefore decide whether the article that will be searched for is one which may be seized in terms of s 20 and whether it appears from the affidavit that there are reasonable grounds to believe that the article is present at a particular place. As far as the concept of 'reasonable grounds' is concerned, see the discussion of the requirement of reasonableness in Chapter 6.

Government action is required to be objectively and demonstrably reasonable. This laudable principle was unfortunately undermined by the decision in *Divisional Commissioner of SA Police, Witwatersrand Area v SA Associated Newspapers* 1966 (2) SA 503 (A), where it was held that the merits of the decision by a justice of the peace, that there are objective grounds upon which a warrant may be issued, may not be contested in court (contrary to where a search without a warrant is conducted by the police). The decision to issue a search warrant may, in terms of this decision, be set aside only on administrative grounds (such as *mala fides* on the part of the judicial officer) and not on the merits. This decision was quoted with approval in *Cresto Machines v Die Afdeling-Speuroffisier SA Polisie, Noord-Transvaal* 1972 (1) SA 376 (A) 396; cf further *Cine Films (Pty) Ltd v Commissioner of Police* 1971 (4) SA 574 (W) 581.

3.3 General search warrants

The procedure with regard to search warrants is governed by s 21. Subsection (1) provides that, subject to ss 22, 24 and 25 (see below), an article referred to in s 20 shall be seized only by virtue of a search warrant issued by—

(1) a magistrate or justice of the peace, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of any person, or upon or at any premises within his area of jurisdiction; or
(2) a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person, or upon or at any premises, is required in evidence at such proceedings.

Section 21(2) stipulates that a warrant must direct a police official to seize the article in question and must to that end authorise such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises. See also *Extra Dimension v Kruger NO* 2004 (2) SACR 493 (T).

It is an important principle of the law of criminal procedure that a warrant should be strictly interpreted to protect the individual against excessive interference

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by the state—*National Union of South African Students v Divisional Commissioner, South African Police* 1971 (2) SA 553 (C) and *Pogrund* 1974 (1) SA 244 (T).

Even though s 21 does not require that the suspected offence be set out in the warrant, it is desirable to do so in order to facilitate the interpretation of the warrant—cf *Cine Films v Commissioner of Police* (above).

The warrant must clearly define the purpose of the search and the articles that must be seized. A court will find that the judicial officer did not apply his mind properly to the question whether there had been sufficient reason to interfere with the liberty of the individual if the search warrant only specifies the articles that are supposed to be seized in broad and general terms—*Smith, Tabata & Van Heerden v Minister of Law and Order* 1989 (3) SA 627 (E). The defect is not cured by an instruction that such a police official must search for documents which 'may' afford evidence of the commission of the crime—cf *Minister of Justice v Desai* 1948 (3) SA 395 (A).

The powers conferred by s 21 constitute grave infringements on the privacy of the individual. To limit this infringement, s 21(3)*(a)* provides that a search warrant must be executed (ie acted upon) by day, unless the judicial officer who issues it gives written authorisation for it to be executed by night.

A warrant may be issued and be executed on a Sunday, as on any other day, and remains in force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority—s 21(3)*(b)*.

3.4 Warrants to maintain internal security and law and order

3.4.1 Background

In *Wolpe v Officer Commanding South African Police, Johannesburg* 1955 (2) SA 87 (W) members of the police entered a hall in which a conference was being held by the 'South African Congress of Democrats' in co-operation with other organisations. The chairman requested the police to leave the meeting and explained that it was a private meeting. The police refused to do so. Members of the Congress of Democrats thereupon brought an urgent application to the court for an interdict prohibiting the police from attending the meeting. They argued that the police do not have greater powers than any other individual, except in so far as they are vested with wider powers by statute. The application was refused. Rumpff J held that the basic duties of the police are not confined to those mentioned in statutes. The basic duties of the police flow from the nature of the police as a civil force in the state. According to him it was not the intention of the legislature by s 7 of the (previous) Police Act

to revoke the basic duties of the police and to supplant them with statutory duties. The judge dealt fully with the duties of the police and came to the conclusion that if there were a suspicion that as a result of the holding of a meeting, a disturbance of public order would occur on the same day, the police are entitled to attend the meeting in order to prevent a disturbance of order, even though the meeting was private. If the police had reasonable grounds for suspecting that seditious speeches would be made at such meeting, and that their presence would prevent them from being made, it would be a reasonable exercise of their duty for the police to attend the meeting, notwithstanding the fact that there would be no immediate disturbance of the peace. According to Rumpff J the liberty of the individual must in such circumstances give way to the interests of the state. He suggested, however, that the legislature should define the duties and powers of the

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police in connection with the combating of what the state from time to time considered to be dangerous.

This eventually led to the inclusion of s 25 in the current Criminal Procedure Act.

3.4.2 Warrant in terms of s 25

Section 25(1) stipulates that if it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing—

(a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises within his area of jurisdiction; or

(b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction,

he may issue a warrant authorising a police official to enter the premises in question at any reasonable time for the purpose—

(i) of carrying out such investigations and of taking such steps as such police official may consider necessary for the preservation of the internal security of the Republic or for the maintenance of law and order or for the prevention of any offence;

(ii) of searching the premises or any person in or upon the premises for any article referred to in s 20 and which such police official on reasonable grounds suspects to be in or upon or at the premises or in the possession or under the control of such person; and

(iii) of seizing any such article.

A warrant under sub-s (1) may be issued on any day and shall remain in force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority—sub-s (2).

A warrant issued in terms of s 25(1) confers wide powers on the police. The fact that a police official who acts in terms thereof may take any steps that he 'consider[s] necessary' for the preservation of the internal security of the Republic or for the maintenance of law and order or for the prevention of any offence means that the police official's discretion in this respect will have to be considered *subjectively*. The question will therefore not be whether the steps he took were *really* necessary, but whether he subjectively thought that he had reason to believe that they were necessary.

3.5 General information requirements with regard to warrants

When law enforcement officials act in terms of a warrant, it is desirable that the subject involved has access to the document which authorises an infringement upon his private rights. The effective execution of legal remedies, such as an interdict, or even the institution of the *rei vindicatio*, is to a large extent dependent thereon. Section 21(4) therefore

stipulates that a police official who executes a warrant in terms of ss 21 or 25 must, once the warrant has been executed and upon the request of any person whose rights are affected by the search or seizure of an object in terms of the warrant, provide such a person with a copy of the warrant. We are of the opinion that two objections may be raised against this subsection

which is laudable in other respects. In the first place a copy of the warrant should, whenever possible (ie if the subject is present at the time of the execution of the warrant), be provided *before* the search and/or seizure. Secondly, the delivery of a copy of the warrant should not be dependent on the *request* of the subject. Many subjects, through lack of knowledge of the law, will not make such a request and thus act to their potential detriment.

4 Search without a warrant

4.1 Introduction

Although it is preferable, as mentioned above, that searches should only be conducted on the authority of a search warrant issued by a judicial officer, it is quite conceivable that circumstances may arise where the delay in obtaining such warrant would defeat the object of the search. It is therefore necessary that provision be made for the power to conduct a search without a warrant.

While search warrants empower only police officials to conduct searches and to seize objects, both private persons and police officials are empowered to conduct searches or to seize objects without a warrant.

4.2 Powers of the police

4.2.1 Consent to search and/or to seize

In terms of s 22*(a)* a police official may search any person, container or premises for the purpose of seizing any article referred to in s 20, if the person concerned *consents* to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises *consents* to such search and the seizure of the article in question.

4.2.2 Search and seizure where a delay would defeat the object thereof

In terms of s 22*(a)* a police official may search any person, container or premises for the purpose of seizing any article referred to in s 20, if the police official believes on reasonable grounds that—

(1) a search warrant will be issued to him under s 21(1)*(a)* if he applies for such warrant; and
(2) the delay in obtaining such warrant would defeat the object of the search.

The belief of the police official must be objectively justified on the facts—*Mayekiso* 1996 (2) SACR 298 (C).

Section 25(3) allows a police official to act without a warrant if he believes on reasonable grounds that—

(1) a warrant will be issued to him under s 25(1)*(a)* or *(b)* if he applies for such warrant; and
(2) the delay in obtaining such warrant would defeat the object thereof.

A police official's powers in terms of s 25(3) are the same as the powers he would have had by virtue of a warrant (cf (i) to (iii) above and *Boshoff* 1981 (1) SA 393 (T)).

4.2.3 Search and seizure for the purposes of border control

Section 13(6) of the South African Police Service Act 68 of 1995 empowers a police official, for the purposes of border control or to control the import or export of any

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goods, to search without a warrant any person, premises, other place, vehicle, vessel, ship, aircraft or any receptacle of whatever nature, at any place in the Republic within ten kilometres or any reasonable distance from any border between the Republic and any foreign state, or from any airport or at any place in the territorial waters of the Republic or inside the Republic within ten kilometres from such territorial waters, and to seize anything found upon such person or upon or at or in such premises, other place, vehicle, vessel, ship, aircraft or receptacle which may lawfully be seized.

4.2.4 Search and seizure in a cordoned-off area

The National or a Provincial Commissioner of the South African Police Service may, in terms of s 13(7) of the South African Police Service Act 68 of 1995, where it is reasonable in the circumstances in order to restore public order or to ensure the safety of the public in a particular area, authorise that the particular area or any part thereof be cordoned off. This is done by issuing a written authorisation which must also set out the purpose of the cordoning off. Any member of the Service may, in order to achieve the purpose set out in the authorisation, without a warrant, search any person, premises, vehicle or any receptacle or object of whatever nature in that area and seize any article referred to in s 20 of the Criminal Procedure Act found by him or her upon such person or in that area: provided that a member executing a search in terms of s 13(7) must, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation by such commissioner.

4.2.5 Search and seizure at a roadblock or checkpoint

The National or a Provincial Commissioner of the South African Police Service may, in terms of s 13(8) of the South African Police Service Act 68 of 1995, where it is reasonable in the circumstances in order to exercise a power or perform a function of the Service, in writing authorise a member under his or her command to set up a roadblock or roadblocks on any public road in a particular area or to set up a checkpoint or checkpoints at any public place in a particular area. Any member of the Service may, without a warrant, search any vehicle and any person in or on such vehicle at such a roadblock or checkpoint and seize any article referred to in s 20 of the Criminal Procedure Act found by him or her upon such person or in or on such vehicle. A member executing a search in terms of s 13(8) must, upon demand by any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation by such commissioner.

Section 13(8)*(d)* authorises any member of the Service to set up a roadblock on a public road without a written authorisation in certain specified circumstances where the delay in obtaining a written authorisation would defeat the object of the setting up of the roadblock.

4.2.6 Search and seizure in terms of the Drugs and Drug Trafficking Act 140 of 1992

Search for and seizure of substances in terms of the Drug and Drug Trafficking Act was, until recently, controlled by s 11 of the Act. Prior to the declaration of constitutional invalidity in *Minister of Police v Kunjana* [2016] ZACC 21, s 11(1) of the Act read as follows:

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(1) A police official may—
(a) if he has reasonable grounds to suspect that an offence under this Act has been or is about to be committed by means or in respect of any scheduled substance, drug or property, at any time—

(i) enter or board and search any premises, vehicle, vessel or aircraft on or in which any such substance, drug or property is suspected to be found;
(ii) search any container or other thing in which any such substance, drug or property is suspected to be found;

(b) if he has reasonable grounds to suspect that any person has committed or is about to commit an offence under this Act by means or in respect of any scheduled substance, drug or property, search or cause to be searched any such person or anything in his possession or custody or under his control: Provided that a woman shall be searched by a woman only;

(c) if he has reasonable grounds to suspect that any article which has been or is being transmitted through the post contains any scheduled substance, drug or property by means or in respect of which an offence under this Act has been committed, notwithstanding anything to the contrary in any law contained, intercept or cause to be intercepted either during transit or otherwise any such article, and open and examine it in the presence of any suitable person;

(d) question any person who in his opinion may be capable of furnishing any information as to any offence or alleged offence under this Act;

(e) subject to section 15 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, require from any person who has in his or her possession or custody or under his or her control any register, record or other document which in the opinion of the police official may have a bearing on any offence or alleged offence under this Act, to deliver to him or her then and there, or to submit to him or her at such time and place as may be determined by the police official, any such register, record or document;

(f) examine any such register, record or document or make an extract therefrom or a copy thereof, and require from any person an explanation of an entry in any such register, record or document;

(g) seize anything which in his opinion is connected with, or may provide proof of, a contravention of a provision of this Act.

The constitutional validity of the entire s 11 was challenged by the applicant in *Kunjana v Minister of Police* [2015] ZAWCHC 198 (High Court judgment). On consideration the High Court, per Veldhuizen J, concluded that the application directed at the entire s 11 was too broad and restricted the relief to s 11(1)*(a)* and *(g)*. The High Court declared the provisions invalid and the matter was placed before the Constitutional Court for confirmation of the order of invalidity (*Minister of Police v Kunjana* [2016] ZACC 21). The Constitutional Court applied the limitation clause to s 11(1)*(a)* and *(g)*. On consideration of the nature and extent of the limitation the court remarked:

> The impugned provisions are broad. Section 11(1)*(a)* and *(g)* of the Drugs Act does not circumscribe the time, place nor manner in which the searches and seizures can be

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> conducted . . . (para [21]) Further, section 11(1)*(a)* grants police officers the power to search warrantless at 'any time' 'any premises, vehicle, vessel or aircraft' and 'any container' in which substances or drugs are suspected to be found (para [22]) I agree with the applicants' contention that the impugned provisions leave police officials without sufficient guidelines with which to conduct the inspection within legal limits (para [23]).

The court contended that constitutionally adequate safeguards must exist to justify circumstances in which legislation allows for warrantless searches. These safeguards are clearly provided s 22 of the Criminal Procedure Act, which provides less restrictive means to restrict the right to privacy during search and seizure procedures. The Constitutional Court accordingly confirmed the constitutional invalidity of ss 11(1)*(a)* and *(g)*.

Warrantless search and seizure should not be a norm of criminal procedure, which is confirmed by the various court interventions in, for example, the Customs and Excise Act 91

of 1964, Estate Agency Affairs Act 112 of 1976 and Financial Intelligence Centre Act 38 of 2001, wherein the validity of warrantless search and seizure provisions were challenged (see also *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* 2014 (3) SA 106 (CC) and *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC)). Search and seizure under the provisions of warrant should form the basis of any such action because—

> A warrant is not a mere formality. It is a mechanism employed to balance an individual's right to privacy with the public interest in compliance with and enforcement of regulatory provisions. A warrant guarantees that the State must be able, prior to an intrusion, to justify and support intrusions upon individuals' privacy under oath before a judicial officer. Further, it governs the time, place and scope of the search. This softens the intrusion on the right to privacy, guides the conduct of the inspection, and informs the individual of the legality and limits of the search. Our history provides evidence of the need to adhere strictly to the warrant requirement unless there are clear and justifiable reasons for deviation (*Gaertner* at [69]).

The above notwithstanding, there are instances where warrantless search and seizure is clearly indicated, but they must be conducted under the prescriptions of s 22 of the Criminal Procedure Act where there is a need for swift action.

4.3 Powers of the occupiers of premises

In terms of s 24 of the Criminal Procedure Act any person who is lawfully in charge or occupation of any premises and who reasonably suspects that—

(1) stolen stock or produce, as defined in any law relating to the theft of stock or produce, is on or in the premises concerned, or that

(2) any article has been placed thereon or therein or is in the custody or possession of any person upon or in such premises in contravention of any law relating to—

(a) intoxicating liquor,

(b) dependence-producing drugs,

(c) arms and ammunition, or

(d) explosives,

may at any time, if a police official is not readily available, enter such premises for the purpose of searching such premises and any person thereon or therein, and if any such stock, produce or article is found, he shall take possession thereof and forthwith deliver it to a police official.

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4.4 Search for the purpose of effecting an arrest

In the event of a search of premises in order to find and arrest a suspect, exactly the same powers are conferred on police officials and private persons.

In terms of s 48, a peace officer or private person who is authorised by law to arrest another in respect of any offence and who knows or reasonably suspects such other person to be on any premises may, if he first audibly demands entry into such premises and states the purpose for which he seeks entry and fails to gain entry, break open and enter and search such premises for the purpose of effecting the arrest.

A number of court decisions on the forerunner of s 48 still apply to s 48. These include the following: In *Jackelson* 1926 TPD 685 it was held that persons who had ejected a police official who had entered premises without first demanding and being refused admission could not be convicted of obstructing such police official in the execution of his duty. In *Rudolf* 1950 (2) SA 522 (C) a police official had seen a man drinking wine in a public place and wished to arrest him. The man ran into a house pursued by the constable and was arrested at the foot of the stairs. The two accused attempted to rescue the wine-drinker from the custody of the police official. It was contended, inter alia, that the wine-drinker had not been in 'lawful custody' because the police official had made an unlawful entry when he entered the premises without first demanding admission in terms of the predecessor to the

present s 48. The court held, however, that the constable had been justified, in the circumstances of the case, in entering the house to arrest the wine-drinker and consequently the arrest was a lawful one. The court distinguished *Jackelson* mainly on the ground that the accused in *Jackelson* had ejected the constable before he had effected an arrest, while in *Rudolf* the arrest had been effected when the accused attempted to rescue the wine-drinker—cf also *Andresen v Minister of Justice* 1954 (2) SA 473 (W).

4.5 Review of the actions of the person conducting the search

In cases where action is taken without a warrant, the actions of the person conducting the search may be reviewed by a court of law on the merits—cf eg *LSD Ltd v Vachell* 1918 WLD 127.

5 Search of an arrested person

This matter is governed by s 23. That section provides that on the arrest of any person, the person making the arrest may, provided that he is a peace officer, search the person arrested and seize any article referred to in s 20 which is in the possession or under the control of the arrested person.

If the person making the arrest is not a peace officer he has no power to search the arrested person. He does, however, have the power to seize an article referred to in s 20 which is in the possession or under the control of the arrested person. Such a private person must forthwith hand the seized article to a police official. (This also applies to a peace officer who is not a police official).

On the arrest of any person, the person effecting the arrest may place in safe custody any object found on the arrested person which may be used to cause bodily harm to himself or others—s 23(2).

6 The use of force in order to conduct a search

The use of force is regulated by s 27 as far as this chapter is concerned.

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In terms of s 27(1), a police official who may lawfully search any person or any premises may use such force as may be reasonably necessary to overcome any resistance against such search or against entry of the premises, including the breaking of any door or window of such premises.

In terms of a proviso to this subsection, such a police official shall first audibly demand admission to the premises and state the purpose for which he seeks to enter such premises. This proviso does not apply where the police official concerned is, on reasonable grounds, of the opinion that any article which is the subject of the search may be destroyed or disposed of if the proviso is first complied with—s 27(2). The latter is known as the ‘no-knock clause’ and is particularly helpful to the police where the search will be for small objects which may easily be swallowed or flushed down a toilet.

7 General requirement of propriety with regard to searching

Section 29 stipulates that a search of any person or premises shall be conducted with strict regard to decency and order, and a woman shall be searched by a woman only, and if no female police official is available, the search shall be made by any woman designated for the purpose by a police official.

In order to comply with the requirement of propriety in terms of s 29, it can certainly be assumed, in terms of the general principles of the interpretation of statutes, that a male person should be searched by a male only. We suggest that any divergence from these

provisions would be unlawful and that 'consent' by the person being searched by the opposite sex would be invalid as it would be *contra bonos mores*.

8 Unlawful search

The provisions of the law of criminal procedure which regulate searching are 'double-functional': From a substantive law viewpoint they constitute grounds of justification, while in formal law they regulate the procedural steps whereby an eventual legal decision may validly be reached. In the latter case the principle of legality (cf Chapter 1) and the concept of 'legal guilt' are of paramount importance in that, unless a 'factually guilty' person can be brought to justice within the bounds of the provisions of the law of criminal procedure (ie in strict compliance with the prescribed rules and limitations), he must, according to law, go free—see Chapter 1.

The question now arises as to what the effect is of unlawful action by the authorities with regard to these pre-trial procedural rules. As these provisions are double-functional, it is necessary to differentiate between the substantive and formal law consequences:

8.1 Formal-law consequences of unlawful action by the authorities

In terms of s 35(5) of the Constitution, evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

This so-called 'exclusionary rule' gives a clear signal to all state officials that it is futile to gather evidence in an unlawful manner, since evidence so obtained will

not be taken into account by the court in reaching a verdict. (See *Motloutsi* 1996 (1) SA 584 (C) and *Mayekiso* 1996 (2) SACR 298 (C).)

The exclusionary rule is discussed in more detail in handbooks dealing with the law of evidence and was briefly dealt with in Chapter 1.

8.2 Substantive-law consequences of unlawful action by the authorities

This aspect is governed partly by s 28. In terms of sub-s (1) a police official commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding six months—

(1) when he acts contrary to the authority of a search warrant issued under s 21 or a warrant issued under s 25(1); or

(2) when he, without being authorised thereto,

(a) searches any person or container or premises or seizes or detains any article; or

(b) performs any act contemplated in s 25(1).

Subsection (2) stipulates that where any person falsely gives information on oath for the purposes of ss 21(1) or 25(1) and a warrant is issued and executed on such information, and such person is in consequence of such false information convicted of perjury, the court convicting such person may, upon the application of any person who has suffered any damage in consequence of the unlawful entry, search or seizure, or upon the application of the prosecutor acting on the instructions of such a person, award compensation in respect of such damage, whereupon the provisions of s 300 shall *mutatis mutandis* apply with reference to such award. (Section 300 is fully dealt with in Chapter 19.)

Even a *police official* who is held criminally liable in terms of s 28(1) is also subject to such an order for compensation.

9 Disposal and forfeiture of seized articles

Sections 30 to 36 of the Criminal Procedure Act provide in detail for the disposal and forfeiture of seized articles.

A police official who seizes any article referred to in s 20, or to whom any such article is delivered in accordance with the provisions of the Criminal Procedure Act, has various powers relating to the disposal thereof. Normally such an article will be kept in police custody and, if required for criminal proceedings, will be handed to the clerk of the magistrate's court or registrar of the High Court for safe custody.

At the conclusion of the criminal proceedings the presiding judicial officer must make an appropriate order in respect of the disposal of the article (cf s 34(1))—eg that it should be returned to the person entitled thereto, or that it be forfeited to the state.

If no criminal proceedings are instituted in connection with a seized article, or if it appears that such an article is not required for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized (if he may lawfully possess it) or, if he may not lawfully possess it, shall be returned to the person who may lawfully possess it—s 31(1)*(a)*. If no person may lawfully possess the article or if the police do not know of any person who may lawfully possess it, the article is forfeited to the state—s 31(1)*(b)*. A person who may lawfully possess the article must be notified that he may take possession of the

article and if he fails to take delivery thereof within thirty days, it shall be forfeited to the state—s 31(2).

If the owner of a stolen object which has been seized fails to lay claim to it after he has been informed of its recovery, he has to be considered to have abandoned his rights of ownership. The object is therefore no longer regarded as stolen property and may then be restored to the person from whom it was forfeited, if he bought it from another. The former person is then considered as 'the person who may lawfully possess it'—*Mdunge v Minister of Police* 1988 (2) SA 809 (N); *Datnis Motors (Midlands) (Pty) Ltd v Minister of Law and Order* 1988 (1) SA 503 (N).

After the conviction of an accused, the court has, in terms of s 35(1) and in certain circumstances, the power to forfeit to the state certain objects which were used in the commission of the particular crime. Section 36 deals with the circumstances under which, and the manner in which, articles may be delivered to the police of another country.

There are also various other laws that make provision for search, seizure and the forfeiture of articles, eg s 29(5) of the National Prosecuting Authority Act 32 of 1998 (cf *Thint (Pty) Ltd v National Director of Prosecutions; Zuma v National Director of Public Prosecutions* 2008 (2) SACR 421 (CC)) and the Prevention of Organised Crime Act 121 of 1998, which provides for confiscation, preservation and forfeiture orders:

A *confiscation order* (s 18) consists therein that a court, convicting an accused of an offence, may, on the application of the public prosecutor, enquire into any benefit which the accused may have derived from that offence (or any other offence of which the accused has been convicted at the same trial or any criminal activity sufficiently related to those offences) and may, in addition to any punishment which it may impose in respect of that offence, make an order against the accused for the payment to the state of any amount it considers appropriate.

A *preservation order* (s 38) prohibits a person from dealing in any manner with any property which is an instrumentality of an offence—ie any property concerned in the commission or suspected commission of an offence. Property only qualifies as an instrumentality if it is used to commit the offence and its use must be such that it plays a real and substantial part in the actual commission of the offence. The fact that a crime is

committed at a certain place does not by itself make that place an instrumentality of the offence—*Singh v National Director of Public Prosecutions* 2007 (2) SACR 326 (SCA).

A *forfeiture order* (s 48) is an order forfeiting to the state all or any of the property subject to a preservation of property order and is applied for by the National Director of Public Prosecutions. An order of forfeiture may be made only if the deprivation in a particular case is proportionate to the ends at which the legislation is aimed, and distinctions between different classes of offence will feature heavily in that part of the enquiry. Although an order of forfeiture operates as both a penalty and a deterrent, its primary purpose is remedial. Forfeiture is likely to have its greatest remedial effect where crime has become a business. The Supreme Court of Appeal, accordingly, did not consider a motor vehicle driven whilst under the influence of alcohol 'an instrumentality of an offence' as contemplated under the Prevention of Organised Crime Act 121 of 1998—*National Director of Public Prosecutions v Vermaak* [2008] 1 All SA 448 (SCA). See also *Shaik* 2008 (1) SACR 1 (CC).

Restitution should be distinguished from forfeiture. Restitution is dealt with in Chapter 19.

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Chapter 10
Bail and other forms of release

SE van der Merwe

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The Constitution and this chapter:

Section 35(1)*(f)*

(This section is quoted in full in 1.2 below)

The Child Justice Act 75 of 2008 and this chapter:

Section 25—Release of child on bail

(1) Chapter 9 of the Criminal Procedure Act applies to an application for the release of a child on bail, except for section 59 and section 59A, to the extent set out in section 21 (2) *(b)*.

(2) An application for the release of a child, referred to in section 21 (3) *(c)*, on bail, must be considered in the following three stages:

(a) Whether the interests of justice permit the release of the child on bail; and

(b) if so, a separate inquiry must be held into the ability of the child and his or her parent, an appropriate adult or guardian to pay the amount of money being considered or any other appropriate amount; and

(c) if after an inquiry referred to in paragraph *(b)*, it is found that the child and his or her parent, an appropriate adult or guardian are—

(i) unable to pay any amount of money, the presiding officer must set appropriate conditions that do not include an amount of money for the release of the child on bail; or

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(ii) able to pay an amount of money, the presiding officer must set conditions for the release of the child on bail and an amount which is appropriate in the circumstances.

See 1.4 and 3.2 below

See also 10.1 below

1 Introduction

1.1 The effect of bail

When bail is granted, an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail—s 58. He must then appear at the place and on the date and at the time appointed for his trial, or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned—s 58. His release shall, unless sooner terminated under certain circumstances, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after conviction and the court in question extends bail, until sentence is imposed—s 58. However, s 58 contains a proviso to the effect that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering whether the accused's bail should be extended pending imposition of sentence, apply the provisions of s 60(11)*(a)* or s 60(11)*(b)*, as the case may be, and the court shall take into account *(a)* the fact that the accused has been convicted of an offence referred to in Schedule 5 or 6, and *(b)* the likely sentence which the court might impose. The provisions of s 60(11)*(a)* and s 60(11)*(b)* are discussed in paras 9.7, 9.8 and 9.9 below.

An accused's failure to appear in court or to comply with any of the other conditions of his bail may ultimately result in cancellation of bail, forfeiture of bail money to the state and the re-arrest of the accused. Failure to appear in court or to comply with a specific condition of bail is also a criminal offence punishable by a fine or imprisonment not exceeding one year—s 67A. See further para 8.6 below.

1.2 The constitutional right to bail and the need for and nature of bail as a method of securing liberty pending the outcome of a trial

The need for a 'mechanism' such as bail must be understood in the light of the following:

(1) Everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions—s 35(1)*(f)* of the Constitution. In the Constitutional Court case *Dlamini*; *Dladla and Others*; *Joubert*; *Schietekat* 1999 (2) SACR 51 (CC)—hereafter cited as '*Dlamini etc*'—the following observation was made in para [6] of the judgment:

> [Section] 35(1)*(f)* postulates a judicial evaluation of different factors that make up the criterion of interests of justice, and . . . the basic objective traditionally ascribed to the institution of bail, namely to maximise personal liberty, fits snugly into the normative system of the Bill of Rights.

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(2) An accused is, in the absence of a conviction by a court of law, also constitutionally presumed to be innocent. See s 35(3)*(h)* of the Constitution. There is an obvious area of tension between this presumption and deprivation of liberty pending the verdict of a court of law. Bail is a method of securing a compromise. In *Acheson* 1991 (2) SA 805 (Nm) at 822A–B Mahomed J said:

> An accused cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.

(3) It has been said that the purpose of bail is to strike a balance between the interests of society (the accused should stand his trial and there should be no interference with the administration of justice) and the liberty of an accused (who, pending the outcome of his trial, is presumed to be innocent)—Du Toit et al 9–1. See also *C* 1998 (2) SACR 721 (C), where Conradie J referred to the relevance of s 12(1)*(a)* of the Constitution, which provides:

> Everyone has the right to freedom and security of the person, which includes the right . . . not to be deprived of freedom arbitrarily or without just cause . . . .

(4) The legislature has determined that refusal to grant bail shall be in the interests of justice where one or more of the grounds referred to in s 60(4)*(a)–(d)* are established—see the discussion of s 60(4) in para 5.2 below.

(5) The whole issue turns on what is in the best interests of justice. Obviously, it is not in the best interests of justice to grant bail to an accused who will not stand his trial or who might otherwise abuse his liberty pending verdict, for example, by intimidating State witnesses. However, it must be appreciated that it is also not in the best interests of justice to refuse bail to an accused who will stand his trial and who will not otherwise interfere with the administration of justice. See *C* above. In (1967) 27 *Maryland Law Review* 154 at 166 some of the disadvantages of being deprived of liberty pending the outcome of a trial were put as follows:

> The . . . accused who . . . is presumed to be innocent, is subject to the punitive aspect of detention. The effect of remaining incarcerated will probably result in the loss of his job, of his respect in the community . . . even if [later] acquitted. In addition, the [accused's] defense [sic] is put to a serious handicap. He will not be free to help locate important witnesses. He will not have the opportunity to frequently contact his attorney. And if detention had resulted in the loss of the [accused's] job, he may not be able to even retain an attorney. The [accused] who is denied the right to bail will feel that effect at the most important level of criminal procedure—at the trial level . . . .

In para [101.15] in *Dlamini etc* as referred to in para 1.2(1) above, the Constitutional Court said:

> Bail serves not only the liberty interest of the accused, but the public interest by reducing the high number of awaiting-trial prisoners clogging our already overcrowded correctional system, and by reducing the number of families deprived of a breadwinner.

(6) In any further development and interpretation of rules and principles governing bail, all courts are obliged to take full account of the provisions of

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s 39(2) of the Constitution, ie, that a court must promote the spirit, purport and objects of the Constitution. See *Letaoana* 1997 (11) BCLR 1581 (W) 1591E and *Porthen* 2004 (2) SACR 242 (C) at [17]. All rights contained in the Bill of Rights must be considered. Where a bail applicant is the primary caregiver of a child, the

constitutionally protected best interests of the child (see s 28 of the Constitution) must be considered in the context of all the other circumstances. In *Petersen* 2008 (2) SACR 355 (C) one of the grounds for refusing bail in the case of a mother of a young child was the fact that appropriate alternative care, as envisaged by s 28(1)*(b)* of the Constitution, was available.

In *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) at [74] attention was drawn to the constitutional responsibilities of the prosecutor in a bail application.

1.3 Bail and some fundamental principles of criminal justice

Bail applications and bail appeals should be treated and heard as matters of urgency. See *Twayie v Minister van Justisie* 1986 (2) SA 101 (O) and *Banger* 2016 (1) SACR 115 (SCA) at [14].

Bail is non-penal in character—*Acheson* 1991 (2) SA 805 (Nm). See also generally *Stanfield* 1997 (1) SACR 221 (C) 233*g-i*; *C* 1998 (2) SACR 721 (C) and Van der Berg *Bail—A Practitioner's Guide* 3 ed (2012) 12. Neither the amount determined for bail nor the refusal of bail may therefore be influenced by punitive notions, for example, to punish the alleged offender or to deter other possible offenders—*Visser* 1975 (2) SA 342 (C). In terms of s 60 (5)*(f)* the court may, however, consider the prevalence of a particular type of offence.

The fact that bail is non-penal in character does not mean that an accused's prior unlawful conduct pending trial must be ignored. See generally *Rudolph* 2010 (1) SACR 262 (SCA) 2678*c-e*.

It is undesirable that an accused person should be deprived of pre-trial liberty if the sentence likely to be imposed will be in the form of a fine or one other than imprisonment—*Moeti* 1991 (1) SACR 462 (B) at 463H.

Each case must be considered on its merits. The prosecutor must make an independent assessment of the case and ought not blindly to follow the police's recommendation that bail should be refused—*Hlopane* 1990 (1) SA 239 (O) at 242.

The court, too, should not act as a mere 'rubber stamp' in confirming the viewpoint of the police and prosecution—*Visser* 1975 (2) SA 342 (C).

Release on bail is not a substitute for an accused's right to be brought to trial within a reasonable period—Du Toit et al 9-3.

Delays caused by prosecutorial decisions are in the absence of *male fides* not in themselves good reasons for a conclusion that bail must be granted (*Ali* 2011 (1) SACR 34 (ECP)).

The issue concerning release on or refusal of bail should not be used as an inducement to obtain a statement from an accused—*Joone* 1973 (1) SA 841 (C) at 846H.

A court must inform an unrepresented accused of his right to apply for bail, as well as the nature of the procedure to be followed—*Ngwenya* 1991 (2) SACR 520 (T); Steytler 1982 *SACC* 3-17. See also s 60(1)*(c)*.

In *Sibeko* 1990 (1) SACR 206 (T) a magistrate who had earlier recorded an out-of-court confession of an accused also presided at the bail application of the

accused. Kriegler J held that this had constituted a gross irregularity nullifying the proceedings. A bail application is—like a trial—also governed by principles regulating the recusal of a presiding officer. Recusal is dealt with in Chapter 13.

1.4 Release of child on bail: the provisions of s 25 of the Child Justice Act 75 of 2008

Section 25(1) of Act 75 of 2008 provides that Chapter 9 of Act 51 of 1977 (that is, the bail chapter) applies to an application for the release of a child on bail, except for ss 59 and 59A, to the extent set out in s 21(2)*(b)* of Act 75 of 2008. See further the discussions of ss 59 and 59A below. Section 25(2) of Act 75 of 2008 provides as follows:

> (2) An application for the release of a child, referred to in section 21(3)*(c)*, on bail, must be considered in the following three stages:
>
> *(a)* Whether the interests of justice permit the release of the child on bail; and
>
> *(b)* if so, a separate inquire must be held into the ability of the child and his or her parent, an appropriate adult or guardian to pay the amount of money being considered or any other appropriate amount; and
>
> *(c)* if after an inquiry referred to in paragraph *(b)*, it is found that the child and his or her parent, an appropriate adult or guardian are—
>
> (i) unable to pay any amount of money, the presiding officer must set appropriate conditions that do not include an amount of money for the release of the child on bail; or
>
> (ii) able to pay an amount of money, the presiding officer must set conditions for the release of the child on bail and an amount which is appropriate in the circumstances.

The above provisions of s 25 of Act 75 of 2008 are referred to in the present chapter where appropriate.

2 Bail granted by police before first court appearance of an accused

2.1 Introduction

The question whether bail should be refused or granted is essentially a judicial one, that is, one that must in principle be determined by a court of law—*Ramgobin* 1985 (4) SA 130 (N). However, bail may in certain limited circumstances be granted by the police—s 59. This kind of bail is in practice (and hereinafter) referred to as 'police bail'. Its purpose is not to oust a judicial decision but to ensure that pre-trial release on bail can in respect of relatively trivial offences be secured as soon as possible—that is, even before the first appearance in a lower court. At any rate, if police bail cannot be granted in terms of s 59 or if it can be granted but is refused, an accused has every right to apply to a lower court for bail at his first compulsory appearance as required in terms of s 50—see para 3(2) below and the discussion of s 50 in Chapter 7. Bail granted by the prosecution pending an accused's first appearance in court is also possible. See further the discussion of s 59A in para 3 below.

2.2 Procedure concerning police bail

An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2, may be released on bail in respect of

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such offence by any police official of or above the rank of non-commissioned officer, if the accused deposits at the police station the sum of money determined by such police official—s 59(1)*(a)*. Schedule 2 is reproduced in the appendix to this work. The police official who has the power to determine police bail is, however, statutorily required to consult with the police official charged with the investigation, ie, the so-called 'investigating officer'—s 59*(a)*. The police official concerned must, at the time of releasing the accused on bail, complete and hand to the accused a recognisance on which a receipt shall be given for the sum of money deposited as bail and on which the offence in respect of which the bail is granted and the place, date and time of the trial of the accused are entered—s 59(1)*(b)*. The police official must forthwith forward a duplicate original of such recognisance to the clerk of the court which has jurisdiction—s 59(1)*(c)*.

The police must grant an accused a reasonable opportunity to communicate with his legal representative, family or friends in order to obtain the amount fixed as police bail.

2.3 Police bail: The limitations

Only cash payments can be received in payment of police bail. Sureties cannot be accepted.

Release on police bail can only take place before an accused's first appearance in a lower court—s 59(1)*(a)*. This limitation is essential in order to ensure that courts remain in direct and exclusive control over release on bail once the case is on the roll.

Discretionary special conditions (these are conditions other than the essential bail conditions concerning appearance in court on a specific time and date and at a specific venue), as provided for in s 62, cannot be added by the police when releasing an accused on police bail—see Van der Berg *Bail—A Practitioner's Guide* 2ed (2001) 34. However, a court of law may upon a prosecutor's application add special conditions to police bail—s 59(2) as read with s 62 which is discussed in para 5 below. In other respects, police bail shall, if it is in force at the time of the first appearance of the accused in a lower court, remain in force after such appearance in the same manner as bail granted by a court—s 59(2).

Police bail is not possible in respect of offences referred to in Part II or Part III of Schedule 2 of Act 51 of 1977. Parts II and III include virtually all serious common-law crimes, for example, treason, sedition, murder, rape, arson, kidnapping, robbery, theft, fraud, and assault (when a dangerous wound has been inflicted). Part II also refers to certain serious statutory offences, for example, drug offences and offences relating to coinage. See further Parts II and III of Schedule 2 (as cited in the appendix to this work) for the other crimes in respect of which police bail is not possible.

Police bail may not be granted in respect of 'essential infrastructure-related offences'. See s 2 as read with s 3 of the Criminal Matters Amendment Act 18 of 2015.

2.4 The discretion

It has been held that, since in principle a theoretically innocent person should not be deprived of his liberty, an application for police bail should—like an ordinary bail application—neither be frustrated by an excessive amount nor be refused in

the absence of substantial cause for such refusal—*MacDonald v Kumalo* 1927 EDL 293. It has been suggested that an action for damages will lie should police bail be refused on malicious grounds, or where the properly authorised official had simply refused to exercise his discretion—*Shaw v Collins* (1883) 2 SC 389.

3 Bail granted by prosecution

3.1 The provisions of s 59A

A director of public prosecutions (hereafter 'DPP'), or a prosecutor authorised thereto in writing by the DPP concerned, may, in respect of the offences referred to in Schedule 7 and in consultation with the police investigating officer, authorise the release of an accused on bail—s 59A(1). This kind of bail is hereafter referred to as 'prosecutorial bail'. Section 59A(3) provides that the effect of prosecutorial bail is that the person who is in custody shall be released from custody—

(a) upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his or her bail at his or her place of detention contemplated in section 50(1)*(a)*;
(b) subject to reasonable conditions imposed by the director of public prosecutions or prosecutor concerned; or
(c) the payment of such sum of money or the furnishing of such guarantee to pay and the imposition of such conditions.

For purposes of exercising the functions as contemplated in s 59A(1) and 59A(3), a DPP may—after consultation with the Minister of Justice—issue directives. See also generally Mokoena *A Guide to Bail Applications* (2012) 18-22.

Prosecutorial bail may not be granted in respect of 'essential infrastructure-related offences'. See s 2 as read with s 3 of the Criminal Matters Amendment Act 18 of 2015.

An accused who is released on prosecutorial bail must appear on the first court day at the court and at the time determined by the prosecution; and the release of the accused shall endure until he appears before the court on the first day—s 59A(4). Prosecutorial bail proceedings must be recorded in full, including the conditions imposed—s 59A(6) as read with s 64. In terms of s 59A(7) prosecutorial bail shall be regarded as bail granted by a court in terms of s 60. See para 4 below. However, it must be pointed out that prosecutorial bail only lasts until the accused's appearance on the first court day. At this first court appearance judicial intervention or approval is required. Section 59A(5) provides that at the first appearance in court of a person released on prosecutorial bail, the court—

(a) may extend the bail on the same conditions or amend such conditions or add further conditions as contemplated in section 62; or

(b) shall, if the court does not deem it appropriate to exercise the powers contemplated in paragraph *(a)*, consider the bail application and, in considering such application, the court has the jurisdiction relating to the powers, functions and duties in respect of bail proceedings in terms of section 60.

3.2 Section 59A and the provisions of the Child Justice Act 75 of 2008

A prosecutor may, prior to a child's first appearance at a preliminary inquiry, authorise the release of a child in terms of s 25 of the Child Justice Act as read with

s 59A of the Criminal Procedure Act. See s 21(2) of Act 75 of 2008. However, such a release on bail can only be authorised in respect of offences referred to in Schedule 1 or 2 of Act 75 of 2008, and the reference to Schedule 7 in s 59A(2) of the Criminal Procedure Act must be regarded as a reference to Schedule 2 of Act 75 of 2008. Preference must be given to releasing the child. See s 21(1) of Act 75 of 2008.

4 Bail applications in court

4.1 General provisions

An accused who is in custody in respect of an offence shall, subject to the provisions of s 50(6), be entitled to be released on bail at any stage preceding his conviction in respect of such offence, unless the court finds that it is in the interests of justice that he be detained in custody—s 60(1)*(a)*. If a court refers an accused to another court for trial or sentencing, the court referring the accused retains jurisdiction relating to the powers, functions and duties in respect of bail until the accused appears in such other court for the first time—s 60(1)*(b)*.

4.2 The provisions of s 50(6)

The procedure which follows an arrest was discussed in para 5.5 of Chapter 7 above. This procedure is governed by s 50. However, certain important provisions which relate to bail are contained in s 50(6).

An accused is at his first appearance in court entitled to apply for release on bail—s 50(6)*(a)*(i)*(bb)*. He is not entitled to bring a bail application outside ordinary court hours—s 50(6)*(b)*.

The bail application of a person charged with a Schedule 6 offence must be considered by a magistrate's court—s 50(6)*(c)*. However, in terms of a proviso in s 50(6)*(c)* a DPP or prosecutor authorised thereto by the DPP may—where he or she deems it expedient or

necessary for the administration of justice in a particular case—direct in writing that the application must be considered by the regional court.

Any lower court before which a person is brought in terms of s 50(6) may—in terms of s 50(6)*(d)*—postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of the Act, if—

(i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;
(ii) the prosecutor informs the court that the matter has been or is going to be referred to a director of public prosecutions for the issuing of a written confirmation referred to in section 60(11A);
(iii) . . . [Sub-para (iii) deleted by s 8 (1)*(c)* of Act 62 of 2000.]
(iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to—
(aa) procure material evidence that may be lost if bail is granted; or
(bb) perform the functions referred to in section 37; or
(v) it appears to the court that it is necessary in the interests of justice to do so.

The requirement 'interests of justice' in s 50(6)*(d)*(v) does not mean that there must be exceptional circumstances (*Block* 2011 (1) SACR 622 (NCK)).

Section 50(6)*(d)* applies to a child whose bail application has not been finalised. See s 66 (3) of the Child Justice Act 75 of 2008.

4.3 Appeal by accused to High Court against a lower court's decision concerning bail

An accused who considers himself aggrieved by the refusal of a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the High Court having jurisdiction or to any judge of that court if the court is not then sitting—s 65(1)*(a)*. The appeal may be heard by a single judge—s 65(1)*(b)*. A local division of the High Court shall have jurisdiction to hear an appeal in terms of s 65(1)*(a)* if the area of jurisdiction of the lower court in question or any part thereof falls within the area of jurisdiction of such local division—s 65(1)*(c)*.

The accused must serve a copy of the notice of appeal on the director of public prosecutions and on the magistrate or the regional magistrate, as the case may be. See *Shefer v Director of Public Prosecutions*, *Transvaal* [2004] 2 All SA 88 (T) at [25]. The notice of appeal must set out the specific grounds upon which the appeal is lodged—*Ho* 1979 (3) SA 734 (W) at 738B-C. The magistrate or regional magistrate concerned must forthwith furnish the reasons for his decision to the court or judge, as the case may be—s 65(3). The mere fact that a court gave brief reasons for dismissing a bail application is not in itself a sufficient ground for the court of appeal to infer that insufficient weight was given to the considerations set out in s 60. See *Ali* 2011 (1) SACR 34 (ECP) at [15]. In this case the reasons were 'scant, but clear' (at [10]).

An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts—s 65(2); *Yanta* 2000 (1) SACR 237 (TkH).

The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its opinion the lower court should have given—s 65(4); *Barber* 1979 (4) SA 218 (D); *De Abreu* 1980 (4) SA 94 (W) at 96H-97A. In *Porthen* 2004 (2) SACR 242 (C) at [17] it was said, with reference to s 39(2) of the Constitution, that s 65(4) of the Act 'should be construed in a manner which does not unduly restrict the ambit of an appeal court's competence to decide that the lower court's decision to refuse bail was "wrong"'.

A further appeal against an order of the High Court sustaining a magistrate's refusal of bail is possible—see generally *Mohamed* 1977 (2) SA 531 (A). But this may be done only with leave of the High Court concerned and, if such leave is refused, with the leave of the Supreme Court of Appeal. The automatic right of appeal to the Supreme Court of Appeal against refusal of bail by a High Court *sitting as a court of first instance* has been abolished by ss 16 and 17 of the Superior Courts Act 10 of 2013. See *Banger* 2016 (1) SACR 115 (SCA). The accused still has a right to appeal to the Supreme Court of Appeal but is required to do so with leave of the High

Court; and if such leave is refused, the leave of the Supreme Court of Appeal itself is required before this court can entertain the appeal.

Bail appeals are *prima facie* urgent (*Prokureur-Generaal, Vrystaat v Ramokhosi* 1997 (1) SACR 127 (O)). But the urgency of a bail appeal does not entitle a party to ignore the procedures prescribed by s 65. See *Shefer v Director of Public Prosecutions* [2004] 2 All SA 88 (T) at [24].

4.4 Appeal by director of public prosecutions against decision of court to release accused on bail

A DPP may appeal to the High Court against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail—s 65A(1)*(a)*.

A DPP may also appeal to the Supreme Court of Appeal against the decision of a superior court to release an accused on bail—s 65A(2)*(a)*. In both instances the court hearing the appeal may order that the state should pay the accused concerned the whole or any part of the costs which the accused may have incurred in opposing the appeal. In the event of a successful appeal against release on bail, the court which heard the appeal shall issue a warrant for the arrest of the accused—s 65A(3).

4.5 The High Court: Power to regulate bail matters where statutes are silent

In *Hattingh* 1992 (2) SACR 466 (N) it was held that a High Court has no statutory power to grant bail to an accused who has been refused leave to appeal to the Supreme Court of Appeal and who wishes to petition the President of that court for leave to appeal to the Supreme Court of Appeal. However, it was concluded that a High Court has the power to grant bail as an incident of its common-law power to control its own decisions—see also *Human* 1990 (2) SACR 155 (NC). See also, generally, *Malcolm* 1999 (1) SACR 49 (SEC) and *Nel* 2002 (1) SACR 425 (T). In *Veenendal v Minister of Justice* 1993 (1) SACR 154 (T) at 158*i-j* reference was made to the 'inherent jurisdiction' of the High Court to grant bail in the absence of statutory provisions authorising such a course. In this case it was accordingly held that a High Court has inherent jurisdiction to grant bail to a person committed by a magistrate to prison in terms of s 10(1) of Act 67 of 1962. See also generally *Thornhill* 1998 (1) SACR 177 (C) 180*e-g*, where Ngcobo J stated (at 180*j*-181*a*) that s 35(1)*(f)* of the Constitution 'reaffirms the common-law inherent jurisdiction of the High Court to grant bail'. See further *Tsotsi* 2004 (2) SACR 273 (E) and *Hlongwane* 1989 (4) SA 79 (T).

It is clear, however, that after the refusal of an appeal by the Supreme Court of Appeal, no court has any statutory or common-law power to release a sentenced prisoner on bail—*Chunguete v Minister of Home Affairs* 1990 (2) SA 836 (W); *Hlongwane* 1989 (4) SA 79 (T), and cf generally *Beehari v Attorney-General, Natal* 1956 (2) SA 598 (N).

No court has the power to order that a person who anticipates arrest should be released on bail if arrested—*Trope v Attorney-General* 1925 TPD 175.

A lower court's power concerning bail is entirely regulated by statute—*Ex parte Graham: In re United States of America v Graham* 1987 (1) SA 368 (T).

5 The risks and factors which must be considered in determining a bail application

5.1 The potential risks

In *Pineiro* 1992 (1) SACR 577 (Nm) at 580*c-d* Frank J cited the following passage in Du Toit et al 9-8B:

In the exercise of its discretion to grant or refuse bail, the court does in principle address only one all-embracing issue: Will the interests of justice be prejudiced if the accused is granted bail? And in this context it must be borne in mind that if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced. Four subsidiary questions arise. If released on bail, will the accused stand his trial? Will he interfere with State witnesses or the police investigation? Will he commit further crimes Will his release be prejudicial to the maintenance of law and order and the security of the state? At the same time the court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to release on bail.

5.2 When is the refusal of bail in the interests of justice?

Section 60(4) provides that 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 the likelihood that the accused, if released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or

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

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

(d) where there is the likelihood that the accused, if released on bail, will 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 the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

The grounds in ss 60(4)*(a)* to 60(4)*(e)*—as referred to above—must be evaluated in conjunction with the various guidelines (factors, considerations) which the legislature has identified in s 60(5) to (9) and which are set out in paras 5.2.1 to 5.2.5 below. In *Dlamini etc* (see para 1.2(1) above) the Constitutional Court had the opportunity to consider the constitutional validity of s 60(4) to (9). These sections were held constitutional, and in para [43] of *Dlamini etc* it was said:

> Such guidelines are no interference by the Legislature in the exercise of the judiciary's adjudicative function; they are a proper exercise by the Legislature of its functions, including the power and responsibility to afford the judiciary guidance where it regards it as necessary. What is more, it is not only a proper exercise of legislative power, but a very welcome one. Here, in conveniently tabulated form, the CPA now first provides (in s 60(4)*(a)* to *(e)*) a check-list of the main criteria to be

considered against the grant of bail and then proceeds (in ss [sic] (5) to (8A)) to itemise considerations that may go to make up

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those criteria. Then, in ss [sic] (9) it provides a list of personal criteria pointing towards the grant of bail.

On the meaning of 'interests of justice' as used in s 60(4) and other related sections, see *Dlamini etc*.

5.2.1 The ground in s 60(4)(a): factors which the court may consider (s 60(5))

In considering whether the ground in s 60(4)*(a)*—as cited in para 5.2 above—has been established, the court may in terms of s 60(5) take the following factors into account where applicable: the degree of violence towards others implicit in the charge against the accused—s 60(5)*(a)*; any threat of violence which the accused may have made to any person—s 60(5)*(b)*; any resentment the accused is alleged to harbour against any person—s 60(5)*(c)*; any disposition to violence on the part of the accused, as is evident from his or her past conduct—s 60(5)*(d)*; any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct—s 60(5)*(e)*; the prevalence of a particular type of offence—s 60(5)*(f)*; any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail—s 60(5)*(g)*; or any other factor which in the opinion of the court should be taken into account—s 60(5)*(h)*.

Bail can properly be refused if the court is satisfied that an accused has a propensity to commit the crime with which he is charged and that he might continue to perpetrate such crimes if released on bail—*Patel* 1970 (3) SA 565 (W). This approach must be understood in the light of what was said by Cooper J in *Peterson* 1992 (2) SACR 52 (C) at 55*e-f*, namely, that the purpose of granting bail to an accused is to minimise interference in his lawful activities and, accordingly, if there is a risk of a repetition of the same criminal conduct if the accused were released on bail, the 'interests of society outweigh the rights of the lawless individual'.

5.2.2 The ground in s 60(4)(b): factors which the court may consider (s 60(6))

In *Letaoana* 1997 (11) BCLR 1581 (W) it was confirmed that s 60(4)*(b)* should be read with s 60(6).

A further ground that the court must consider is the likelihood of the accused attempting to evade his trial if released on bail—see s 60(4)*(b)* as cited in para 5.2 above. In considering this ground the court may, where applicable, take into account the following factors:

(a) the emotional, family, community or occupational ties of the accused to the place at which he is to be tried—s 60(6)*(a)*;
(b) the assets held by the accused and where such assets are situated—s 60(6)*(b)*;
(c) the means, and travel documents held by the accused, which may enable him or her to leave the country—s 60(6)*(c)*;
(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set—s 60(6)*(d)*;
(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial—s 60(6)*(e)*;
(f) the nature and the gravity of the charge on which the accused is to be tried—s 60(6)*(f)*;

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(g)

the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial—s 60(6)*(g)*;

(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—s 60(6)*(h)*;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached—s 60(6)*(i)*; or

(j) any other factor which in the opinion of the court should be taken into account—s 60 (6)*(j)*.

It has repeatedly been held that in assessing the risk of flight, courts may properly take into account not only the strength of the case for the prosecution and the probability of a conviction (*Lulane* 1976 (2) SA 204 (N) at 213C-F) but also the seriousness of the offence charged and the concomitant likelihood of a severe sentence—*Nichas* 1977 (1) SA 257 (C) at 263. The obvious reason for this approach is that 'the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the appellant to abscond'—*Hudson* 1980 (4) SA 145 (D) at 146H. The risk of absconding increases where a severe sentence has in fact been imposed and a bail application is lodged pending an appeal—*Ho* 1979 (3) SA 734 (W) at 740B.

In *Petersen* 2008 (2) SACR 355 (C) a full bench noted that the existence of the extradition arrangements between South Africa and Namibia provided no guarantee that extradition would indeed take place if the appellant were to 'relocate for the purpose of evading justice' (at [78]). This reality rendered meaningless the undertaking of the appellant's Namibian family that they would not have permitted her to become a fugitive from justice.

The risk that an accused may take flight should also be weighed in the light of factors such as the mobility of an accused and his access to overseas travel (*Nichas* (above)); the fact that an accused is a foreign national (*Hudson* (above)); the absence of border formalities at certain international borders (*Mataboge* 1991 (1) SACR 539 (B)) and the depth of emotional, occupational, financial and family roots that the accused has within the country where he is to stand trial—*Acheson* 1991 (2) SA 805 (Nm) at 822. The fact that the accused is a foreign national can never serve as an absolute bar to the granting of bail. See *Branco* 2002 (1) SACR 531 (W).

In *Masoanganye* 2012 (1) SACR 292 (SCA) at [19] it was observed that 'the personal circumstances of an accused—much more than assets—determine whether the accused is a flight risk'.

5.2.3 The ground in s 60(4)(c): factors which the court may consider (s 60(7))

The likelihood that an accused, if released on bail, will attempt to influence or intimidate witnesses or conceal or destroy evidence is a ground for refusing bail—s 60(4)*(c)* as referred to in para 5.2 above. In terms of s 60(7) the court may, in considering whether this ground has been established, take into account the following factors where applicable:

(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 (see *Dhlamini* 1997 (1) SACR 54 (W));

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(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.

In *Hlongwa* 1979 (4) SA 112 (D) it was held that bail for an accused can be refused 'if, on all the evidence, there is a reasonable possibility that he would tamper with one or more State witnesses if he were released'. In assessing this risk, the court may take into account the relationship between the accused and prosecution witnesses (*Ex parte Taljaard* 1942 OPD 66), whether or not the accused is aware of the identity of State witnesses or the nature of their statements (*Acheson* (above) at 822), whether or not any bail condition preventing communication between State witnesses and an accused can be policed effectively (*Acheson* (above) at 822), whether or not State witnesses have been threatened by the accused (*Ex parte Nkete* 1937 EDL 231) and, further, the nature of the accused's criminal record, 'particularly if it includes a conviction for defeating or obstructing the ends of justice by tampering with a State witness'—*Hlongwa* (above) at 113H.

In *Bennett* 1976 (3) SA 652 (C) Vos J formulated the following test for purposes of determining the presence or absence of a reasonable possibility of future interference (at 655G-H, emphasis in the original):

[A]s [the] applicant has thus far not interfered with the investigation, the proper approach should be that, unless the state can say that there is a real risk that he *will*, not merely *may*, interfere, there does not appear . . . to be a reasonable possibility of such interference.

5.2.4 The ground in s 60(4)(d): factors which the court may consider (s 60(8))

Refusal of bail shall be in the interests of justice if it is established that there is a likelihood that the accused, if released on bail, will undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system—s 60(4)*(d)*. Section 60 (8) provides that when considering whether the ground in sub-s (4)*(d)* has been established, the court may, where applicable, take into account the following factors:
(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 (see also s 60(11B));
(b) whether the accused is in custody on another charge or whether the accused is on parole;
(c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
(d) any other factor which in the opinion of the court should be taken into account.

5.2.5 The ground in s 60(4)(e): factors which the court may consider (s 60(8A))

Section 60(8A) provides that a court—when considering the provisions in s 60(4)*(e)*—may, where applicable, take into account the following factors:

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(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 jeopardised by his or her release;
(d) whether the sense of peace and security among members of the public will be undermined or jeopardised by the release of the accused;
(e) whether the release of the accused will undermine or jeopardise public confidence in the criminal justice system; or
(f) any other factor which in the opinion of the court should be taken into account. See *Miselo* 2002 (1) SACR 649 (C).

5.2.6 The interests of justice and the personal freedom of and possible prejudice to an accused (s 60(9))

Section 60(9) provides that the court must weigh the interests of justice against the right of an accused to his personal freedom and in particular the prejudice such an accused will suffer if bail is refused. In doing so, the court is also in terms of s 60(9) required to take the following factors into account:

(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) any other factor which in the opinion of the court should be taken into account.

According to Steytler *Constitutional Criminal Procedure* (1998) 143, s 60(9) 'implies a proportionality test; the likely harm must be weighed against the deprivation of liberty'. Continued incarceration would manifestly be prejudicial to the accused, but must be weighed against other factors such as the likelihood of the accused absconding and the ease with which stringent bail conditions might be evaded. See *Thornhill (2)* 1998 (1) SACR 177 (C) at 184*d-f*.

If the prosecution has failed to show a likelihood that one or more of the grounds contemplated in s 60(4)*(a)* to *(e)* are present, the provisions of s 60(9) will rarely be of assistance to the prosecution because the latter section mentions factors favouring the accused—*Tshabalala* 1998 (2) SACR 259 (C).

5.2.7 Additional factors to be considered in a bail application pending an appeal against conviction or sentence

In an application for bail pending appeal against conviction or sentence, the absence of reasonable prospects of success on appeal may justify refusal of bail—

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Beer 1986 (2) SA 307 (SE). However, bail ought not to be refused lightly on the sole ground of absence of prospects of a successful appeal—*Ndlovu* 1999 (2) SACR 645 (W). It has been suggested that where there is no risk of an accused absconding and the appeal is against sentence only, the test should merely be whether 'the appeal against sentence is reasonably arguable and not manifestly doomed to failure'—*Anderson* 1991 (1) SACR 525 (C) 527*e*. There is merit in this suggested lesser test where sentence is concerned, as success on appeal can be a hollow victory if the accused has started serving a prison sentence which is eventually reduced or wholly suspended on appeal. In *Makaula* 1993 (1) SACR 57 (Tk) it was held that an application for bail pending an appeal against sentence should generally be granted where the accused has been sentenced to less than one year's imprisonment.

5.2.8 The amount of bail

An excessive sum which practically speaking amounts to a refusal of bail should not be fixed—*Shaban* 1965 (4) SA 646 (W). See also *Fhetani* 2007 (2) SACR 590 (SCA). The guideline is to fix bail at an amount that can not only be paid but will make it more advantageous to the accused to stand his trial rather than flee and forfeit his money—*Du Plessis* 1957 (4) SA 463 (W). Accordingly, there must be a careful investigation of the means and resources of the accused, especially in the absence of legal representation—*Mohamed* 1977 (2) SA 531 (A). Individualisation is important—*Visser* 1975 (2) SA 342 (C). The court

is entitled to fix a high amount of bail where the accused is clearly a man of vast financial resources (*Stanfield* 1997 (1) SACR 221 (C) 234*f*).

If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in s 60(1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum. See s 60(2B)*(a)* as inserted by s 9 of the Judicial Matters Amendment Act 66 of 2008. If the court finds that the accused is unable to pay any sum of money, the court is required to consider setting appropriate bail conditions not involving the payment of the money and must, as an alternative, consider release of the accused in terms of s 60(13)*(b)*, that is, in terms of a guarantee as discussed in para 7 below. See s 60(2B)*(b)*(i) and *Jacobs* 2011 (1) SACR 490 (ECP). If the court finds that the accused is able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances. See s 60(2B)*(b)*(ii). Section 60(2B) must be read with s 25(2)*(b)* and *(c)* of the Child Justice Act 75 of 2008, as cited at the beginning of the present chapter. See para 1.4 above.

The Child Justice Act 75 of 2008 also determines that where the interests of justice permit the release of a child on bail, the court must hold an inquiry into the ability of the child, a parent, a guardian or other appropriate adult to pay bail money. See s 25 of Act 75 of 2008 as well as para 6 below.

5.2.9 Some irrelevant factors

In deciding a bail application, a court should ignore an accused's threat to continue his hunger strike if bail is refused—*Veenendal v Minister of Justice* 1993 (1) SACR 154 (T). The fact that an accused may receive indemnity from prosecution on

the basis of an agreement between the government and political bodies is also irrelevant in determining bail—*Lukas* 1991 (2) SACR 429 (E).

6 Bail conditions

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—s 60(12). These conditions may be referred to as discretionary special conditions.

The distinction between discretionary special conditions of bail (as provided for in terms of s 62) and the essential conditions of bail (as determined by s 58) was noted in para 2.3 above. The court must establish whether any possible objection to release on bail can suitably be met by setting one or more special conditions which can, in conjunction with the essential conditions, govern an accused's release on bail. In terms of s 62 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—

(1) with regard to the reporting in person by the accused at any specified time and place to any specified person or authority;
(2) with regard to any place to which the accused is forbidden to go;
(3) with regard to the prohibition of or control over communication by the accused with witnesses for the prosecution;
(4) with regard to the place at which any document may be served on him under the Act;
(5) 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.

Practical examples of such discretionary special bail conditions are that the accused must report to a specified police station once or twice a day, or that he must hand his passport over to the police, or that he may not leave a specified magisterial district without informing the police official charged with the investigation of the case. Good examples of such conditions can be found in *Ramgobin* 1985 (4) SA 130 (N) at 132, *De Abreu* 1980 (4) SA 94 (W) at 101 and *Pineiro (1)* 1992 (1) SACR 577 (Nm) at 581. In *Jacobs* 2011 (1) SACR 490 (ECP) it was said that appropriate conditions can be as effective for the administration of justice as payment of money. See also s 60(2B) of the Act.

In terms of s 62*(f)* a court may also add a condition that the accused be placed under the supervision of a probation officer or a correctional official.

Bail conditions added in terms of s 62 must be practically feasible (*Fourie* 1947 (2) SA 574 (O) at 577) and should be neither vague nor ambiguous (*Budlender* 1973 (1) SA 264 (C) at 271A) nor *ultra vires* (*Russell* 1978 (1) SA 223 (C) at 226E). Such conditions may also not be *contra bonos mores*. A bail condition prohibiting a husband from communicating with his wife who happens to be the complainant is not *contra bonos mores—De Jager v Attorney-General, Natal* 1967 (4) SA 143 (D). In *Louw* 2000 (2) SACR 714 (T) the possible issue whether a bail condition preventing an applicant from marrying a state witness would be immoral and unconstitutional arose but was not decided.

In the ordinary course of events a condition which prohibits communication with a State witness should be taken to include a potential State witness—*Dockrat* 1959 (3) SA 61 (D) at 62.

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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, increase or reduce the amount of bail determined under ss 59 and 60 or amend or supplement any conditions imposed under s 60 or s 62, whether imposed by that court or by any other court. Where the application is made by the prosecutor and the accused is not present when the application is made the court may issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application—s 63(1).

Section 25(2)*(c)*(i) of the Child Justice Act 75 of 2008 provides that if after an inquiry referred to in s 25(2)*(b)* of the same Act, it is found that a child and his or her parent (or appropriate adult or guardian) are unable to pay any amount of money, the presiding officer must set appropriate conditions that do not include an amount of money for the release on bail of the child concerned.

7 Payment of bail money

A prerequisite for release on bail granted by a court is that the accused must deposit the sum of money as determined by the court. The deposit must be made with the clerk of any magistrate's court or with the registrar of any High Court, as the case may be, or with a member of the correctional services at the prison where the accused is in custody, or with any police official at the place where the accused is in custody—s 60(13)*(a)*. In terms of s 60 (13)*(b)* the court may order an accused to furnish a guarantee, with or without sureties, that he will upon breach of the relevant bail pay and forfeit to the state the sum of money as determined or as increased or reduced under s 63(1).

A third person may pay bail money for the benefit of the accused—s 69(1). However, no person shall be allowed to deposit for the benefit of an accused any bail money if the official concerned has reason to believe that such person, at any time before or after depositing such bail money, has been indemnified or will be indemnified by any person in any manner against loss of such bail money or that he has received or will receive any financial benefit in connection with the deposit of such bail money—s 69(3).

Bail money, whether deposited by an accused or by any other person for the benefit of the accused, must, notwithstanding that such bail money or any part thereof may have been ceded to any person, be refunded only to the accused or the depositor, as the case may be—s 69(2).

A legal representative should in principle not pay bail money for the benefit of his client. It is generally considered unethical. Lewis *Legal Ethics* (1982) 202 claims that the following rule of the Natal Law Society reflects the general position of attorneys in South Africa:

Although it is permissible for an attorney in exceptional circumstances to stand security for bail or to advance bail for an accused person he should not make a practice of doing so.

Paragraph 3.5.1 of the *Uniform Rules of Professional Ethics of the General Council of the Bar* provides that counsel should not become personally associated with his client's interests and should, therefore, for example, not pay bail for his client.

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8 Cancellation of bail and forfeiture of bail money

8.1 Failure to observe conditions of bail

If the prosecutor applies to lead evidence to prove that the accused has failed to comply with a condition of bail, the court before which the charge is pending must, if the accused is present and denies that he failed to comply with the condition or that his failure to comply was due to fault on his part, proceed to hear such evidence as the prosecutor and the accused may place before it—s 66(1). If the accused is not present when the prosecutor applies to the court, the court may issue a warrant for his arrest in order to hear evidence in his presence—s 66(2). The court may, if it finds that the failure by the accused was due to fault on his part, cancel the bail and declare the bail money forfeited to the state—s 66(3). No appeal lies against an order for the cancellation of bail—*Sebe v Magistrate, Zwelitsha* 1984 (3) SA 885 (Ck).

8.2 Failure to appear: procedure and consequences

If an accused who is released on bail fails (1) to appear at the place and on the date and at the time appointed for his trial or to which the proceedings were adjourned, or (2) to remain in attendance, the court must cancel the bail provisionally, declare the bail money provisionally forfeited to the state and issue a warrant for the arrest of the accused—s 67(1). If the accused does not appear within fourteen days of the issue of the warrant for his arrest (or within such extended period as the court may on good cause determine) or if the accused does appear but fails to satisfy the court that his failure to appear or to remain in attendance was not due to fault on his part, the provisional cancellation of the bail and provisional forfeiture of the bail money become final. However, if the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation and forfeiture lapse—s 67(2); *Sibuya* 1979 (3) SA 193 (T); *Dyantyi* 1983 (3) SA 532 (A). A withdrawal of bail and forfeiture of bail money in terms of s 67 do not preclude a new application for bail in terms of s 60. The fact that the bail was withdrawn will, however, be a relevant fact which may be taken into account in the consideration of the new application for bail—*Nkosi* 1987 (1) SA 581 (T).

8.3 Cancellation of bail where accused about to abscond

Any court before which a charge is pending in respect of which the accused has been released on bail may, upon information on oath that the accused is about to evade justice or is about to abscond in order to evade justice, or that the accused interferes or threatens or attempts to interfere with witnesses, or that the accused defeats the ends of justice or poses a threat to the safety of the public or a particular person, or that it is in the public interest to do so, issue a warrant for the arrest of the accused and make such order as it may seem

proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings—s 68(1)*(a)* to *(d)*. An accused's bail may be cancelled if he, after bail had been granted, indulged in further criminal conduct—*Kyriacou* 2000 (2) SACR 704 (O). In terms of s 68(1)*(e)* to *(g)*, a similar procedure may be followed where the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail; or

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where further evidence has since become available or factors have arisen, including the fact that the accused furnished false information in the bail proceedings, which might have affected the decision to grant bail; or it is in the interests of justice to do so.

Such a warrant may also be issued by any magistrate upon the application of a peace officer, where it is not practicable to approach the relevant court. See s 68(2). The committal to prison in this instance remains in force until the conclusion of the trial unless the court before which proceedings are pending reinstates the bail at an earlier stage—s 68 (2). The decision of a magistrate under s 68 is subject to appeal—*McInnes* 1946 WLD 386; *Casker* 1971 (4) SA 504 (N).

An accused has an automatic right of appeal against withdrawal of his bail. See *Nqumashe* 2001 (2) SACR 310 (N).

8.4 Cancellation of bail at request of accused

Any court before which a charge is pending in respect of which the accused has been released on bail may, upon application by the accused, cancel the bail and refund the bail money if the accused is in custody on any other charge or is serving a sentence—s 68A.

8.5 Forfeiture and remission

Forfeiture has the same effect as a civil judgment upon the accused and can be executed in the ordinary way. It should be noted, however, that such forfeiture is not always ordered, for example when such an order would subject the sureties to undeserved or undue hardship.

Apart from the court concerned, the Minister of Justice or any officer acting under his authority may remit the whole or any part of bail money—s 70.

Although it is within the power of the prosecutor (with the permission of the director of public prosecutions) to abandon prosecution at any stage, it is contrary to the purpose for which bail can be granted for the prosecutor, in any but trivial cases, to abandon the prosecution owing to the non-appearance of an accused. Even if a substantial sum may thus accrue to the state, a warrant for the arrest of the accused may still be issued and executed. The prosecution can then be proceeded with, while the question of forfeiture is left for the decision of the court in the proper exercise of its discretion.

8.6 Criminal liability on the ground of failure to appear or to comply with a condition of bail

Any person who has been released on bail and who fails without good cause to appear on the date and at the place determined for his appearance, or to remain in attendance until the proceedings in which he must appear have been disposed of, or who fails without good cause to comply with a condition of bail imposed by the court in terms of s 60 or s 62, including an amendment or supplementation thereof in terms of s 63, shall be guilty of an offence and shall on conviction be liable to a fine or to imprisonment not exceeding one year—s 67A. For purposes of s 67A a charge sheet must be drawn up and a proper trial held (*Mabuza* 1996 (2) SACR 239 (T)).

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9 Procedural and evidentiary rules relating to bail applications

9.1 The pro-active (inquisitorial) role of the court

A court hearing a bail application should not act as a 'passive umpire'. See para [10] of the Constitutional Court decision in *Dlamini etc* (as cited in para 1.2(1) above). See also *Mathonsi* 2016 (1) SACR 417 (GP) at [14].

If the question of the possible release of an accused on bail is not raised by the accused or the prosecutor, the court should *mero motu* ascertain from the accused whether he wishes bail to be considered by the court—s 60(1)*(c)*. See also generally *Ngwenya* 1991 (2) SACR 520 (T).

Apart from postponing bail proceedings as provided for in s 50(6) and explained in para 4.2 above, the court may—in respect of matters which are not in dispute between the accused and the prosecution—acquire in an informal manner the information that is needed for its decision or order regarding bail—s 60(2)*(a)* and *(b)*. If matters are in dispute, the court may require the prosecutor or the accused, as the case may be, to adduce evidence—s 60(2)*(c)*. The court, it seems, has the power to decide who should lead evidence first.

Where the prosecutor does not oppose bail in respect of matters referred to in s 60(11)*(a)* and *(b)*, the court must require of the prosecutor to place on record the reasons for not opposing the bail application—s 60(2)*(d)*. This is another inquisitorial feature of bail proceedings. The provisions of s 60(11) are discussed in paras 9.8 and 9.9 below.

In bail proceedings the court should not play a passive role in the presentation of evidence. This much is clear from s 60(3), which provides that 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—s 60(3). The traditional adversarial right of the parties to be selective in their presentation of facts in support of their respective cases has been curtailed by s 60(3). A further active role is given to the court by s 60(10). This section provides that the court '. . . has the duty . . . to weigh up the personal interests of the accused against the interests of justice . . .' despite the fact that the prosecution does not oppose the granting of bail. See further *Prokureur-generaal, Vrystaat v Ramokhozi* 1997 (1) SACR 127 (O).

However, the fact that the court is required to play an inquisitorial role in a bail application does not entitle it to resort to unfair and excessively robust questioning of witnesses, including a bail applicant who elected to testify orally in support of his application. See *Gade* [2007] 3 All SA 43 (NC).

9.2 Application of a free system of evidence

The strict rules of evidence are relaxed for purposes of a bail application. Hearsay may be received more readily than at a trial—*Maharaj* 1976 (3) SA 205 (D). However, a careful assessment of such evidence is necessary. In *Maqungu v Assistant Magistrate, Whittlesea* 1977 (2) SA 359 (E) the court refused to rely on a young constable's evidence that he had received information that the accused were planning to flee. The source of the constable's information was an informer whom he had lawfully declined to identify in terms of the informer's privilege as

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explained in para 4.6 in Chapter 3. There are obvious risks in relying upon hearsay of this nature.

Ex parte statements (oral statements made by the defence and prosecution from the bar) may be received as 'it is desirable that . . . [bail] . . . applications should be dealt with expeditiously—to prepare affidavits or find witnesses may cause delay . . . [and] . . . [t]he

absence of legal representation may also tip the balance in favour of informality'—*Nichas* 1977 (1) SA 257 (C) at 261A-B. However, this easy-going procedure has disadvantages: Very little of substance is on record in the event of an appeal and *ex parte* statements also carry less weight than oral evidence. Oral evidence on oath is preferable (*Nichas* (above) at 262F-G) because the witness concerned can then be cross-examined. This advantage, inherent in oral evidence, does not mean that a court may disallow affidavits—*Pienaar* 1992 (1) SACR 178 (W). See also *Jacobs v S* [2004] 4 All SA 538 (T) at [6]. In *Moekazi v Additional Magistrate, Welkom* 1990 (2) SACR 212 (O) it was held that bail applications can be brought on affidavits and that the State—should it wish to oppose the application—can file answering affidavits and adduce oral evidence. The probative value of affidavits is less than that of oral evidence, even though affidavits do carry more weight than a statement from the bar—*Pienaar* (above) at 180H-I.

The court may, depending upon the circumstances of the case, rely on the opinion of the investigating police official, for example, the latter's opinion that the accused will interfere with State witnesses—*Hlongwa* 1979 (4) SA 112 (D). In *Lukas* 1991 (2) SACR 429 (E) at 437*b-c* it was, however, warned that a 'court should . . . be astute not to simply accept the *ipse dixit* of the investigating officer or other policemen who testify on behalf of the state and should consider the possibility that such witnesses may have an improper motive in opposing bail'.

The personal opinion of a director of public prosecutions (as opposed to that of any of his prosecutors) is a relevant consideration because of a DPP's experience and the responsibilities of his office—*Kantor* 1964 (3) SA 377 (W). Nonetheless, his opinion cannot be substituted for the court's discretion—*Bennett* 1976 (3) SA 652 (C) at 654H-655A. A DPP's opinion, moreover, becomes irrelevant once the court is in as good a position as the DPP concerned to assess the likelihood or otherwise of an accused absconding—*Lulane* 1976 (2) SA 204 (N) at 211F-G.

Due consideration should be given to an accused's testimony that he has no intention of absconding—*Hudson* 1980 (4) SA 145 (D) at 148E. Still, great reliance cannot be placed on an accused's mere *ipse dixit* to the effect that he will not abscond, since an accused who has such an intention is hardly likely to admit it—*Hudson* (above) at 148E-F.

9.3 Proof of previous convictions

Previous convictions may be proved by the state in the course of a bail application—*Patel* 1970 (3) SA 565 (W) at 566B-C; *Ho* 1979 (3) SA 734 (W); *Attorney-General, Zimbabwe v Phiri* 1988 (2) SA 696 (ZHC); *Mdleleni* 1992 SACJ 197.

The accused or his legal adviser is also compelled to inform the court whether the accused has previously been convicted of an offence—s 60(11B)*(a)*(i). Any charges pending against the accused must also be disclosed by him or his legal representative and there is also a duty to inform the court whether the accused has been released on bail pending those charges—s 60(11B)*(a)*(ii). Where the legal representative submits the required information, whether in writing or orally, the accused

shall be required by the court to declare whether he confirms such information or not—s 60 (11B)*(b)*. An accused who wilfully fails or refuses to comply with the provisions of s 60(11B) *(a)* commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years—s 60(11B)*(d)*(i). The same applies to an accused who wilfully furnishes false information—s 60(11B)*(d)*(ii). It is submitted that the offences referred to in s 60(11B)*(d)* may not be tried summarily.

The fact that an accused is on parole or knowingly supplied false information at the bail proceedings may be taken into account in determining the issue of release on bail—s 60(5)*(b)* and s 60(5)*(c)* read with s 60(4)*(a)*. See also para 5.2.1 above.

9.4 The subsequent trial and the admissibility of the record of the bail proceedings

The record of the bail proceedings—excluding the information relating to previous convictions, pending charges and release on bail in respect of pending charges—forms part of the record of the trial of the accused following upon such bail proceedings—s 60(11B)*(c)* as read with s 60(11B)*(a)*. This means that the trial court will as a rule have access to all the evidence led at the bail application. However, s 60(11B)*(c)* contains a proviso to the effect that if the accused elects to testify during the bail proceedings the court must inform him that anything he says may be used against him at his subsequent trial, and such evidence becomes admissible in any subsequent proceedings. The result is that before s 60(11B)*(c)* can be invoked to prove the oral testimony given by an accused in the course of his bail application, it must be clear that the accused was properly informed at the bail application of his constitutional right to silence and privilege against self-incrimination—*Cloete* 1999 (2) SACR 137 (C). The court must inform the bail applicant—*Sejaphale* 2000 (1) SACR 603 (T) and *Nzima* 2001 (2) SACR 354 (C). The judicial warning must be given even where the bail applicant has a legal representative and even if the bail applicant submits an affidavit (as opposed to testifying orally)—*Agliotti* 2012 (1) SACR 559 (GSJ) at [39] and [41]. The proviso protects the constitutional right to a fair trial—*Snyman* 1999 (8) BCLR 931 (C). Issues concerning recusal (see para 2.4 of Chapter 13) may as a result of the provisions of s 60(11B)*(c)* arise where a bail application is made during the course of a trial to the officer presiding at the trial. See generally *Thusi* 2000 (4) BCLR 433 (N) and *Nhlati* 2000 (8) BCLR 921 (N). Where a formal bail hearing was held, the presiding judicial officer would ordinarily be disqualified from presiding at the subsequent trial: the reasonable apprehension of bias (an objective test) would require recusal. See *S v Booysen* 2016 (1) SACR 514 (ECG), where reliance was placed on *Bruinders* 2012 (1) SACR 25 (WCC) and *Nkuna* 2013 (2) SACR 541 (GNP).

The Constitutional Court has held that s 60(11B)*(c)* is not unconstitutional—*Dlamini etc* as referred to in para 1.2(1) above. In para [99] of this case it was said:

> Provided trial courts remain alert to their duty to exclude evidence that would impair the fairness of the proceedings before them, there can be no risk that evidence unfairly elicited at bail hearings could be used to undermine accused persons' rights to be tried fairly. It follows that there is no inevitable conflict between s 60(11B)*(c)* of the CPA and any provision of the Constitution. Subsection (11B)*(c)* must, of course, be used subject to the accused's right to a fair trial and the corresponding obligation on the judicial officer presiding at the trial to exclude evidence, the admission of which would render the trial

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> unfair. But it is not only trial courts that are under a statutory and constitutional duty to ensure that fairness prevails in judicial proceedings. The command that the presiding judicial officer ensure that justice is done applies with equal force to a bail hearing. There the presiding officer is duty bound to ensure that an accused who elects to testify, does so knowing and understanding that any evidence he or she gives may be admissible at trial.

In para [101.14] the Constitutional Court made it clear that even though s 60(11B)*(c)* is constitutional, the record of bail proceedings 'is neither automatically excluded from nor included in the evidentiary material at trial. Whether or not it is to be excluded is governed by the principles of a fair trial.' It is submitted that this approach leaves ample room for the trial court to exclude or ignore evidence (contained in the record of bail proceedings) which—in terms of the normal rules of evidence—should be excluded, such as hearsay, character and opinion evidence. The trial court is concerned with guilt or innocence. The bail proceedings concern the issue of liberty pending the outcome of the trial. Evidence received in terms of the free system of evidence which applies in bail proceedings (see para 9.2

above), and which becomes part of the trial record on account of the provisions of s 60(11B)*(c)*, would be ignored by the trial court if the admission of such evidence would be in conflict with the ordinary rules of evidence which govern criminal trials. Ultimately, the right to a fair trial must be upheld. See *Thusi* 2000 (4) BCLR 433 (N). In *S v Booysen* 2016 (1) SACR 521 (ECG) at [22] it was explained that 'although provision is made that the bail record forms part of the trial record, this does not mean that evidence which is otherwise inadmissible at trial but which may be admissible during a bail hearing is thereby rendered admissible. Such evidence is to be excluded at trial in accordance with the principles of a fair trial.'

9.5 The relationship between s 60(11B)*(c)* and s 235

Bail proceedings may also be proved by relying on s 235. But here, too, inadmissible evidence contained in the bail record should be excluded—*Nomzaza* 1996 (2) SACR 14 (A); *Chavulla* 1999 (1) SACR 39 (C); *Machaba* 2016 (1) SACR 1 (SCA) at [27].

9.6 Access to information held by the prosecution

Section 60(14) provides as follows:

> Notwithstanding anything to the contrary contained in any law, no accused shall, for the purpose 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 prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.

This section was held constitutional by the Constitutional Court in *Dlamini etc* as referred to in para 1.2(1) above. In para [82] it was pointed out that *Shabalala* 1995 (2) SACR 761 (CC) is no authority for the proposition that bail applicants, or their legal representatives, are entitled to access to the police docket. *Shabalala* was concerned with access for purposes of the *trial* and the fairness of the *trial*.

However, circumstances may be of such a nature that a court is on the basis of ss 60(3) and 60(10) duty bound to order the state to grant the bail applicant access to some specific information in the police docket. In *Green* 2006 (1) SACR 603 (SCA) it was found as follows (at [23]):

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> It is clear from s 60(10) that the court's function in a bail application is intended to be more proactive than in normal criminal proceedings. As it was put in the *Dlamini* decision (at para [11]), 'a bail hearing is a unique judicial function' and 'the inquisitorial powers of the presiding officer are greater'. On a proper consideration of the case on which the State relied, any reasonable court must have concluded that it lacked reliable and important information necessary to reach a decision, notwithstanding that such information was apparently readily available. In such circumstances the court has no discretion but to invoke s 60(3). In my view, the magistrate should, instead of refusing bail without more, have ordered the State to grant the defence access to the video tapes and any statements made by the police fingerprint experts, linking the fingerprints of either of the appellants with the crime, with the decision on whether or not to grant bail to be made thereafter.

In *Josephs* 2001 (1) SACR 659 (C) at 664*c-d* it was also said that even though s 60(14) vests a discretion in the prosecutor to disclose information or material in the docket, it is not an unfettered discretion: Section 60(14) cannot be used to deprive a bail applicant of the reasonable opportunity to adduce evidence or make appropriate submissions in support of his application. See also Van der Merwe 2001 *Stell LR* 215. A bail applicant is entitled to a copy of his *own* statement made to the police. See Van der Merwe 2001 *SACJ* 298.

9.7 The burden and standard of proof in bail applications

The standard of proof required from an accused where he bears the burden of proof as provided for in s 60(11)*(a)* and *(b)* is the civil standard, namely proof on a balance of probabilities. Both these provisions are dealt with more fully in paras 9.8 and 9.9 below.

In all cases falling outside the ambit of s 60(11)*(a)* and *(b)*, the burden of proof is on the prosecution. See further *Tshabalala* 1998 (2) SACR 259 (C). The standard of proof is proof on a balance of probability. Proof beyond a reasonable doubt is not necessary because guilt or innocence in respect of the charge is not the issue. Section 25(2)*(d)* of the interim Constitution provided that every person arrested for the alleged commission of an offence shall, in addition to the rights which he has as a detained person, have the right 'to be released with or without bail, unless the interests of justice require otherwise'. This former constitutional provision—which is echoed by s 60(1)*(a)* of the Act—placed the burden of proof on the state. See generally *Njadayi* 1994 (5) BCLR 90 (E) at 96*c-d* and *Magano v District Magistrate, Johannesburg (1)* 1994 (2) SACR 304 (W), and compare *Ellish v Prokureur-generaal, WPA* 1994 (2) SACR 579 (W). It is submitted that s 35(1)*(f)* of the new Constitution has not altered the position. See also *Tshabalala* above.

9.8 The provisions of s 60(11)*(a)* and *(b)*

Section 60(11) provides as follows:

> 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, but not 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,

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> 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.

In *Mazibuko* 2010 (1) SACR 433 (KZP) at [19] the court observed as follows as regards the interaction between s 60(11)*(a)* and *(b)*:

> For the circumstance to qualify as sufficiently exceptional to justify the accused's release on bail [in the case of a Schedule 6 offence, dealt with in sub-s (11)*(a)*] it must be one which weighs exceptionally heavily in favour of the accused, thereby rendering the case for release on bail exceptionally strong or compelling. The case to be made out must be stronger than that required by sub-s (11)*(b)*, but, precisely how strong, it is impossible to say. More precise than that one cannot be. Applying this approach, the process of deciding a bail application would be the same as in a case governed by sub-s (11)*(b)*, save that the additional requirement of exceptional circumstances must be satisfied. This means that if an accused does not satisfy the sub-s (11)*(b)* test, it is not even necessary to consider whether the additional requirement imposed by sub-s (11)*(a)* has been met.

Section 60(11)*(a)* is constitutional even though it places a formal onus (burden of proof) on the accused to adduce evidence which satisfies the court that exceptional circumstances (see para 9.9 below) exist which in the interest of justice permit release—*Dlamini etc* as referred to in para 1.2(1) above. In para [77] of this case, the Constitutional Court also held that the requirement of 'exceptional circumstances' limits the right in s 35(1)*(f)* of the Constitution, but that it is a constitutionally permissible limitation in terms of the limitation provisions contained in s 36 of the Constitution.

In *Dlamini etc* the Constitutional Court was not required to determine the constitutionality of s 60(11)*(b)*. However, the remarks made by the court in para [65] of its judgment are instructive and emphasise the differences between s 60(11)*(a)* and *(b)*. In para [65] it was said that the latter section—

> stipulates that an accused must satisfy a magistrate that the 'interests of justice' permit his or her release. It clearly places an *onus* upon the accused to adduce evidence. However, apart from that, the exercise to determine whether bail should be granted is no different to that provided for in subsecs 60

(4)-(9) or required by s 35(1)*(f)*. It is clear that an accused on a Schedule 5 offence will be granted bail if he or she can show, merely, that the interests of justice permit such grant. The additional requirement of 'exceptional circumstances' imposed by s 60(11)*(a)* is absent. A bail application under s 60(11)*(a)* is more gravely invasive of the accused person's right to liberty than that under s 60(11)*(b)*. To the extent, therefore, that the test for bail established by s 60(11)*(a)* is more rigorous than that contemplated by s 35(1)*(f)* of the Constitution, it limits the constitutional right.

In paras [80] and [84] the Constitutional Court referred to the importance of the words 'having been given a reasonable opportunity to do so' as used in s 60(11)*(a)* and *(b)*. These words imply that a court may—despite the provisions of s 60(14) as cited in para 9.6 above—order that certain information be released to the accused in order to assist him in trying to meet the requirements of s 60(11). See also *Josephs* 2001 (1) SACR 659 (C).

Section 60(11) must be read with s 60(11A). The latter section facilitates proof of the so-called 'jurisdictional fact', ie, the fact that is necessary to bring a bail applicant within the ambit of s 60(11). See *Botha* 2002 (1) SACR 222 (SCA) at [16] and *Van Wyk* 2005 (1) SACR 41 (SCA) at [3]. Section 60(11A) provides as follows:

(a) If the director of public prosecutions intends charging any person with an offence referred to in Schedule 5 or 6 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 he or she intends to charge the accused with an offence referred to in Schedule 5 or 6.

(b) The written confirmation shall be handed in at the court in question by the prosecutor as soon as possible after the issuing thereof and forms part of the record of that court.

(c) Whenever the question arises in a bail application or during bail proceedings whether any person is charged or is to be charged with an offence referred to in Schedule 5 or 6, a written confirmation issued by a 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.

In the absence of a written confirmation as referred to in s 60(11A), the state can adduce evidence to establish the required jurisdictional fact—*Botha* 2000 (2) SACR 201 (T). In *Josephs* 2001 (1) SACR 659 (C) at 661*f-i* the following was said concerning s 60(11A):

> I consider it desirable that the procedural provisions of s 60(11A) of the CPA should be closely adhered to. This would require the charge sheet to be part of the court record, alternatively for a written confirmation as contemplated by s 60(11A)*(a)* to be handed in. I do not suggest that this is the only way in which the nature of the charges faced by the applicant can be proved, but the wording of the relevant provisions (see the reference to 'charge noted on the charge sheet' in s 60(11A)*(a)* and the 'written confirmation' by the 'Attorney-General' in paras *(a)*, *(b)* and *(c)* of s 60(11A)), taken together with the consequences for the applicant, suggest that proof of the nature of the charges should occur with some formality, either at the commencement of proceedings or as soon thereafter as possible.

9.9 The meaning of 'exceptional circumstances' as used in s 60(11)*(a)*

In para [76] of its judgment in *Dlamini etc*, the Constitutional Court observed as follows:

> In requiring that the circumstances proved must be exceptional, the subsection does not say they must be circumstances above and beyond, and generally different from those enumerated. Under the subsection, for instance, an accused charged with a Sch 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case. Other examples are readily to hand in the small body of case law that has already been established in the short period since the 1997 amendment came into operation on 1 August 1998. Thus an otherwise dependable man charged with consensual sexual intercourse with a 15-year-old girl, and who has a minor previous conviction dating back many years, would technically fall within the ambit of s (11)*(a)*. Yet a prudent judicial officer could find those circumstances sufficiently exceptional to warrant bail provided there were no other factors adverse to the grant.

In *Petersen* 2008 (2) SACR 355 (C) at [55]-[56] a full bench stated (emphasis added):

> On the meaning and interpretation of 'exceptional circumstances' in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. . . In the context of s 60 (11)*(a)* the exceptionality of the

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> circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for a certain measure of flexibility in the judicial approach to the question. See *S v Mohammed* 1999 (2) SACR 507 (C) ([1999] 4 All SA 533) at 513*f*-515*f*. *In essence the court will be exercising a value judgement in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria*.

In *Jonas* 1998 (2) SACR 677 (SECLD) the court gave the following examples of what would constitute 'exceptional circumstances' for purposes of s 60(11)*(a)*: a bail applicant's terminal illness, urgent medical operation or cast-iron alibi. In this case it was held that 'exceptional circumstances' are present where an accused has adduced acceptable evidence that the prosecution's case against him is non-existent or subject to serious doubt. It should be noted that in this case the prosecution had led no evidence to contradict the accused's testimony. See also *Hartslief* 2002 (1) SACR 7 (T). Evidence of an investigating police officer that a bail applicant was not a 'flight risk' (and was not likely to interfere with state witnesses and the investigation) led the court in *Porthen* 2004 (2) SACR 242 (C) at [58] to the conclusion that the bail applicant had discharged the burden of proof which rested upon him in terms of s 60 (11)*(a)*. Proof of the accused that he will probably be acquitted can serve as 'exceptional circumstances' (*Botha* 2002 (1) SACR 222 (SCA)). In *Siwela* 1999 (2) SACR 685 (W) it was held that the following factors taken together constituted 'exceptional circumstances': The failure of the state to adduce evidence contradicting the accused's denial of guilt; the lengthy period of incarceration and the good conduct of the accused during a period of release after an initial period of detention. In *Josephs* 2001 (1) SACR 659 (C) at 668*i* it was held: 'Showing "exceptional circumstances" for the purposes of s 60(11) . . . does not posit a standard which would render it impossible for an exceptional, but deserving applicant to make out a case for bail.' The standard of proof that an accused must satisfy in proving 'exceptional circumstances' is proof on a balance of probabilities. See *Scott-Crossley* 2007 (2) SACR 470 (SCA), as well as *Mauk* 1999 (2) SACR 479 (W) and *Yanta* 2000 (1) SACR 237 (Tk) 243*h*-*i*. Where an accused carries the burden of proof on account of the provisions of s 60(11)*(a)* 'it is insufficient for an accused who . . . wishes to rely on the weakness of the State's case to simply show that the State's case is weak. The accused must go further, ie show that the case is exceptionally weak and this must be done by showing on a balance of probabilities that [he] will be acquitted' (*Mazibuko* 2010 (1) SACR 433 (KZP) at [23]). Where an accused fails to make out a *prima facie* case that exceptional circumstances are present, there is no duty on the State to advance evidence in rebuttal (*Viljoen* 2002 (2) SACR 550 (SCA)).There is no onus on the State to disprove the presence of exceptional circumstances—*Mpulampula* 2007 (2) SACR 133 (E).

It should, furthermore, be accepted that '[a] certain measure of flexibility in the judicial approach to the question is required' (per Legodi J *DV* 2012 (2) SACR 492 (GNP) at [8]). In this case the cumulative effect of the following constituted 'exceptional circumstances': the fact that the State's case was subject to some doubt; the low risk pertaining to flight; the absence of a likelihood of interference with state witnesses; the low risk of reoffending (at [43]); and the fact that on account of the high number of charges, the accused if not released on bail, would 'remain in custody for many years before their case is finalised' (at [52]).

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In *C* 1998 (2) SACR 721 (C) Conradie J took the view that in interpreting the words 'exceptional circumstances', a court should bear in mind that it could not have been the intention of the legislature that an alleged offender must be kept in custody when he has established conclusively that he will attend his trial, will not interfere with the administration of justice and will commit no further wrong-doing (ie, the usual circumstances that arise for consideration in a bail application). To require more of a bail applicant would mean that the procedure becomes punitive—and this cannot be reconciled with constitutional provisions and the fact that bail is non-penal in character, as explained in para 1.3 above. Compare generally *H* 1999 (1) SACR 72 (W) and *Mokgoje* 1999 (1) SACR 233 (NC). In the latter case it was held that the following facts did *not* constitute 'exceptional circumstances' for purposes of s 60(11)*(a)*: (i) postponement of trial for five months; (ii) prior release on bail of co-accused before s 60(11)*(a)* came into operation; (iii) value of stolen goods appearing far less than value initially alleged by the prosecution; and (iv) the fact that the bail applicant's business was suffering because of his detention.

The mere fact that a sentenced person was granted leave to appeal does not constitute an exceptional circumstance—*Scott-Crossley* (above).

In *Rudolph* 2010 (1) SACR 262 (SCA) Snyders JA, having referred to *Dlamini etc* (above) and *Botha* (above), concluded that 'ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified' (at 266*h-i*).

10 Release other than on bail

10.1 The provisions of s 27 of the Child Justice Act 75 of 2008

Section 71 of Act 51 of 1977 was repealed by s 99(1) of the Child Justice Act 75 of 2008 with effect from 1 April 2010. The now-repealed s 71 provided for the placement of a juvenile in a place of safety in lieu of release on bail or detention in custody. The present position is regulated by s 27 of the Child Justice Act 75 of 2008. This section is headed 'Placement options for child who has not been released before first appearance at preliminary inquiry'. It reads as follows:

> If, at any stage before a child's first appearance at a preliminary inquiry, the child has not been released from detention in police custody and is charged, in the case of a child who is—
>
> *(a)* (i) 10 years or older but under the age of 14 years, with any offence; or
> (ii) 14 years or older, with an offence referred to in Schedule 1 or 2,
>
> the police official must give consideration to the detention of the child in an appropriate child and youth care centre, if a centre is available and there is a vacancy, or if a centre or vacancy is not available, in a police cell or lock-up; or
>
> *(b)* 14 years or older, with an offence referred to in Schedule 3, the police official must cause the child to be detained in a police cell or lock-up.

A 'child and youth centre' is in terms of s 1 of Act 75 of 2008 'a child and youth care centre referred to in s 191 of the Children's Act [38 of 2005]'.

Section 27 of Act 75 of 2008 must also be read with the following sections of the same Act: s 26 (approach to be followed when considering placement of child); s 28 (protection of children detained in police custody); s 29 (placement of a child in a child and youth care centre); s 30 (placement in a prison); s 31 (error regarding placement); s 32 (factors to be taken into account by the presiding officer regarding

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further detention and placement at preliminary inquiry or child justice court); and s 33 (conditions of detention at preliminary enquiry or child justice court).

10.2 Release on warning

Release on warning is provided for in terms of s 72, which was also referred to in Chapter 7. The gist of s 72 is that an accused may be released by the court or a police official and warned to appear before a specified court at a specified time and date. The accused's release does not depend on the deposit of money or certain conditions. This procedure is followed with lesser offences where there is no reason to expect that the accused will abscond or try to evade justice. Section 72A makes provision for the cancellation of release on warning. The grounds for cancellation are similar to those which apply in respect of cancellation of bail. See s 72A as read with s 68.

Section 72 is subject to the Child Justice Act 75 of 2008.

11 Section 63: Release on warning or on bail (or amendment of bail conditions) on account of prison conditions

11.1 Introduction

South African prisons are hopelessly overcrowded. See the statistics as provided in *Mark* 2001 (1) SACR 572 (C) 583*g-i* and see also generally *Jacobs* 2011 (1) SACR 34 (ECP). Prisoners awaiting trial are part of the problem. A fair number of these awaiting-trial prisoners ('unsentenced prisoners') are people who have been granted—but cannot afford to pay—bail. These people were never really meant to be in prison pending the outcome of their trial. But their mere inability to pay the required bail money keeps them in prison where they, in turn, become part of, or contribute to, the inevitable problems caused by over-population of prisons.

Over-population of a prison poses a threat to the dignity, physical health and safety of its inmates. This much has been acknowledged by the legislature by its insertion of s 63A into the Act. Section 63A was inserted by s 6 of the Judicial Matters Amendment Act 42 of 2001.

11.2 The role of the head of prison

The whole process as provided for in s 63A of the Act is set in motion by a head of prison contemplated in the Correctional Services Act (hereafter the 'head of prison'). Section 63A (1) provides that if a head of prison 'is satisfied that the prison population of a particular prison is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused' who meets all the criteria set by s 63A(1)*(a)* to *(c)*, he may apply to a lower court for *either* the release of such an accused on warning in lieu of bail (see s 63A(1)*(aa)*) *or* the amendment of such an accused's bail conditions as imposed by a lower court (see s 63A(1)*(bb)*). This type of application is hereafter referred to as a 's 63 A(1) application'.

11.3 The category of accused in respect of whom a head of prison can bring a s 63A(1) application

A head of prison can only bring a s 63A(1) application in respect of an accused—

(a) who is charged with an offence falling within the category of offences—

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(i) for which a police official may grant bail in terms of section 59; or
(ii) referred to in Schedule 7;

(b) who has been granted bail by any lower court in respect of that offence, but is unable to pay the amount of bail concerned; and

(c) who is not also in detention in respect of any other offence falling outside the category of offences referred to in paragraph *(a)*.

An important criterion which must be met for an accused to fall within the ambit of a s 63A (1) application is that the accused must have been granted bail by a lower court in respect of the offence concerned but should be unable to pay the amount of bail concerned. See s 63A(1)*(b)*. It may therefore be said that in principle a s 63A(1) application seeks to achieve

what the lower court—by granting bail—essentially had in mind, namely liberty pending the outcome of the trial. It makes good sense to have a mechanism like a s 63A(1) application when lack of financial resources leads to continued incarceration of an individual in circumstances where there is a material and imminent threat to the dignity, physical health or safety of the individual concerned. An important control mechanism is that a s 63A(1) application must contain a written certificate 'to the effect that the prosecuting authority does not oppose the application'. See s 63A(2)*(a)*(ii).

11.4 Role of the magistrate

If the magistrate or regional court magistrate (hereafter 'the magistrate') is satisfied that the s 63A(1) application complies with the requirements set out in s 63(2)*(a)*, he may either order the release of the accused (s 63A(3)*(a)*(i)) or reduce the amount of bail determined under s 60 (s 63A(3)*(a)*(ii)).

Where the release of the accused is ordered, the magistrate may, if he deems it appropriate, amend or supplement any condition imposed under s 60 or s 62 (s 63A(3)*(a)* (iii)).

Section 63A(2)*(d)* provides that a s 63A(1) application may be considered in the presence of the accused if the magistrate deems it necessary. It is submitted that where a magistrate contemplates reduction of bail *and* supplementing or amending bail conditions, he ought to do so in the presence of the accused. The same should happen where a release order is given *and* new conditions of release are imposed. In all these instances, it is submitted, the *audi alteram partem* rule should be applied.

12 Bail applications by way of audio visual link

The provisions of ss 159A to 159D make the above procedure possible in respect of persons older than eighteen. In certain limited circumstances a court may hear a bail application while the applicant is physically in prison. The procedure cannot be followed where the prosecution opposes bail or evidence is required. The court also has the power to direct in the interests of justice that the applicant be brought physically before it. The procedure is only possible in certain magisterial districts and in respect of certain correctional facilities, that is, prisons.

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Chapter 11
Pre-trial examinations

M Basdeo, T Geldenhuys, MG Karels

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2 Plea in magistrate's court on a charge justiciable in the regional court
3 Plea in magistrate's court on a charge justiciable in the high court
4 Preparatory examinations
4.1 What is a preparatory examination?
4.2 When is a preparatory examination held?
4.3 Powers of the director of public prosecutions after conclusion of the preparatory examination

The Child Justice Act 75 of 2008 and this chapter:

Section 43—Nature and objectives of preliminary inquiry

(1) A preliminary inquiry—
(a) is an informal pre-trial procedure which is inquisitorial in nature;
(b) may be held in a court or any other suitable place; and
(c) must be presided over by a magistrate of the district within which the child is alleged to have committed the offence.

(2) The objectives of a preliminary inquiry are to—
(a) consider the assessment report of the probation officer, with particular reference to—
(i) the age estimation of the child, if the age is uncertain;
(ii) the view of the probation officer regarding the criminal capacity of the child if the child is 10 years or older but under the age of 14 years and a decision whether an evaluation of the criminal capacity of the child by a suitably qualified person referred to in section 11(3) is necessary; and

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(iii) whether a further and more detailed assessment of the child is needed as referred to in section 40(1)*(g)*;
(b) establish whether the matter can be diverted before plea;
(c) identify a suitable diversion option, where applicable;
(d) establish whether the matter should be referred in terms of section 50 to a children's court referred to in section 42 of the Children's Act;
(e) ensure that all available information relevant to the child, his or her circumstances and the offence are considered in order to make a decision on diversion and placement of the child;
(f) ensure that the views of all persons present are considered before a decision is taken;

(g) encourage the participation of the child and his or her parent, an appropriate adult or a guardian in decisions concerning the child; and

(h) determine the release or placement of a child, pending—

(i) the conclusion of the preliminary inquiry;

(ii) the appearance of the child in a child justice court; or

(iii) the referral of the matter to a children's court, where applicable.

(3) *(a)* A preliminary inquiry must be held in respect of every child who is alleged to have committed an offence, except where—

(i) the matter has been diverted by a prosecutor in terms of Chapter 6;

(ii) the child is under the age of 10 years; or

(iii) the matter has been withdrawn.

(b) A preliminary inquiry referred to in paragraph *(a)* must be held—

(i) within 48 hours of arrest as provided for in section 20(5) if a child is arrested and remains in detention; or

(ii) within the time periods specified in a written notice in terms of section 18 or a summons in terms of section 19.

(c) A child's appearance at a preliminary inquiry is regarded as his or her first appearance before a lower court, in terms of section 50 of the Criminal Procedure Act.

(4) Section 90 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), applies with the changes required by the context to subsection (1)*(c)*.

See 1, below

Section 44—Persons to attend preliminary inquiry

(1) The following persons must, in addition to the inquiry magistrate and prosecutor, attend the preliminary inquiry, subject to subsections (2) and (3):

(a) The child;

(b) the child's parent, an appropriate adult or a guardian; and

(c) the probation officer.

(2) If a diversion order is likely to be made, a diversion service provider identified by the probation officer should be present at the preliminary inquiry.

(3) The inquiry magistrate may, subject to section 81, exclude any person from attending the preliminary inquiry if that person's presence is not in the best interests of the child or undermines the inquisitorial nature and objectives of a preliminary inquiry.

(4) *(a)* A preliminary inquiry may proceed in the absence of the child's parent, an appropriate adult, guardian or the probation officer if the inquiry magistrate is satisfied that to do so would be in the best interests of the child.

(b) An inquiry magistrate who proceeds in the absence of the child's parent, an appropriate adult, guardian or probation officer in terms of paragraph *(a)*, must enter the reasons for the decision on the record of the proceedings.

(5) The inquiry magistrate may permit the attendance of any other person who has an interest in attending or who may contribute to the proceedings.

(6) The inquiry magistrate may subpoena or cause to be subpoenaed any person whose presence is necessary at the preliminary inquiry.

Section 45—Confidentiality of information furnished at preliminary inquiry

(1) Section 154 of the Criminal Procedure Act relating to the publication of information that reveals or may reveal the identity of a child or a witness under the age of 18 years applies with the changes required by the context to proceedings at a preliminary inquiry.

(2) No information furnished by any person at a preliminary inquiry in relation to the child may be used against that child in any bail application, plea, trial or sentencing proceedings.

See 1, below

Section 46—Failure to appear at preliminary inquiry

A child or his or her parent, an appropriate adult or a guardian, who has been directed to appear at a preliminary inquiry in terms of—

(a) a written notice in terms of section 18;
(b) a summons in terms of section 19;
(c) a written notice by a police official in terms of section 22, read with section 23;
(d) a warning by a presiding officer in terms of section 24(4), (5) or (6),

or is otherwise obliged to appear at a preliminary inquiry and who fails to appear at the inquiry or to remain in attendance at the proceedings must be dealt with in accordance with the provisions of section 24 (7), which apply with the changes required by the context.

See 1, below

Section 47—Procedure relating to holding of preliminary inquiry

(1) The inquiry magistrate must conduct the preliminary inquiry in an informal manner by asking questions, interviewing persons at the inquiry and eliciting information, and must keep a record of the proceedings.

(2) At the start of the preliminary inquiry the inquiry magistrate must—

(a) in the prescribed manner—
  (i) explain the purpose and inquisitorial nature of the preliminary inquiry to the child;
  (ii) inform the child of the nature of the allegation against him or her;
  (iii) inform the child of his or her rights; and
  (iv) explain to the child the immediate procedures to be followed in terms of this Act;
(b) In order to consider diversion, ascertain from the child whether he or she acknowledges responsibility for the alleged offence, and if the child—
  (i) does not acknowledge responsibility, no questions regarding the alleged offence may be put to the child and no information regarding a previous diversion or conviction or charge pending against the child may be placed before the preliminary inquiry, whereupon the provisions of subsection (9)*(c)* apply with the changes required by the context; or
  (ii) does acknowledge responsibility, the preliminary inquiry proceeds in terms of this Chapter; and
(c) determine the age of a child in accordance with section 14, if necessary.

(3) The following information must be placed before the inquiry magistrate:

(a) The probation officer's assessment report, if available;
(b) any form and documentation required for the determination of age referred to in section 14(2)*(a)* and *(b)*, if available;
(c) any documentation relating to any previous conviction, diversion or a pending charge;
(d) the report regarding the detention of the child in police custody provided by the investigating police official in terms of section 22(2), if applicable; and
(e) any other information that may be relevant to the proceedings.

(4) In considering the information referred to in subsection (3), the inquiry magistrate may—

(a) request any further documentation which may be relevant to the proceedings;
(b) elicit any information from any person attending the preliminary inquiry to supplement or clarify the available information; and
(c) take any steps as may be necessary to establish the truth of any statement or the correctness of any submission.

(5) *(a)* If the child has not yet been assessed, the inquiry magistrate may dispense with assessment if it is in the best interests of the child to do so.

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(b) An inquiry magistrate who dispenses with an assessment in terms of paragraph *(a)*, must enter the reasons for that decision on the record of the proceedings.

(6) If a preliminary inquiry proceeds in the absence of a probation officer, the probation officer's assessment report must be available at the preliminary inquiry, unless assessment has been dispensed with in terms of subsection (5).

(7) In order to ensure that the views of all persons present are considered before a decision regarding the child is made, the inquiry magistrate must—

(a) encourage the participation of the child and his or her parent, appropriate adult or a guardian;

(b) allow the child, the child's parent, an appropriate adult or a guardian or any other person present to ask questions and to raise issues which, in the opinion of the inquiry magistrate, are relevant for the purposes of a preliminary inquiry.

(8) *(a)* If the child is a co-accused with one or more other children, a joint preliminary inquiry may be held if the inquiry magistrate is satisfied that this will be in the best interests of all the children concerned.

(b) If a joint preliminary inquiry is held in terms of paragraph *(a)*, different decisions may be made in respect of each child.

(9) If the prosecutor indicates that the matter may not be diverted, the inquiry magistrate must—

(a) obtain from the prosecutor confirmation that, based on the facts of the case at his or her disposal and after consideration of other relevant factors, there is sufficient evidence or there is reason to believe that further investigation is likely to result in the necessary evidence being obtained, for the matter to proceed;

(b) enter the prosecutor's confirmation on the record of the proceedings; and

(c) inform the child that the matter is being referred to the child justice court to be dealt with in accordance with Chapter 9.

(10) Where an inquiry magistrate has presided over a preliminary inquiry and has heard any information prejudicial to the impartial determination of the matter, the magistrate may not preside over any subsequent proceedings, procedure or trial arising from the same facts.

See 1, below

Section 49—Orders at preliminary inquiry

(1) *(a)* An inquiry magistrate may, subject to paragraph *(b)*, make an order that the matter be diverted in terms of section 52(5).

(b) An inquiry magistrate may, in the case of a child who is 10 years or older but under the age of 14 years, only make an order that the matter be diverted in terms of paragraph *(a)* if he or she is satisfied that the child has criminal capacity.

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(2) An inquiry magistrate may make an order that the matter be referred to a child justice court in terms of section 47(9)*(c)* to be dealt with in terms of Chapter 9, in which case—

(a)

if the child is not legally represented, the inquiry magistrate must explain to the child and the parent, an appropriate adult or a guardian, the provisions of section 82(1) regarding legal representation;

(b) if the child is in detention, the inquiry magistrate must, after due consideration of the provisions of Chapter 4, inform the child of the charge against him or her and the date, time and place of the next appearance in a child justice court and must warn the child's parent, an appropriate adult or a guardian to attend the proceedings on the specified date, and at the specified time and place; and

(c) if the child is not in detention, the inquiry magistrate—

(i) may alter or extend any condition imposed in terms of section 24(4); and

(ii) must warn the child and his or her parent, an appropriate adult or a guardian to appear in a child justice court on the specified date and at the specified time and place.

See 1, below

1 Introduction

Ordinarily, once the investigation into an offence has been completed and steps have been taken to ensure the presence of the accused at the trial; the charges against the accused will be formulated and the trial will commence.

If however, the decision has been taken to charge the accused in the regional court or to indict him before the High Court, certain procedures may be followed before the trial actually starts. These are that the accused be brought before a magistrate's court and be required to plead to the charges or that a preparatory examination be held.

In order to draw a clear distinction between a summary trial and a pre-trial examination, the former will be discussed briefly in view of the fact that it is repeatedly referred to further on in this chapter.

A trial is referred to as a summary trial when it was not preceded by a preparatory examination. The director of public prosecutions or any person authorised thereto by him, eg the public prosecutor, may designate any court which has jurisdiction as the forum for a summary trial—s 75(1)*(c)* of the Criminal Procedure Act 51 of 1977. This may or may not be the same court in which the accused has appeared for the first time. In deciding where to hold the summary trial, no court is consulted. Once the court has been designated, the accused will be brought before that court and the trial will commence.

When the accused is in custody he must first be brought before a lower court even though that court may not have jurisdiction to try him. When this occurs, s 75(1)*(b)* read with s 75 (2) applies. At the prosecutor's request the accused is then referred for a summary trial to a court with jurisdiction. That court may be a regional court or a superior court.

Section 75 is subject to ss 119, 122A and 123, which in effect means that, before the summary trial commences in a superior court, the director of public prosecutions may either order that a preparatory examination be held or that the accused be required to plead in a magistrate's court to the charge against him, although that court does not have jurisdiction to try the offence or to impose what the director of public prosecutions considers to be an appropriate punishment—s 119. Similarly, before the start of the summary trial in the regional court, the prosecutor may require the accused to plead to a charge before a magistrate's court although that court does not have jurisdiction to try the offence or does not have jurisdiction to impose the punishment which, in the opinion of the prosecutor, would be the appropriate punishment to impose upon the accused—s 122A.

A preparatory examination and a pre-trial examination (referred to here) must be clearly distinguished from a preliminary inquiry. A preliminary inquiry is provided for in the Child

Justice Act 75 of 2008. A child (a person between the ages of 10 and 18) who is suspected of having committed an offence must first appear at the preliminary inquiry. The purpose of the preliminary inquiry is to consider whether the matter involving the child may be diverted away from the formal criminal justice process. A preliminary inquiry *(a)* is an informal pre-trial procedure which is inquisitorial in nature, and *(b)* may be held in a court or any other suitable place—s 43(1). Although a preliminary inquiry may be followed by a summary trial of the child, the objective of the preliminary inquiry is to consider the possibility of diverting the matter involving the child away from the formal criminal justice process. If the matter is diverted, no summary trial will take place (eg the matter may be referred to a children's court). If the matter is not diverted, the matter will be referred to a child justice court. The child justice court will try the case in accordance with the Criminal Procedure Act (with the necessary changes provided for in the Child Justice Act)—cf chapters 4 and 7.

2 Plea in magistrate's court on a charge justiciable in the regional court

When an accused appears in a magistrate's court and the alleged offence may be tried by a regional court but not by a magistrate's court, or the prosecutor informs the court that he is of the opinion that the offence is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of the magistrate's court but not of the jurisdiction of the regional court, the prosecutor may put the relevant charge and any other charge to the accused, who shall be required by the magistrate to plead to it—s 122A.

If the accused pleads not guilty, the magistrate may question him in terms of s 115 and thereafter commit him for a summary trial to the regional court concerned—s 122D. On a plea of guilty the accused is questioned in terms of s 112 and the magistrate, if he is satisfied that the accused is guilty, refers the accused for sentence to the regional court—s 122C(1). If he is not satisfied that the accused is guilty, he will enter a plea of not guilty and submit the accused for a summary trial to the regional court—s 122C(2) and cf *M* 1980 (4) SA 404 (O); *Dimane* 1987 (3) SA 146 (T). See also *Meyers* 1988 (3) SA 917 (O).

The pleas, recorded in terms of s 122A, differ from the pleas of 'guilty' or 'not guilty' in terms of s 106 (in that the accused is not entitled to demand that he be convicted or acquitted), and the first-mentioned plea proceedings cannot be

regarded as the commencement of or part of the subsequent trial. It follows, therefore, that a plea of *autrefois acquit/convict* cannot be sustained. The accused must accordingly be asked to plead afresh at the subsequent trial, irrespective of what he has pleaded in the magistrate's court—*Lubbe* 1989 (3) SA 245 (T); *Singh* 1990 (1) SA 123 (A); cf *Hendrix* 1979 (3) SA 816 (D); *Singh* 1986 (4) 263 (C).

Where a charge that was temporarily withdrawn after the accused had already pleaded in terms of s 122A is later reinstated, the accused must not be asked to plead again in the district court on the same charge, but must be summarily referred to the correct court for trial in terms of s 75. If the accused were to be asked to plead in the district court again, it would constitute an irregularity—*Lethopa* 1994 (1) SACR 553 (O).

3 Plea in magistrate's court on a charge justiciable in the high court

This procedure is sometimes referred to as the 'curtailed preparatory examination'. It is sometimes also called a 'mini-preparatory examination'.

The purpose of this procedure is to ease the workload of the High Court and of the director of public prosecutions. It is a sifting process whereby a preparatory examination or a superior court trial may be eliminated in certain cases where, on account of the possible co-operation of the accused at an early stage, the charge proves to be of a less serious nature than was initially thought.

When an accused appears in a magistrate's court and the alleged offence may be tried by a superior court only, or is of such a serious nature and magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court, the prosecutor may, on the instructions of the director of public prosecutions, put the charge to the accused in the magistrate's court—cf *S* 1978 (4) SA 374 (T). The magistrate does not determine the charge upon which the accused must stand trial. The proceedings only serve as an aid to the director of public prosecutions in determining the charge and, in terms of the provisions of s 122(1), decisions regarding the prosecution rests with him—*M; S* 1979 (2) SA 959 (T). The magistrate directs the accused to plead to the charge—s 119. (The proceedings commence by lodging the charge-sheet with the clerk of the court—s 120 read with s 76(2) and (3).)

Where an accused pleads guilty, the magistrate questions him in order to ascertain whether he admits the allegations in the charge—s 121(1) read with s 112(1)*(b)*. If the magistrate is satisfied that the accused admits the allegations, he stops the proceedings pending the decision of the director of public prosecutions. The director of public prosecutions may decide to arraign the accused for sentence before the superior court or any other court having jurisdiction—including the court in which the proceedings were stopped—s 121(2)*(a)* and (3). (If the magistrate is not satisfied that the accused admits the allegations in the charge-sheet, he must, in terms of s 121(2)*(b)*, record in what respect he is not so satisfied, enter a plea of not guilty and deal with the matter in terms of s 122(1), below.) The magistrate must advise the accused of the decision of the director of public prosecutions. If the decision is that the accused be arraigned for sentence—

(1) in the magistrate's court concerned, the court must dispose of the case and the proceedings continue as though no interruption occurred;
(2) in a regional or superior court, the magistrate must adjourn the case for

sentence by such court—s 121(4). This court may convict the accused on his plea of guilty of the offence concerned and impose any competent sentence—s 121(5). Nothing prevents the prosecutor or accused from presenting evidence on any aspect of the charge, or the court from questioning the accused for the purposes of determining an appropriate sentence—s 121(7). If the accused satisfies the court that the plea of guilty or an admission was incorrectly recorded, however, or if the court is not satisfied that the accused is guilty or has no valid defence to the charge, it records a plea of not guilty and proceeds with the trial as if it is a summary trial in that court. An admission by the accused, the recording of which took place with the agreement of the accused, stands as proof of the fact thus admitted—s 121(6).

Where an accused pleads not guilty, s 122(1) provides that the court must act in terms of s 115: the magistrate asks the accused whether he wishes to make a statement indicating the basis of his defence. Where the accused does not make a statement, or does so and it is not clear from the statement to what extent he denies or admits the allegations, the court may question him in order to establish which allegations in the charge the accused disputes. The court may in its discretion put any question to the accused in order to clarify any of the above-mentioned aspects and must enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty may be recorded as an admission. When s 115 has been complied with, the magistrate must stop the proceedings and adjourn the case pending the decision of the director of public prosecutions. The latter may—

(1) arraign the accused on any charge at a summary trial before a superior court or any other court having jurisdiction (including the magistrate's court in which the proceedings were adjourned); or
(2) institute a preparatory examination against the accused.

The director of public prosecutions advises the magistrate's court concerned of his decision and the court notifies the accused accordingly.

If the decision is that the accused be arraigned in the magistrate's court in which the proceedings were adjourned, the court must proceed from the stage at which adjournment took place as if no interruption occurred. If the accused is arraigned on a charge different from the charge to which he has pleaded, he must plead to that charge. (The court must then deal with the matter in accordance with s 115 if the plea is one of not guilty, or in terms of s 112 in the case of a plea of guilty—cf in this regard the chapter on arraignment and plea.)

If the director of public prosecutions' decision is that the accused be arraigned in a regional court or a superior court, the magistrate must, after having notified the accused of the decision, commit the accused for a summary trial before such court—s 122(3).

Although the Criminal Procedure Act does not provide for transmission of the record of the proceedings to the director of public prosecutions (express provision is made in the case of preparatory examinations—s 137), one may assume that this will actually happen in practice; there is indeed no other way for a director of public prosecutions to reach the decision which is mentioned several times in ss 121 and 122. (With regard to the evidentiary value of the record of the respective proceedings, cf ss 121(5)*(a*A*)* and 122(4) as well as *Tsankobeb* 1981 (4) SA 614 (A).)

The pleas recorded in terms of s 119 differ from the pleas of 'guilty' or 'not guilty'

in terms of s 106, and the first-mentioned plea proceedings cannot be regarded as the commencement of or part of the subsequent trial—as is the case with the pleas recorded in terms of s 122A, above. A plea of *autrefois acquit/convict* can, once more, not be sustained and the accused must be asked to plead afresh at the subsequent trial.

A request for further particulars in relation to a charge such as murder may be enforced before the accused is required to plead in terms of s 119. Section 87 is also applicable to proceedings in terms of s 119—*Leopeng v Meyer NO* 1993 (1) SACR 292 (T).

4 Preparatory examinations

Chapter 20 of the Act (ss 123-143) is applicable to preparatory examinations.

4.1 What is a preparatory examination?

In terms of s 1 a preparatory examination is a criminal proceeding. A preparatory examination is not a trial because the final decision in the proceedings rests with the director of public prosecutions and not with the court. It is an examination which is held before a magistrate to determine whether the evidence presented before him justifies a trial before a superior court or any other court which has jurisdiction. The accused is not on trial. He is not requested to plead at the commencement of the proceedings, as at a trial, but only at the conclusion, after all the evidence to the charge or charges has been led—s 130. The magistrate (or regional magistrate) asks the accused to plead to the charge(s)—s 131. The magistrate (or regional magistrate) does not make a finding of guilty or not guilty. If a trial is instituted after a preparatory examination, it is a separate proceeding because the criminal proceeding (preparatory examination) is terminated when the accused is committed for trial—*Swanepoel* 1979 (1) SA 478 (A).

A preparatory examination is inherently irreconcilable with the s 119 or s 122A procedure, as discussed in paras 2 and 3 above, because the purpose of the latter is to arraign an accused as soon as possible without the accused knowing on what evidence the State's case is founded. The purpose of the preparatory examination, on the other hand, is to enable the director of public prosecutions to determine whether the prosecution has a case and whether it is a case which should be prosecuted in a superior court or another court.

If the director of public prosecutions decides, on the evidence presented, to prosecute the accused in a particular court, the accused is then *tried* by that court. It is at the director of public prosecutions' discretion to arraign the accused for sentence where he has pleaded guilty, or for trial, if the accused has pleaded not guilty in any court other than the superior court.

If the magistrate discharges the accused at the conclusion of the examination, this does not have the effect of an acquittal. If however, the accused is informed by the magistrate that the director of public prosecutions has decided not to prosecute him, he may, if charged with the same crime again, plead that he has previously been acquitted (*autrefois acquit*)—s 142. This creates the impression that he has been acquitted during a trial, but is only a statutory extension of the application of the rules relating to *autrefois acquit*—cf also *Ndou* 1971 (1) SA 668 (A) and Chapter 14 below.

4.2 When is a preparatory examination held?

Before the coming into operation of s 152*bis* of the Criminal Procedure Act 56 of 1955, a preparatory examination had to precede every superior court trial. Under s 152*bis* the director of public prosecutions was given the discretion to decide whether a summary trial should be held without a preceding preparatory examination, only if he was of the opinion that there was any danger of interference with or intimidation of witnesses or if he deemed it in the interest of the safety of the state or in the public interest. The opinion was held at that time that a preparatory examination afforded an accused an unfair advantage in that he was able to hear all the State's evidence without having to testify himself or to call witnesses or to cross-examine them and that it was time-consuming—an opinion which still finds support today. See *Commission of Inquiry into the Structure and Functioning of the Courts* (Hoexter Commission), Fifth and Final Report, Part III 199.

Section 123 regulates the present position. It lays down that if a director of public prosecutions is of the opinion that it is necessary for the more effective administration of justice, he may decide to order the holding of a preparatory examination before the accused is tried in a superior or other court with jurisdiction. He may take this decision at the following stages:

(1) following s 119 procedure in which the accused has pleaded guilty, if the director of public prosecutions is in doubt regarding the accused's guilt or if he feels that the facts do not fully appear from the record—ss 121(3)*(c)* and 123*(a)*;

(2) following s 119 procedure in which the accused has pleaded not guilty—ss 122(2)(ii) and 123*(a)*; or

(3) at any stage before conviction during the course of a trial in a magistrate's court or regional court—s 123*(b)*. In such a case the trial will be converted into a preparatory examination. (In *Tieties* 1990 (2) SA 461 (A) the Appellate Division (now the Supreme Court of Appeal) held that, notwithstanding the wording of s 123*(b)*, it was the intention of the legislature to provide for a conversion of a trial into a preparatory examination only before conviction and that any other interpretation would be a departure from existing principles of law. Should an accused person's trial be converted into a preparatory examination in terms of s 123*(b)* after conviction, the accused will be entitled to plead *autrefois convict* if he is required to plead on the same charges at a trial subsequent to the preparatory examination.)

The decision to institute a preparatory examination is at the director of public prosecutions' exclusive discretion and neither the magistrate nor the accused can interfere with it. The director of public prosecutions will institute a preparatory examination if he is of the opinion—

(i)

that the crime is too serious to be tried by a lower court, in which case he may, in terms of s 139, refer the case to the High Court on an even more serious charge; or

(ii) that there is a fatal deficiency in the State's case after the closure of the State's case at the end of the trial and that it might be remedied by converting the trial into a preparatory examination—cf *Bham v Lutge NO* 1949 (3) SA 392 (T).

The record of the proceedings held in any of the instances referred to in (1), (2) and (3) above, which have been adjourned awaiting the director of public prosecutions'

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decision, forms part of the preparatory examination which is subsequently held—s 124*(a)*. The examination proceeds on the charge to which the accused has pleaded. However, evidence may be led which relates to further crimes allegedly committed by the accused, other than the charge to which he has pleaded—s 124*(b)*.

The accused pleads to the charge(s) after all the evidence for the State has been led. He may object to the charge in terms of s 85 or plead mental illness in terms of ss 77, 130 and 131. Where a summary trial has been converted into a preparatory examination the evidence already led has the same legal force and effect as if it had been led at the preparatory examination. A witness who has already testified may be recalled by the court. New witnesses may be called to testify to the charge(s) to which the accused has pleaded in the summary trial, and also to allegations of further crimes committed by the accused—ss 127 and 128.

4.3 Powers of the director of public prosecutions after conclusion of the preparatory examination

In terms of s 139 the director of public prosecutions may, after considering the record of a preparatory examination transmitted to him under s 137, arraign the accused for sentence, arraign him for trial, or decline to prosecute. The director of public prosecutions must advise the court in which the examination was held of his decision.

(1) Where an accused is arraigned for *sentence*, the magistrate or regional magistrate of the court in which the preparatory examination was held must advise the accused of the decision of the director of public prosecutions and, if the decision is that the accused be arraigned—
   (a) in the court concerned, dispose of the case on the charge on which the accused is arraigned, or
   (b) in another court, adjourn the case for sentence by such other court. The latter court may—with certain provisos—convict the accused on his plea of guilty—cf s 140.

(2) Where the accused is arraigned for *trial*, he is advised by the court of the director of public prosecutions' decision (as in the preceding paragraph) and if he is to be arraigned in some other court, he is committed for trial by such other court. The case is dealt with in all respects as a summary trial. See s 141 for further details.

(3) Where the director of public prosecutions *declines* to prosecute an accused, he advises the magistrate of the district in which the preparatory examination was held of his decision and the magistrate must forthwith have the accused released from custody, or if he is not in custody, advise him in writing of the director of public prosecutions' decision. No criminal proceedings may again be instituted against the accused in respect of the charge in question—s 142. The director of public prosecutions' decision to decline to prosecute should for all practical purposes be equated to an acquittal on the merits by a court of law, ie the accused will at a 're-trial' in respect of the same subject-matter be able to rely on the plea of *autrefois acquit*—Du Toit et al 20–8.

Phase Two:
The Trial

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Chapter 12
Indictments and charge sheets

M Basdeo, MG Karels, JP Swanepoel

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The Constitution and this chapter:

Section 32—Access to information

(1) Everyone has the right of access to—
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.

See 1.1, below

Section 35—Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right—
(a) to be informed of the charge with sufficient detail to answer it;

. . .

(i) to adduce and challenge evidence . . .

See 1.1, below

The Child Justice Act 75 of 2008 and this chapter:

Section 6—Seriousness of offences

(1) In order to determine the seriousness of offences for purposes of this Act, the categories of offences are listed in the following order, beginning with the category of least serious offences:

(a) Offences contained in Schedule 1;

(b) offences contained in Schedule 2; and

(c) offences contained in Schedule 3.

(2) In the case of a child being charged with more than one offence which are dealt with in the same criminal proceedings, the most serious offence must guide the manner in which the child must be dealt with in terms of this Act.

(3) In the case of a child being charged with more than one offence which are dealt with in separate criminal proceedings, subsection (2) does not apply.

See 6, below

1 Lodgement and service of indictments and charge sheets

1.1 Introduction

Everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise of protection of any rights—s 32 of the Constitution. This principle applies to various facets of the criminal process:

(a) *Access to the content of the police docket or relevant parts thereof*

In *Shabalala v Attorney-General, Transvaal, and Another; Gumede and Others v Attorney-General, Transvaal* 1995 (2) SACR 761 (CC) at [37] and [72] the Constitutional

Court gave direction as to the factors and principles that could influence the decision by the prosecution or the court (where relief is sought from the court against the State's denial of access) as to whether the accused should be allowed or denied access:

(1) In general, an accused person should be entitled to have access at least to documents in the police docket which are exculpatory for the accused (or which are *prima facie* likely to be helpful to the defence) unless, in very rare cases, the State is able to justify the refusal of such access on the grounds that it is not justified for the purposes of a fair trial.

(2) Ordinarily, the right to a fair trial would include access to the statements of witnesses (whether or not the State intends to call such witnesses) and such parts of the contents of a police docket as are relevant in order to enable an accused person properly to exercise that right, but the prosecution may, in a particular case, be able to justify the denial of such access on the grounds that it is not justified for the purposes of a fair trial. This would depend on the circumstances of each case. Considerations to be taken into account are, for example:

(i) the simplicity of the case, either on the law or on the facts or on both;

(ii) the degree of particularity furnished in the indictment or the summary of substantial facts in terms of s 144 of the Criminal Procedure Act;
(iii) the particulars furnished pursuant to s 87 of the Criminal Procedure Act;
(iv) the details of the charge, read with such particulars.

(3) The State is entitled to resist a claim by the accused for access to the dossier or to any particular document in the police docket on the grounds that such access is not justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial; or on the ground that it has reason to believe that there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer, or might divulge State secrets; or on the grounds that there is a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice. The courts retain a discretion and should balance the degree of risk involved in attracting the potential prejudicial consequences for the proper ends of justice against the degree of the risk that a fair trial may not ensue for the accused (if such access is denied). A court may review and change its own decision later.

(4) See also the provisions of s 39 of the Promotion of Access to Information Act 2 of 2000, in terms of which an information officer of a (governmental) public body may refuse access to a police docket before the commencement of the trial, if such disclosure may prejudice the police investigation or prosecution of the crime committed by the alleged offender, and must refuse disclosure if the access to the police docket concerns certain bail proceedings in terms of s 60(14) of the Criminal Procedure Act.

(b) *To be informed of the allegations* (s 35(3)*(a)* of the Constitution)

More specifically (as far as the present chapter is concerned), an accused has the right (included in his right to a fair trial) to be informed of the charge with sufficient detail to answer it—s 35(3)*(a)* of the Constitution; *Petersen* [2003] 2

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All SA 448 (C). The accused may, however, be entitled to have access to the relevant parts of the police docket even in the cases where the particulars furnished *might be sufficient to enable* the accused to understand the charge against him or her but, in the special circumstances of a particular case, it might not enable the defence to exercise its other fair trial rights. For example:

(c) *To prepare its own case sufficiently* (s 35(3)*(b)* of the Constitution);

(d) *To properly exercise its right 'to adduce and challenge evidence'* (s 35(3)*(i)* of the Constitution). This includes the right to identify witnesses able to contradict the assertions made by the State witnesses or to obtain evidence which might have a sufficient impact upon the credibility of the State witnesses during cross-examination; or to instruct expert witnesses properly to adduce evidence which might similarly detract from the probability of the versions given by the State witnesses; or to focus properly on significant matters omitted by the State witnesses to their statement; or to deal properly with the significance of matters stated in their statements by such witnesses in one statement.

In order to avoid uncertainty concerning the facts which must be proved, our law stipulates strict requirements which have to be satisfied when an indictment or charge is drawn up. (The term 'indictment' is used in connection with prosecutions in a division of the High Court of South Africa ('High Court') while 'charge' refers to a prosecution in a lower court.) These documents, in which it is alleged that the accused is guilty of a specific crime or crimes, furnish specific information, as it is essential that the accused should know exactly what the charge against him is—*Hugo* 1976 (4) SA 536 (A). The legislature, nevertheless, has endeavoured to avoid criminal trials being rendered abortive merely because of insignificant

mistakes made by the persons who draw up indictments and charge sheets. In the past the requirements for indictments were so strict that the slightest technical error often vitiated proceedings.

Our legislature, therefore, has enacted provisions through the years in order to bring about a less formalistic practice. However, this does not mean that an indictment or charge sheet may be slovenly drawn—*Mkenkana* 1972 (2) SA 200 (E): the golden rule remains that an indictment or charge sheet should inform the accused in clear and unmistakable language of the charge he has to meet—*Pillay* 1975 (1) SA 919 (N) and cases cited there.

1.2 In the High Court of South Africa

Having decided to indict an accused, the director of public prosecutions must lodge an indictment with the registrar of the High Court. This is a document presented in the name of the director of public prosecutions whereby he informs the court that the accused is guilty of the crime alleged therein. The document further sets out the date and place at which the crime was allegedly committed, together with certain personal particulars of the accused—s 144(1), (2). Where no preparatory examination has been held, the indictment must be accompanied by a summary of the salient facts of the case, in order to inform the accused of the allegations against him, provided that this will not be prejudicial to the administration of justice or the security of the state. The purpose of the summary of substantial facts is to fill out the rather terse picture almost inevitably presented by the indictment—*Mpetha (1)* 1981 (3) SA 803 (C). The State is not bound by the summary and cannot be precluded from leading evidence which contradicts it—*Kgoloko* 1991 (2) SACR 203

(A). A list of the names and addresses of persons the director of public prosecutions intends calling must also be supplied, although this may be withheld if the director of public prosecutions is of the opinion that the witnesses may be tampered with or intimidated—s 144(3).

The indictment must then be served on the accused in accordance with the rules of court. Service of the indictment, together with a notice of trial, must take place at least *ten days* (Sundays and public holidays excluded) before the date appointed for the trial, unless the accused agrees to a shorter period. Service is effected either in terms of the rules of court, or by the magistrate handing the documents to the accused when committing him to the High Court—s 144(4).

1.3 In the lower courts

Unless an accused has been summoned to appear in court the proceedings at a summary trial in a lower court are commenced by lodging a charge sheet with the clerk of the court—s 76(1). Unlike an indictment, this is not served on the accused, but is presented in court. The accused may examine this at any stage of the relevant criminal proceedings—s 80. The accused in such a case is brought to court, as we have seen, on written notice, by summons, or under arrest.

Where an accused is brought to court on written notice or under arrest, he may be required to appear upon very short notice, but where a summons is served upon an accused this must take place at least 14 days (Sundays and public holidays excluded) before the day of trial—s 54(3). If the accused or his adviser finds that this period leaves the accused insufficient time within which to prepare his defence, he may apply for, and the court will in appropriate cases grant, a postponement for that purpose—*Thane* 1925 TPD 850 and *Van Niekerk* 1924 TPD 486. In *Singh v Blomerus NO* 1952 (4) SA 63 (N) it was held that short service to which no objection had been made at the trial could not be relied on before the appeal court.

2 Form and substance of charges and indictments

2.1 Terminology

Because the requirements as to the form and substance of indictments and charge sheets are the same, the shorter term ‘indictment’ (or simply ‘charge’) will, for the sake of convenience, be used from now on.

2.2 Necessary averments in the charge sheet

Charge sheets should be kept as simple as possible. They should be intelligible and a case that can be paraphrased in simple terms must not be made intricate—*Rautenbach* 1991 (2) SACR 700 (T).

Section 84(1) sets out the requirements with which a charge should comply. It provides as follows:

(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

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(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state the fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.

In short, this section provides that the *relevant offence* should be set forth in the charge in such a manner that the accused is sufficiently informed of the nature of the charge brought against him. Briefly, it can be said that all the elements of the offence should be mentioned in the charge, or to put it differently, that the charge should disclose an offence. Section 84 (1) specifically requires that *sufficient particulars* as to the time and place at which the offence is alleged to have been committed, the person (if any) against whom and the property (if any) in respect of which the offence is alleged to have been committed, should be furnished in the charge.

Compliance with the foregoing requirements of a charge can be demonstrated by referring to a typical charge of murder. (As mentioned above, in the High Court a charge sheet is referred to as an indictment.) Such a charge normally reads as follows:

That the accused is guilty of the crime of murder in that on or about 1 December 2016 and at or near Sunnyside in the district of Pretoria, the accused did intentionally and unlawfully kill John Smith, an adult male.

Particulars furnished are—

(1) the name of the offence for which the accused is indicted (murder);

(2) all the elements of the crime murder (intention, unlawfulness, killing of another human being);

(3) the date on which and place where the offence was allegedly committed; and

(4) the person against whom the offence was allegedly committed.

In this case the accused is charged with a common-law offence. In such an instance the offence must be described in clear legal terms, and if legal appellation for the offence exists, it must be set forth by such appellation, or otherwise it should be strictly and accurately described—*Endemann* 1915 TPD 142 and *Neumann* 1949 (3) SA 1238 (Spec Crim Ct). In s 84(3) it is specifically provided that the description of a statutory offence will be sufficient if the words of the enactment, or similar words, are used. Those who draft indictments should

not slavishly follow the wording of a statute, but should confine the charge to that which is relevant—*Mangqu* 1977 (4) SA 84 (E).

With regard to averments as to the time at which the offence is alleged to have been committed, s 92(1)*(c)* provides that if time is not of the essence of the offence, an indictment is not necessarily deficient as a result of failure to state the time at which the offence was committed. If the time of the offence is indeed mentioned, but it is proved that the act or offence was committed on any other day or time *not more than three months before or after the day or period alleged*, such proof will be taken to support such allegation as to the time of the offence, provided that time is not of the essence of the offence—s 92 (2).

If the accused raises an *alibi* as a defence (in other words, that at the time of the commission of the alleged crime he was elsewhere) and the court considers that the accused might be prejudiced in making such defence if proof were to be admitted that the act or offence had been committed on some day or time other than the day

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or time stated in the indictment, then the court must reject such proof (even though the time proposed to be proved is within the aforesaid three-month period). The accused will then be in the same position as if he had not pleaded.

The place where the crime was committed may also be of the essence of an offence. For example, some offences can be committed only in a public place, eg negligent driving of a motor vehicle (which offence can take place only on a public road). In such a case a charge is defective if it does not allege that the offence was committed in such a place.

In the above example of an indictment of murder, you will notice that it is specifically mentioned that the accused acted intentionally. Where it is an essential feature of an offence that it be committed in circumstances showing a particular mental attitude *(animus)* of the offender—for example, that it was done intentionally (as in the case of 'murder'), or negligently (as in the case of 'culpable homicide')—such mental attitude should be averred, otherwise the charge does not disclose an offence.

A charge is valid if it sets out the particulars of an offence with which an accused is charged. It is not required of the State to specify on the charge sheet the penal consequences of a conviction on the offence as charged—*Director of Public Prosecutions, Western Cape v Prins* 2012 (2) SACR 183 (SCA). Although the presence of aggravating circumstances affects sentence only, it is of great importance that a person charged with robbery or with housebreaking with intent to commit an offence, should be informed, in clear terms, that the State alleges and intends to prove that aggravating circumstances were present (*Zonele and Others* 1959 (3) SA 319 (A)). In a constitutional dispensation it can certainly be no less desirable than under common law that the facts the State intends to prove to increase the courts' sentencing jurisdiction (as under s 51 of Act 105 of 1997 (minimum sentencing legislation)) should be clearly set out in the charge sheet or indictment. But in *S v Legoa* 2003 (1) SACR 13 (SCA) at [20] the court held that whilst the desirability of specific reference in a charge sheet or indictment to any sentencing legislation (such as Act 105 of 1997) upon which the State may seek to rely and to the facts which the State intends to prove to bring the accused within the ambit of such legislation cannot be gainsaid, it is not necessarily essential. See also *Ndlovu* 2003 (1) SACR 331 (SCA) at [11] and [12]. Where there is no such reference, the issue is whether, despite the omissions, the accused has had a fair trial.

2.3 Negativing exceptions, exemptions, provisos, excuses or qualifications

Sometimes statutory provisions contain exceptions or provisos in terms whereof certain persons are exempted from the operation of a statutory provision. In terms of s 90 it is not

necessary for the state to specify or negative such exceptions, etc in the charge. If the prosecutor (unnecessarily) does this, it need not be proved by the prosecution. It is for the accused to prove that he is protected by such an exception, exemption, etc.

A distinction should be drawn between a necessary averment concerning the offence, and an exception. In this regard the golden rule is that incriminating factors must be proved by the prosecution and exculpatory factors by the accused. While incriminating facts *must* be mentioned in the charge, exculpatory facts need not be mentioned.

The application of this rule can be explained as follows: If the accused is charged

with the offence of driving a motor vehicle without a licence, the fact that the accused did not possess a licence is a substantial element of the relevant offence. Driving a vehicle as such is not an offence, but driving it *without a licence* is. The averment that the accused was not in possession of a licence is, in other words, incriminatory and must be included in the charge. However, if a person is charged with the unlawful possession of prohibited dependence-producing medicine (eg dagga), the prosecution need not allege that the accused was not authorised in terms of the Drugs and Drug Trafficking Act 140 of 1992 to be in possession of such medicine. If the accused should allege that he was indeed authorised to be in possession of such medicine, this fact constitutes an *exculpatory factor* which must be raised by the accused and it need not be included in the charge.

2.4 Inclusion of unnecessary averments

When, during a trial, it appears that any words or particulars in an indictment or charge are superfluous, an amendment may be made if it does not prejudice the accused—s 86(1). 'Prejudice' is meant to refer to the accused's defence (*Coetzer* 1976 (2) SA 769 (A)). If such amendment is not made, the validity of the proceedings will not be affected, unless the amendment has been refused by the court. Such surplusage, if it does not embarrass the accused in his defence, will as a general rule be disregarded; for example, a charge which needlessly and inaccurately specified an exception was upheld in *Mannheim* 1943 TPD 169. Inaccurate averments in a charge may seriously prejudice the State's case—*Hassan* 1970 (1) SA 192 (C).

2.5 The obligation to provide particulars

If the accused feels that the particulars in the indictment are too scanty to inform him properly of the charge against him, he or his legal representative may request particulars or further particulars from the prosecutor—s 87. Even if a charge complies with the requirement set out in the preceding paragraphs of this chapter, the court is still competent to grant an order for further particulars which may be required by the accused to enable him to prepare his defence—*Mokgoetsi* 1943 AD 622 at 627. The court may (either before or at the trial but before evidence has been led) in its discretion direct particulars to be delivered to the accused. Where the accused genuinely requires particulars of the substantive allegation against him in order to ascertain the true nature of the case he has to meet, the court will order the prosecution to furnish such particulars unless this is shown to be impracticable—*Abbass* 1916 AD 233. The prosecutor must deliver the particulars free of charge. In determining whether a particular is required or not and whether a defect in an indictment is material to the substantial justice of the case or not, the court may refer to the preparatory examination or summary of substantial facts in terms of s 144(3)*(a)*.

In *Weber v Regional Magistrate Windhoek* 1969 (4) SA 394 (SWA), the South West Africa Division granted a mandamus directing that the magistrate order the prosecutor to deliver to the applicants further particulars regarding the charges against them. The High Court will intervene in unconcluded proceedings in magistrates' courts only if it is necessary to prevent a grave injustice. In this case the High Court rejected the proposition that postponements

and recalling of witnesses could serve as a substitute for the right of an accused to be sufficiently informed of the charges before he pleads and before he presents his defence—*Nangutuuala* 1973

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(4) SA 640 (SWA). Generally speaking, the courts are very reluctant to issue a *mandamus* directing the furnishing of further particulars—*Goncalves v Addisionele Landdros, Pretoria* 1973 (4) SA 587 (T).

If a charge sufficiently discloses an offence, but is lacking in adequate narration of particulars, the accused is deemed to have waived his right to apply for particulars and cannot set up such defect on appeal if he has failed to apply for such particulars at the trial—*Lotzoff* 1937 AD 196.

The function of particulars is to define the issues and not to enlarge them. The prosecutor must give particulars with regard to the evidence which is to be led. He is not entitled to set out an endless series of alternatives—*Sadeke* 1964 (2) SA 674 (T) and *Mpetha (1)* 1981 (3) SA 803 (C). In *Adams* 1959 (1) SA 646 (Spec Crim Ct) it was held that where further particulars are applied for the State may not merely refer to the record of the preparatory examination if such record is voluminous. Nor may the State reply to a request for particulars by stating simply that the particulars sought 'are matters peculiarly within the knowledge of the accused'. Such reply may lead to the indictment being quashed—*National High Command* 1964 (1) SA 1 (T). Where there is more than one count, the particulars applicable to each count must be set out—*Nkiwani* 1970 (2) SA 165 (R).

Where particulars are given, the State must prove the charge as particularised in the further particulars (*Anthony* 1938 TPD 602) and where a conviction is based on evidence not covered by the particulars supplied, the conviction may be set aside on review—*Kroukamp* 1927 TPD 412. In a charge of negligent driving of a motor vehicle, for instance, the general allegation is made that the accused drove the car in a negligent manner. The accused requests the prosecutor to furnish particulars with regard to the manner in which it is alleged he drove negligently. The prosecutor, in response to this request, informs the defence that the accused was negligent 'in that he failed to keep a proper look-out'. If it appears in the course of the trial that the accused actually did keep a proper look-out, but that he failed to apply his brakes, he cannot be convicted (in the absence of an amendment of the charge) —cf *Kroukamp* (above) and *Mafungo* 1969 (2) SA 667 (GW).

If the trial court has refused an application for particulars and it appears on appeal that the accused has been prejudiced by such refusal and that it cannot be said that no failure of justice has resulted, the court will set aside the accused's conviction—*Verity-Amm* 1934 TPD 416; *De Coning* 1954 (2) SA 647 (N) and *C* 1955 (1) SA 464 (T).

3 Defect in indictment or charge cured by evidence

When discussing the requirements with which indictments must comply, regard must be had to s 88 of the Criminal Procedure Act, which was originally enacted in 1959 as part of the 1955 Criminal Procedure Act. This section has very far-reaching effects.

Background:

Before 1959 the courts consistently required indictments to disclose an offence, ie that they disclose facts which, if proved, would render the accused guilty of an offence. See, eg, *Desai* 1959 (2) SA 589 (A). Where a material element of the crime in question was omitted (for example where the prosecutor failed to allege that the offence was committed in a public place, or that the offence was committed with a particular *animus*) the accused could not be found guilty, even though the evidence

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at the trial proved the element omitted in the charge. This was also the case where the accused had pleaded guilty. If the accused was convicted in such a case he could be sure that the conviction would be quashed on appeal. The leading case in this connection is *Herschel* 1920 AD 575. Cf *Tucker* 1953 (3) SA 150 (A); *Magadhla* 1947 (3) SA 585 (N); *Radebe* 1954 (3) SA 785 (O). The court had the power, of course, to amend the indictment, but up to 1959 our courts held the view that an indictment could not be amended unless it disclosed an offence.

To put an end to prosecutions being rendered abortive because of such 'technical' errors made by persons drawing up charges, the legislature introduced, in 1959, s 179*bis* into the Criminal Procedure Act 56 of 1955 (now s 88 of Act 51 of 1977).

Section 88 provides as follows:

> Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.

This means that the accused can now be found guilty even though the indictment does not disclose an offence, as long as the evidence proves the offence. This arrangement greatly alleviates the burden of prosecutors. From a narrow reading or interpretation of the section, the charge may be so defective that the accused is not properly informed of the charge brought against him. However, what was acceptable in a pre-constitutional dispensation will not necessarily meet present demands in view of the emphasis in s 35(3) of the Constitution on the right to a fair trial. Section 35(3)*(a)* demands that the accused be informed of the charge(s) against him with sufficient detail to answer to it. The question in each given situation where the accused relies on an alleged infringement of his right embodied in s 35 (3)*(a)* of the Constitution should be whether an accused was prejudiced in the exercising of his right to a fair trial. An accused will be so prejudiced if, for example, he reasonably would have called controverting evidence or cross-examined differently if the charge had read differently, and if the position could not have been cured by a postponement (*S v Kearney* 1964 (2) SA 495 (AD)) or by an amendment without the accused being in any way prejudiced in his defence, so that his defence would have remained exactly the same had the State amended the charge (*Moloi v Minister of Justice and Constitutional Development* 2010 (2) SACR 78 (CC) at [19]).

The following comments concerning s 88 are noteworthy:

(1) Although s 88 provides for an automatic cure of a defect, at any time before judgment, the State cannot rely on the provisions of this section once the defect is brought to the court's notice by any of the parties before judgment. In such a case the State must ask for an amendment in terms of s 86.

(2) The language of the section indicates that, at the very least, the offence with which the accused is charged should be named in the indictment—*Mcwera* 1960 (1) PH H43 (N). The words 'the offence' should undoubtedly be construed as meaning the offence with which the accused is charged and of which he is convicted. If the prosecutor wants to charge the accused with theft, he should, it is submitted, at the very least use the word 'theft' in the indictment. Where a statutory offence is alleged, the number of the section should at least be given accurately if the prosecutor wants to rely on s 88. There must, in other words,

be indicated in the charge some recognisable offence, although no offence is, technically speaking, disclosed—*Dhludhla* 1968 (1) SA 459 (N); see also *Mayongo* 1968 (1) SA 443 (E). Therefore, where two offences are contained in a section and the accused is charged with only one of them (no reference being made in the charge

sheet to the other offence), s 88 cannot be invoked to convict the accused of such other offence—*Moloinyane* 1965 (2) SA 109 (O); *Van Rensburg* 1969 (1) SA 215 (G).

(3) Even though an accused may now be convicted upon an indictment which does not disclose an offence, in a constitutional dispensation it is essential that the prosecutor should exercise caution by framing the indictment in such terms that it does disclose an offence. If he fails to do so the accused can before pleading raise an exception against the charge.

(4) If the accused before judgment brings the want of averment to the notice of the court and the court then refuses to order the charge to be amended, the rule in *Herschel's* case still applies, ie the accused may rely upon the defect on appeal, if he has been convicted by the trial court—*Gaba* 1981 (3) SA 745 (O).

(5) A defect can be cured only by evidence proper, not, for example, by the invocation of statutory provisions and presumptions—*AR Wholesalers* 1975 (1) SA 551 (NC) (this case contains a thorough exposition regarding s 88); *Pheka* 1975 (4) SA 230 (NC). The replies of an accused (who has pleaded guilty) to questioning in terms of s 112(1)*(b)* may, for the purposes of s 88, be treated as 'evidence' capable of curing a defect in the charge—*Tshivhule* 1985 (4) SA 48 (V).

(6) Section 88 does not authorise replacement of one offence with another offence proved by evidence—*Sarjoo* 1978 (4) SA 520 (N). (Substitution of 'jersey' for 'meat' in a theft charge would amount to substitution of a charge—*Kuse* 1990 (1) SACR 191 (E).)

4 Correction of errors in charge

Sections 88 and 86 should be read together both from a historical and a contextual perspective. Both sections are aimed at correcting mistakes or omissions of an essential nature in the charge sheet (or indictment). Whereas the provisions of s 88 could automatically cure a fatal defect in the charge sheet (provided that the defect in the charge sheet has not been brought to the attention of the court by any of the parties *before judgment* (see *ZW* 2015 (2) SACR 483 (ECG)), and provided that none of the impediments discussed in para 3 above is present, such as that there has been no evidence to supply the missing averment), s 86 is aimed at (mostly verbal) requests by the State to the court to amend a defect, allegation or omission in the charge sheet at any time *before judgment*.

Before 1959 it was generally assumed, on the strength of an *obiter dictum* of the Appellate Division (now the Supreme Court of Appeal) in *Jhazbai* 1931 AD 480, that a charge could be amended only where it disclosed an offence. If it did not disclose an offence, it was considered fatally defective. In 1959, however, the Supreme Court of Appeal in *Crause* 1959 (1) SA 272 (A) held that this was incorrect and that the trial court could correct the indictment even though it did not disclose an offence. This decision was confirmed by an express provision to this effect in s 16, Act 16 of 1959, which amended s 180(1) of the Criminal Procedure Act 56 of

1955—*Ntjoro* 1959 (4) SA 447 (T). The present s 86(1) contains a similar stipulation. Section 86 provides as follows:

> (1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

(2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit.

(3) Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences as if it had been originally in its amended form.

(4) The fact that a charge is not amended as provided in this section shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder.

In short, s 86(1) makes provision for the amendment of an indictment or charge in the following situations:

(1) where it is defective for want of an essential averment;
(2) where there is a variance between the averment in the charge and the evidence offered in proof of such averment; or
(3) where words or particulars have been omitted, or unnecessarily inserted, or
(4) where any other error is made.

The following points regarding the amendment of a charge or indictment in terms of s 86 are to be noted:

(1) In terms of s 86(1) the court may order an amendment only if it considers that the making of the amendment will not prejudice the accused in his defence—*Taitz* 1970 (3) SA 342 (N). In a summary trial of great complexity which involves a number of counts, a court will be very loath, at a late stage of the proceedings, to sanction any radical departure from the indictment for fear of prejudicing the accused—*Heller* 1971 (2) SA 29 (A) at 53C–D. There will not be prejudice if there is but a slight variance or where it is clear that the *defence would have remained exactly the same* had the State originally presented the charge in the amended form. Where application to amend a charge is made on appeal, the court must be satisfied that the defence would have remained the same if the charge had originally contained the necessary particulars. On appeal the court would accede to an application for an amendment of a charge only if it were satisfied that there was no reasonable doubt that the appellant would not be prejudiced—*F* 1975 (3) SA 167 (T) at 170. Thus the question of prejudice depends upon an examination of the facts and circumstances in each particular case—*Pillay* 1975 (1) SA 919 (N) and *Coetzer* 1976 (2) SA 769 (A).
(2) Section 86 makes provision for amendment of the charge—not for replacement

thereof by an altogether new charge—*Barketts Transport (Edms) Bpk* 1988 (1) SA 157 (A). The approach to adopt is to establish whether the proposed amendment differs to such an extent from the original charge that it is in essence another charge. If the proposed amended charge does not correspond at all to the original charge, then one can talk of a substitution and not of an amendment. If only the citation of a charge has to be amended (eg replacing a charge of bribery—which has been repealed and replaced by a statutory offence—with a statutory provision under the Corruption Act 94 of 1992) and the essentials of the charge will be essentially the same, the defence will not be affected thereby—*Mahlangu* 1997 (1) SACR 338 (T). Should a new charge be framed in the course of a trial, the possibility of prejudice to the accused is strong; the accused comes to court prepared to meet a particular charge, and will now be faced with a different issue—*Slabbert* 1968 (3) SA 318 (O).
(3) Section 86(4), however, provides that the fact that a charge has not been amended as provided in this section shall not, unless the court has refused to allow the amendment, affect the validity of the proceedings thereunder. This subsection may be misleading. According to our courts it must be interpreted in such a way that if an amendment would have been in order by virtue of sub-s (1), ie *if it would not have prejudiced the accused in his defence*, the failure to effect the amendment will not invalidate the proceedings, except where the court refused to allow the

amendment—*Coetzer* 1976 (2) SA 769 (A) at 772. The interpretation referred to in the italicised words above is still in force as regards the insertion of superfluous words and any discrepancy between the averment in the charge and the evidence adduced. See *Moloi v Minister of Justice and Constitutional Development* 2010 (2) SACR 78 (CC).

5 Splitting of charges or duplication of convictions

It happens frequently that *one and the same* act of a person constitutes more than one offence. If a man, for instance, assaults a mentally disabled person below the age of 16 years and has forcible intercourse with him or her, his conduct may constitute any of the following offences: common assault; assault with intent to rape; rape; connection with a girl below the age of 16 years in contravention of s 15(1), Act 32 of 2007. General considerations of fairness militate against the perpetrator being charged with *and* convicted of all these offences.

The further possibility exists that a person commits more than one offence, (i) by conduct which is spread over a period, for instance a person who for a year continuously pretends to be a medical doctor and treats patients; (ii) through the same series of actions, for instance a man who attacks a woman, rapes her and then runs away with her handbag, thereby committing within a brief period of time assault, assault with intent to commit rape, rape, robbery and theft. May the perpetrator be charged with all these offences?

Subject to the qualification that the accused *should not be convicted* of all these offences, the answer to the question above is in the affirmative. Section 83 provides that if by reason of any uncertainty as to the facts which can be proved, or for any other reason, it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with *having committed all or any of those offences* and any number of such charges may be tried at once, or the

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accused may be charged in the alternative with having committed any number of those offences.

The courts developed a rule against the so-called splitting (or duplication) of charges. (For a historical review, see Hiemstra 234.) In *Ex parte Minister of Justice: In re R v Moseme* 1936 AD 52 at 60 it was questioned whether this provision does not draw a veil over the whole series of decisions dealing with splitting of charges and whether the prosecution's rights regarding the splitting of charges were not enlarged. The Supreme Court of Appeal (known at the time as the Appellate Division) did not decide this point, however. In *Van Zyl* 1949 (2) SA 948 (C) it was held that in view of the provisions of (the forerunner of the current) s 83 the old tests were now applicable only to convictions and not to charges. Gardiner and Lansdown accordingly state (at 298):

> It is the duplication of convictions to which attention must be directed: save where there can be no reasonable doubt as to the offence to be charged, the duplication of charges, but not of convictions, is permitted by the section.

The leading case on 'splitting of charges' is *Grobler* 1966 (1) SA 507 (A). In this decision the origin and application of the rule is extensively traced and the opinion is expressed that s 83 deals with the procedure which may be adopted in the formulation of charges and not with the statutory and common-law principles regarding conviction and punishment. The rule against the splitting of charges was in fact always directed at the duplication of *convictions* and designed to apply in the field of punishment. The effect of the section is only that when there is uncertainty about the facts which can be proved, or where it is doubtful for any other reason, including legal uncertainty, which of several offences is constituted by the facts which can be proved, the State may formulate as many charges as the available facts justify, and no exception can be taken against the charge sheet if the accused is charged with more than one offence in respect of one punishable fact. If, however, it appears at the

end of the trial that according to the proven facts, two charges comprise one and the same punishable fact, the court will convict the accused on one charge only. Cf *Heyns* 1976 (1) PH H48 (C) and *Maneli* 2009 (1) SACR 509 (SCA).

The rule against the duplication of convictions is to be approached on the basis of the following possibilities:

5.1 A single act constitutes more than one statutory offence, or statutory and common-law offences

Section 336 provides that where an act (or omission) constitutes an offence under two or more statutory provisions or is an offence against a statutory provision and the common law, the perpetrator may be prosecuted and punished under either the statutory provision or the common law. The perpetrator may not, however, be held liable to more than one punishment for the act or omission constituting the offence. Illustrations of the application of this principle are:

(1) Where a man is charged with incest on the ground of connection with his daughter (who is under the age of 16) as well as with connection with a girl (the same daughter) who is under the age of 16 arising out of the same act of carnal intercourse, this will amount to undue splitting.

(2) There is undue splitting of charges if the accused is charged (in actual fact convicted) in respect of the same act with assault and with committing the

statutory offence of pointing a firearm—*Wegener* 1938 EDL 3 and cf *Blaau* 1973 (2) PH H(S) 116 (C).

(3) Where an accused is convicted of both driving under the influence of liquor and reckless driving, and both counts are based on the same facts, it would constitute an incorrect duplication of convictions—*Engelbrecht* 2001 (2) SACR 38 (C).

Section 336 deals only with cases where there was a single act (or omission) and where at least one of the offences is a statutory offence. Our courts, however, apply the same principle in the following situations:

5.2 A single act constitutes more than one offence at common law

Illustrations:

(1) Where the accused was found stripping lead from a roof intending to steal it, his conviction on a charge of malicious injury to property was held incompetent, since, in respect of the same act, he had been convicted of theft—*Hendricks* 17 CTR 470.

(2) Where the accused was charged with both rape and incest, arising from the same act of intercourse, he was convicted of only one of these offences—*T* 1940 CPD 14.

(3) Where two persons are killed in the same road accident, it is improper to convict the accused on two counts of culpable homicide. A single charge should make reference to both the deceased—*Mampa* 1985 (4) SA 633 (C).

5.3 More than one act of the same nature or of more or less the same nature is committed practically simultaneously, constituting more than one offence (whether a statutory or common-law offence)

The test applied by our courts in this type of case is the following: Were the acts done with a single intent and were they part of one continuous transaction *or* does the evidence required to prove the one charge necessarily involve proof of the other? See Hiemstra 235. The tests are in the alternative: they need not both be answered in the affirmative. If the answer to one of the questions is in the affirmative, it is said to be an improper splitting. In *S v Maneli* 2009 (1) SACR 509 (SCA) at [8] the court held as follows:

> One such test is to ask whether two or more acts were done with a single intent and constitute one continuous criminal transaction. Another is to ask whether the evidence necessary to establish one crime involves proving another crime.

In *Whitehead* 2008 (1) SACR 431 (SCA) at [5] the court held that there is not an all-embracing formula and the various tests are mere guidelines that are not exhaustive. If the tests do not yield clear results a court must apply its common sense and sense of fairness to make a finding.

These tests are rather arbitrary and it is hardly surprising to find many conflicting decisions. The tests are, in any event, only guiding principles and not conclusive. In every case the ultimate rule is that the court must judge whether, according to the difference in nature and degree of the facts, one or more offences have been proved—*Grobler* 1966 (1) SA 507 (A) 511G-512H, a case where a conviction of both murder and robbery was upheld. In *Kuzwayo* 1960 (1) SA 340 (A) it was pointed out

that there are borderline cases which may not be covered precisely by the tests and in such cases the decision of the issue will depend on the judicial officer's common sense and sense of fair play. Cf also *Mbulawa*, *Tandawupi* 1969 (1) SA 532 (E); *Christie* 1982 (1) SA 464 (A) and *Nambela* 1996 (1) SACR 356 (E). *Dlamini* 2012 (2) SACR 1 (SCA) is an example of different opinions of judges on one factual situation, where the court in its majority decision (three to two) decided that the accused, together with two others, in the execution of a common purpose robbed three women in the driveway to one of the women's house when they took the women's motor vehicles and personal belongings. Only one of the robbers had had a weapon pointed at the women. The court found that three robberies were committed and held as follows (at [52]):

> If violence is directed at only one person but property is taken from several persons including the one against whom violence was directed, there is one robbery and several thefts. But where violence or threats are perpetrated against three persons and property taken from all three as a result of such violence or threats, there are three robberies.

If the totality of the accused's criminal conduct can be accommodated in one single charge, the accused may not be convicted of multiple charges. For example: if an accused, in the act of committing rape, tears the victim's jacket, he may not be convicted of rape and malicious injury to property. But should the accused after the completion of the rape take the victim's purse which has dropped from her jacket, the accused commits the further act of theft. Where the nature of the separate acts that have been committed, and the intent with which each act has been committed, differ to such an extent that it is impossible to accommodate all the acts within one offence only, conviction on multiple charges would not constitute an improper duplication of convictions—*Waites* 1991 (2) SACR 388 (NC). See also *Murbane* 1992 (1) SACR 298 (NC).

Further illustrations for the application of these principles:

(1) If a man breaks into a house with intent to steal and thereupon commits theft from the house, he should be charged only with housebreaking with intent to steal and theft—*S* 1981 (3) SA 377 (A) at 380H. However, when a burglar breaks into different premises under one roof—various flats in one block, for example—this will amount to different offences—*Tshuke* 1965 (1) SA 582 (C). (House-breaking with intent to steal and theft are two separate offences, though they are in practice charged and punished as one offence—*Cetwayo* 2002 (2) SACR 319 (E).)

(2) If an assault is committed pursuant to, and in the course of, an attempt to escape, the accused should be convicted of one of these offences only—*Vlok* 1931 CPD 181.

(3) If an act of rape is accompanied by robbery of the victim, the accused may be convicted of both these crimes—*N* 1979 (3) SA 308 (A).

(4)

If a person breaks into premises with intent to commit an offence, and *thereafter* 'breaks out' again (eg by breaking a door) in order to escape, he may be convicted of both housebreaking with intent to commit a crime and malicious injury to property—*Shelembe* 1955 (4) SA 410 (N).

(5) Where an accused drives under the influence of intoxicating liquor, and through his negligent driving causes the death of other persons, he may be convicted of both culpable homicide and driving under the influence of intoxicating

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liquor—*Grobler* 1972 (4) SA 559 (O) and *Koekemoer* 1973 (1) PH H20 (N). Simultaneous convictions of driving under the influence of liquor and negligent driving may be appropriate where on the proven facts both forms of culpable conduct can be distinguished—*Mlilo* 1985 (1) SA 74 (T). If, however, evidence relating to the negligent driving is used as probative material to prove that the driver's judgment and skill were affected by the consumption of liquor, then the accused can only be convicted of driving under the influence of liquor. Common sense and considerations of reasonableness dictated the finding that otherwise an unwarranted duplication of convictions would occur—*Wehr* 1998 (1) SACR 99 (C).

(6) Where an accused is caught selling dagga, he may be convicted only of selling and not also of possession of the rest of the (unsold) dagga—*Ebrahim* 1974 (2) SA 78 (N). The courts are not unanimous as to whether dealing in or possession of dagga and mandrax at the same time constitutes one or two offences—*Diedericks* 1984 (3) SA 814 (C) and *Phillips* 1984 (4) SA 536 (C).

(7) Where there is no evidence that an accused armed himself with the intention to commit an eventual assault, he may be convicted of both the unlawful possession of a dangerous weapon (in terms of s 2(1) of Act 71 of 1968) and assault—*Zenzile* 1975 (1) SA 210 (E) and *Mbulawa* 1969 (1) SA 532 (E).

(8) In cases where an act of assault does indeed constitute an element of attempted murder, a conviction of attempted murder and robbery will result in an accused being convicted twice of the same act of assault if the same complainant in both offences was shot with a firearm and robbed—*Benjamin* 1980 (1) SA 950 (A). Cf, however, *Moloto* 1980 (3) SA 1081 (BH). If, however, it was proved beyond reasonable doubt that the accused also had the intention to kill and not merely to use force, the court is entitled to find him guilty of the two separate offences—*Moloto* 1982 (1) SA 844 (A).

5.4 Conduct of the perpetrator is spread over a long period of time and amounts to a continuous repetition of the same offence

As to whether such conduct should form the subject of one conviction only, the decisions of our courts are conflicting.

Illustrations:

(1) A separation into two counts of keeping an eating-house in a disorderly way on four consecutive days amounts to an unlawful splitting—*R v LakZuny* 1919 JS 345 *LakZuny* 1919 JS 345.

(2) Once the fact had been established that a person was wrongfully practising as a medical practitioner, each act of treating a patient, separate in respect of time and place, was regarded as a separate contravention—*Hannah* 1913 AD 484.

(3) Where an accused had made an arrangement with S, an officer of the public service, that he would pay S a certain amount in respect of each motor vehicle ordered by the administration from the accused, it was held that every subsequent individual transaction could properly form the subject of a separate charge of bribery—*Ingham* 1958 (2) SA 37 (C) and cf *Vorster* 1976 (2) PH H202 (A).

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(4) Where failing to report the presence of terrorists in the neighbourhood over a period of time was separated into several offences, it was held that splitting of charges had taken place—*Mutawarira* 1973 (3) SA 901 (R).
(5) Where an accused has stolen goods from two complainants living in the same room he can only be convicted on one charge of theft—*Polelo* 1981 (2) SA 271 (NC) and *Ntswakele* 1982 (1) SA 325 (T).
(6) The state is entitled to rely on a course of conduct on the part of the accused in order to charge the accused on the ground of a series of acts done in pursuance of one criminal design as a single crime. The various alleged acts are not mentioned as separate charges in the charge sheet, but by means of particulars in respect of a single charge, eg one charge of treason or sedition, based on a series of acts—*Zwane (1)* 1987 (4) SA 369 (W).

Prejudice to the accused, if he is convicted on more than one charge arising from one and the same punishable fact contrary to the above-mentioned rule, could result in one or both of the following ways: first, the combined punishment imposed by a magistrate in respect of the various charges could exceed that which it would have been competent for him to impose if the accused were to have been found guilty of one charge only (the magistrate's jurisdiction in respect of maximum punishment relates to every single charge separately); secondly the number of convictions could affect the accused adversely on a subsequent conviction, considering the effect of previous convictions regarding permissible punishment—see Chapter 19. Further to the above: in sentencing, courts are also enjoined to guard against the duplication of punishment which could result where two convictions arise out of the same incident (eg rape/robbery and murder, where the victim is killed in the act of being raped/robbed). Although many of the facts relevant to one conviction may also be relevant to the other, taking the same facts into account in sentencing an accused for each of the two different offences could result in such a duplication of punishment—*Morten* 1991 (1) SACR 483 (A) and *S* 1991 (2) SA 93 (A).

Should the prosecutor in the same indictment bring a whole series of charges against the accused, for example incest, rape and connection with a female below the age of 16 years, all arising out of the same act of intercourse, the accused may not, as a rule, object to the indictment, but may object to conviction of more than one of the offences.

If an accused had been convicted (or acquitted) of offence X and the prosecutor thereafter charges him with offence Y, which, if it had been brought against him when he was charged with X, would have amounted to a splitting of charges (as we understand this expression now), the accused may raise the plea of *autrefois convict* or *acquit* (as the case may be). To give an example: A is charged with rape of a 15-year-old girl. He is found not guilty. He cannot subsequently be charged with unlawful connection with a girl below the age of 16 years. Should he be charged thus, he can plead *autrefois acquit*. (*Autrefois convict* and *autrefois acquit* will be dealt with below.)

6 Joinder of offences

In practice the prosecutor usually charges the accused with the most serious crime as main charge, and the lesser offences as alternative charges.

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Apart from undue splitting, which we have just discussed, any number of offences may be charged against the same accused in one indictment—s 81(1). It must, however, take place at any time before any evidence has been led in respect of any particular charge. If this provision is not complied with, the proceedings are void, not merely voidable—*Thipe* 1988 (3) SA 346 (T). The court may, however, direct that the charges thus joined be tried separately, if in its opinion this will be in the interests of justice—s 81(2). It is desirable that

where the state has knowledge of a number of charges against a person, it should endeavour as far as is reasonably possible to bring such charges before the court in one indictment so that they are tried together—*Lubbe* 1925 TPD 219 and *Jantjies* 1982 (4) SA 790 (C). But the trial of separate charges may not take place separately on the basis of 'trials within the main trial'—*Majola* 1971 (3) SA 804 (N).

Up to 1963 a charge of murder could not be joined in the same indictment with any other charge, but this limitation has now been removed—see, for example, *Mathebula* 1978 (2) SA 607 (A).

No additional charges can be joined after questioning of the accused in terms of s 112(1) *(b) (see* the discussion of the plea of guilty below) has commenced—*Witbooi* 1980 (2) SA 911 (NC).

Section 6(2) of the Child Justice Act 75 of 2008 provides that, in the case of a child being charged with more than one offence and these being dealt with in the same criminal proceedings, the most serious offence must guide the manner in which the child must be dealt with in terms of this Act. (Aspects of accommodation of child offenders in the criminal process, in terms of the Child Justice Act, are dealt with in various sections of this handbook.) In order to determine the seriousness of offences for the purposes of the Child Justice Act, in terms of s 6(1), the categories of offences are listed in the order of the three Schedules to the Act, beginning with the less serious offences contained in Schedule 1 (eg, trespass), advancing in seriousness to those contained in Schedule 3 (eg, treason or murder).

7 The joinder of several accused

Section 155 provides that any number of participants in the *same offence* may be tried together, as well as any number of accessories after the fact to an offence, or both participants and accessories in respect of the same offence. The section further provides that a receiver of property obtained by means of an offence shall be deemed to be a participant in the offence in question. The first part of this section requires that the co-accused took part in the same offence. Where two accused were charged with having been found in possession of meat reasonably suspected to have been stolen and not being able to give a satisfactory account of such possession, and it appeared that separate meat was involved, it constituted a misjoinder to charge the two accused jointly—*Chawe* 1970 (2) SA 414 (NC).

Section 156 provides that whenever it is alleged in a charge that two or more persons have committed separate offences at the same place and time, or at about the same time, and the prosecutor informs the court that any evidence which is in his opinion admissible at the trial of one of those persons is in his opinion also admissible at the trial of the other person or persons, such persons may be tried jointly for those offences on that charge. Thus persons who through participation in the same transaction commit different offences may be jointly charged and tried, for example, where a man procures and furnishes premises in which women

carry on prostitution, on the proceeds whereof he lives, he and they may be charged and tried together: he with living on the proceeds of prostitution, and they with carrying on the practice. Prior to the enactment of s 156 it was held that where a passenger was killed as a result of a collision between two motor cars, there were two separate offences and that joinder of the two drivers was irregular—*Meyer* 1948 (3) SA 144 (T). But s 156 leaves little doubt that such joinder would no longer be irregular. In *Gelderbloem* 1962 (3) SA 631 (C), however, it was held that where two persons were charged with having pointed a firearm at the complainant, each person's conduct constituted a separate transaction and that joinder was irregular. It is submitted that this decision is correct. Although separate offences were

committed at the same time and place, evidence that X had pointed a gun would not be admissible in a charge that Y had pointed a gun, or vice versa. But it must be noted that the section makes proper joinder dependent upon the *opinion* of the public prosecutor as to admissibility. It is submitted that a court should satisfy itself that the prosecutor's opinion is *bona fide* and based on a reasonable interpretation of the rules of evidence.

The provisions of the Criminal Procedure Act and Act 74 of 1982 regarding joinder are not peremptory. The prosecutor need not, therefore, join the said persons. The provisions are merely permissive. Furthermore, there is no provision for the addition of further accused *during* the trial; such a procedure would, in respect of that accused, offend against s 158 (principle of confrontation; trial in presence of accused—see Chapter 5).

The replies to the questioning of an accused in terms of s 112(1)*(b)* are not 'evidence' in terms of s 157(1), and further accused can therefore be joined after an accused has been questioned in terms of s 112(1)*(b)*—*Slabbert* 1985 (4) SA 248 (C).

Where a child and an adult are charged together in the same trial in respect of the same set of facts in terms of ss 155, 156 and 157 of the Criminal Procedure Act, the court must apply the provisions of the Child Justice Act 75 of 2008 in respect of the child, and the Criminal Procedure Act in respect of the adult—s 63(2) of the Child Justice Act.

In terms of s 332(5) directors of a company may be charged jointly with the company. The subsection also makes provision for separate trials.

Further aspects regarding joinder and the right of persons who are jointly charged to apply for separate trials will be discussed in Chapter 16, below.

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Chapter 13
The trial courts

M Basdeo, MG Karels, JP Swanepoel

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3.2 Fairness to the accused

The Constitution and this chapter:

Section 9—Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

See 3.1.2, below

Section 34—Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

See 3.1.2 and 3.1.3, below

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Section 35—Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right—

. . .

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence; . . .

Section 165 (2) and (6) of the Constitution.

See Chapter 2 and paragraphs 3.1.3 and 3.2, below

The Child Justice Act 75 of 2008 and this chapter:

Section 1—Definitions

In this Act, unless the context indicates otherwise—

'child justice court' means any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child;

1 Venue of the trial courts

For the High Court of South Africa the venue of each court is fixed at the permanent seat of the divisions or is specified in the proclamation constituting circuit courts. Lower courts must sit at the places assigned by the President in terms of s 2 of the Magistrates' Courts Act 32 of 1944. Certain exceptions may be allowed, for example with juvenile accused and with patients in institutions, where the venue of the court may be changed respectively to a room other than the regular courtroom or to the institution. A child justice court is any ordinary criminal trial court dealing with bail proceedings, plea, trial or sentencing of a child under the age of 18 years (and in certain circumstances a person between 18 and 21 years of age—s 1 of the Child Justice Act 75 of 2008).

If the accused is brought before a court which lacks jurisdiction to try him, he may object to the jurisdiction of that court. However, if he fails to object and the trial, having run its normal course, ends in a conviction, the fact that the venue was wrong will not avail the accused on appeal—see s 110 of Act 51 of 1977, which applies to both High Court and lower courts; and see *Nqunelo* 1948 (4) SA 428 (O).

Section 149 makes provision for the removal of a criminal case from one division of the High Court to another division of the High Court on application of the prosecution or of the accused. The effect of such removal may be to confer jurisdiction upon a court which would not normally have been competent to try the accused. Such removal from one jurisdiction to another must be done before the trial date and after the lodging of the indictment. Section 149 applies only to the High Court of South Africa. Section 27 of the Superior Courts Act 10 of 2013 has a similar provision *after any proceedings* have been instituted.

Such an application for removal will not be granted unless the applicant can show that the change of venue would be in the interests of justice, for example

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where it may reasonably be feared that the evidence may be lost or tampered with if the trial has to stand over for months until the next session of the circuit court. In *Bothma* 1957 (2) SA 100 (O), it was held that the mere saving of time would not be considered a valid ground for removal.

A court can order the removal of a trial to another venue if the court deems it necessary or expedient, for example, to protect witnesses whose lives are threatened—see *Mbaka* 1964 (2) SA 280 (E), where the court made its order by virtue of s 169.

In terms of s 22(3) of Act 32 of 1998, where the National Director (or a deputy director authorised thereto in writing by the National Director) deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of

jurisdiction of one director of public prosecutions ('DPP') be investigated and tried within the area of jurisdiction of another DPP, he or she may, subject to the provisions of s 111 of the Criminal Procedure Act, in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other DPP.

Please note that the words 'trial courts' are used for the sake of convenience and refer to courts of 'first instance'.

2 Constitution of and the manner of arriving at decisions by the trial courts

2.1 Lower courts

These courts are presided over by magistrates. In a district or regional court trial the magistrate may, if he or she deems it expedient for the administration of justice, before any evidence has been led or in considering a community-based punishment in respect of any person who has been convicted of any offence, summon one or two assessors to assist him or her at the proceedings. In the regional court at the trial of an accused on a charge of murder, it is peremptory that the judicial officer summon two assessors to assist him or her, unless the accused requests that the trial proceed without assessors (s 93*ter*(1)*(a)* of Act 32 of 1944). If the accused waives his right to assessors the judicial officer may in his or her discretion summon one or two assessors to assist him or her. Non-compliance with the provisions of s 93*ter*(1)*(a)* is grossly irregular and constitutes a failure of justice—*Titus* 2005 (2) SACR 204 (NC).

The accused must exercise his choice whether to proceed with or without assessors—*Mokalaka* 2010 (1) SACR 88 (GNP).

A failure to give consideration to having assessors constitutes a serious irregularity even where the accused had agreed to dispense with assessors—*Mitshama* 2000 (2) SACR 181 (W). In considering whether summoning assessors would be expedient for the administration of justice, the judicial officer shall take into account factors like the cultural, social and educational background of the accused, the nature and seriousness of the offence, the interests which the community may have in the adjudication of the matter concerned, etc. The assessors commence with their functions after the plea has been recorded. With regard to matters of fact the decision of the court is that of the majority thereof. Matters of law (and deciding whether a matter for decision is a matter of law) are decided by the judicial officer—s 93*ter* of Act 32 of 1944.

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The prosecutor or the accused may apply for the recusal of the assessor. The presiding officer may at any stage before the completion of the proceedings order the recusal of the assessor from the proceedings if he or she is satisfied that—

(1) the assessor has a personal interest in the proceedings concerned;
(2) there are reasonable grounds for believing that there is likely to be a conflict of interests as a result of the assessor's participation in the proceedings concerned;
(3) there are reasonable grounds for believing that there is a likelihood of bias on the part of the assessor;
(4) the assessor is (for any reason) absent; or
(5) the assessor has died.

An assessor may request his or her own recusal based on any of the reasons mentioned in (1) to (3) above. The prosecution and the accused shall be given the opportunity to address arguments on the issue of the assessor's recusal, and the assessor, when applicable, shall be given the opportunity to respond to those arguments. The presiding officer is obliged to give reasons for his or her order of recusal of the assessor and may direct, in the interests of

justice, that the proceedings continue before the remaining members of the court; or that the proceedings start afresh; or where the assessor was absent for any reason, postpone the proceedings to obtain the assessor's presence—s 93*ter*(10) and (11) of Act 32 of 1944, as amended by Act 67 of 1998. If assessors abscond during a trial without good reason and the magistrate continues with the trial without them, this amounts to a fatal irregularity which vitiates the proceedings—*Mngeni* 2001 (2) SACR 20 (E).

2.2 Divisions of the High Court

Criminal cases in the High Court are tried either by a judge sitting alone or by a judge and one or two assessors. The presiding judge generally has a discretion whether or not to sit with assessors. (The advantages which the assistance of assessors may render a judge at a trial should, however, not be underestimated—*Mhlongo* 1991 (2) SACR 207 (A).) An assessor is a person who, in the opinion of the presiding judge, has experience in the administration of justice or skill in any matter which may be considered at the trial—s 145(1)*(b)* of the Criminal Procedure Act. Usually the judge procures the services of advocates for this purpose, but occasionally magistrates (especially retired magistrates), attorneys and professors of law serve in this capacity. In cases in which expert evidence on a particular topic is expected to be led, the judge may sit with an assessor who is professionally qualified in the field in question (eg in medicine, engineering, accountancy).

In practice, the trial judge is obliged to rely, to a certain extent, on the recommendation of the director of public prosecutions or a member of his or her staff (counsel for the State). In the final analysis, it is the trial judge who has to come to a conclusion in this matter, and the opinion of the director of public prosecutions is but one factor to be taken into account for this purpose, along with other information (eg the summary of salient facts accompanying the indictment—see Chapter 12)—*Schoba* 1985 (3) SA 881 (A).

Section 147(1)*(a)* provides that if an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during a trial, the presiding judge may direct that the trial proceed before the remaining member or

members of the court, or that the trial begin *de novo*. Procedural safeguards exist to ensure that fairness is not compromised by continuation of a trial with only one assessor—*Khumalo* 2006 (1) SACR 447 (N). In terms of s 147(1), the words *unable to act* embrace not only physical but also mental disabilities. An assessor who is subjected to serious and continued emotional stress during a trial in which he is sitting as an assessor may, because of such stress, become *unable to act* as an assessor. If the mental capability and/or competency of the assessor to fulfil his duties is in issue, the matter has to be decided on the common-law basis of the duty of a judicial officer to recuse himself. However, the test of reasonable perception or suspicion of the parties as to impartiality of the judicial officer *is not* applicable in the case of mental incompetence. The assessor's competence or lack thereof can be established objectively—*Kroon* 1997 (1) SACR 525 (SCA).

Pressing commitments elsewhere cannot constitute an inability to act as an assessor within the meaning of the word—*Gqeba* 1989 (3) SA 712 (A). The court has no power to dispense with his presence and proceed without him; not even with the consent of the accused—*Daniels* 1997 (2) SACR 531 (C). The inability to act in the context of s 147(1) is not applicable to a situation where an assessor is legally incompetent to continue to act in a case because of some act or occurrence which warranted the assessor's recusal—*Malindi* 1990 (1) SA 962 (A).

Where a judge, acting in terms of s 147(1), finds an assessor has become unable to act as such, it is incumbent upon him or her to hear the parties on the question of how the proceedings will be conducted further (ie with one assessor or *de novo*). In general, the

parties are entitled to be heard before the judge comes to the decision that an assessor has become unable to act—*Malindi* (above); *K* 1997 (1) SACR 106 (C).

2.3 Rights and duties of assessors

Before the trial commences, the assessors must take an oath that they will give a true verdict, according to the evidence upon the issues to be tried. As soon as this oath has been administered by the judge, the assessors are members of the court—see s 145(3) and (4) —with the following provisos:

(1) Subject to paras (2) and (3) below and s 217(3)*(b)*, the decision or finding of the majority of the members of the court upon any question of fact, or upon the question referred to in para (2), shall be the decision or finding of the court, except when the presiding judge sits with only one assessor, in which case the decision or finding of the judge shall, in the case of a difference of opinion, be the decision or finding of the court;

(2) If the presiding judge is of the opinion that it would be in the interests of the administration of justice that the assessor(s) assisting him or her do not take part in any decision upon the question whether evidence of any confession or other statement made by an accused is admissible as evidence against him, the judge alone shall decide upon such question, and he or she may for this purpose sit alone. It is clear that the judge may now, in his or her discretion, together with the assessors determine the admissibility of a confession or other statement made by the accused—s 145(4)*(a)* and *(b)*; *Ngcobo* 1985 (2) SA 319 (W);

(3) The presiding judge alone shall decide upon any other question of law or upon any question whether any matter constitutes a question of law or a question of

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fact, and he or she may for this purpose sit alone—s 145(4). An application at the close of the State's case for the accused's discharge in terms of s 174 is one of law, and the decision is that of the judge alone—*Magxwalisa* 1984 (2) SA 314 (N);

(4) A judge presiding at a criminal trial in the High Court shall give the reasons for his or her decision where he or she decides any question of law or whether any matter constitutes a question of law or a question of fact. The judge shall also give the reasons for the decision or finding of the court upon any question of fact or the question referred to in para (2) above, whether he or she sits with or without assessors. Where the judge sits with assessors and there is a difference of opinion upon any question of fact or upon the question referred to in para (2), the judge shall give the reasons for the minority decision—s 146.

As soon as an assessor receives information detrimental to the accused which has not been proved in evidence, he must retire from the case—*Matsego* 1956 (3) SA 411 (A). In *Solomons* 1959 (2) SA 352 (A) the irregularity in the case was that the assessors had gained information that the accused had at an earlier stage of that same evening been involved in knife-assaults. This information did not form part of the evidence at the trial. An assessor must show absolute impartiality: His expressing an opinion about a particular witness before the accused has been called to state his defence, will be grossly irregular—*Mayekiso* 1996 (1) SACR 510 (C). Cf also *Stone* 1976 (2) SA 279 (A).

The function of assessors is limited to the hearing of the trial, and since the trial is the determination of the matters put in issue and ends with the verdict, the assessors have no part with the judge in the assessment or the imposition of an appropriate sentence; although, according to Hiemstra 367, it is not irregular for the judge to seek the advice of the assessors in the matter of sentence. In practice this is frequently done—cf *Sparks* 1972 (3) SA 396 (A) and *Lekaoto* 1978 (4) SA 684 (A); *Malgas* 1996 (1) SACR 73 (NC).

Cf in general Richings 1976 *Criminal Law Review* 107-16; Dugard 1 (2) *Crime, Correction & Punishment* 55-9 (Nov 1972); Bekker 'Assessore in Suid-Afrikaanse strafsake' *Huldigingsbundel vir WA Joubert* (1988) 32-49; Watney 1992 *THRHR* 465.

2.4 Recusal

2.4.1 General

It is a clear rule of our law that no person who has an interest in or harbours any prejudice in respect of the matter to be tried should adjudicate on such matter. (See the remarks on impartiality in 3.1.2, below.)

Since the Criminal Procedure Act does not contain any provisions on the subject of recusal, the common-law rules must be applied in applications for the recusal of judges, magistrates, or, it is suggested, assessors.

2.4.2 Application for recusal of judicial officer

Such application should, if possible, be made at the commencement of the trial in order to obviate unnecessary complications, such as a discontinuation of a partly heard trial and the necessity of starting it *de novo*. If unavoidable, such an application may be made in the course of the trial—*Silber* 1952 (2) SA 475 (A). Such application must, however, be made in respectful and courteous terms and must not be wilfully insulting as the application in the case of Silber was held to be.

The requirements of the test for the presence of judicial bias are:

(1) There must be a suspicion that the judicial officer *might be*, not *would be*, biased.
(2) The suspicion must be that of a reasonable person in the position of the accused.
(3) The suspicion must be based on reasonable grounds.
(4) The suspicion must be one which the reasonable person referred to *would*, not *might*, have held.

The presiding judicial officer should, for example, have no communication whatever with either party except in the presence of the other—*Roberts* 1999 (2) SACR 243 (SCA).

As a general rule, any magistrate or judge who is aware that he or she has any feeling of partiality, enmity or any motive which might actuate or be commonly supposed to actuate him or her in deciding a matter, would *mero motu* recuse him- or herself and cause a substitute to try the matter. Where, for instance, a magistrate has in a previous capacity as a public prosecutor been concerned with the merits of a case, such a magistrate should recuse him- or herself, for, as it has been put, justice must not only in fact be done but must also appear to be done. Cf *Bailey* 1962 (4) SA 514 (E); *Anderson* 1973 (2) SA 502 (O); *Tampart* 1990 (1) SACR 282 (SWA); *Heita* 1992 (2) SACR 285 (Nm). Similarly, it is grossly irregular for a presiding officer to hear an application for bail when he or she has previously taken down a confession from the same accused. The presiding officer should be an impartial, open-minded and uninformed adjudicator in the sense of taking cognisance of only those facts about the case which are proven in court in the usual way—*Sibeko* 1990 (1) SACR 206 (T). The principle involved in an application for recusal is that no reasonable man should, by reason of the situation or action of a judicial officer, have grounds for suspecting that justice will not be administered in an impartial and unbiased manner—*Herbst* 1980 (3) SA 1026 (E). The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his or her impartiality that is important—*Malindi* 1990 (1) SA 962 (A) 969G-I; *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A). There is a presumption against the partiality of a judicial officer, and an applicant who alleges real bias or the reasonable apprehension thereof has to establish it. Cogent and convincing evidence will be necessary

to dislodge this presumption—*Basson* 2007 (1) SACR 566 (CC). The criterion for recusal is an objective one, ie whether the presiding officer's conduct leaves a right-thinking observer or litigant with the impression that the accused did not receive a fair trial—*Maseko* 1990 (1) SACR 107 (A). See also *Sager v Smith* 2001 (3) SA 1004 (SCA); *Shackell* 2001 (2) SACR 185 (SCA).

A relationship with one or other of the parties to a case also affords grounds for recusal, by reason of the not unnatural bias which may reasonably *be supposed* to result—*Head and Fortuin v Wollaston* 1926 TPD 549. Cf *Bam* 1972 (4) SA 41 (E) and *Dube* 2009 (1) SACR 99 (SCA). Irregularity in the questioning of a witness by the trial court does not mean that the presiding officer is necessarily biased—*Dawid* 1991 (1) SACR 375 (Nm). The mere fact that the judge and the accused belong to different race groups will obviously not amount to a ground for recusal—*Collier* 1995 (2) SACR 648 (C).

In *Segal* 1949 (3) SA 67 (C), it was held that it is undesirable for a magistrate who has conducted an inquest to preside at the trial arising from such inquest, unless there is no other judicial officer available.

When two judicial officers are attached to the same bench as colleagues, irrespective of order of rank, and one of them is a litigant or an accused, then there is a reasonable ground for the other to be recused from trying the action—*SA Motor Acceptance Corporation v Oberholzer* 1974 (4) SA 808 (T).

The interest on which an application for recusal is based should not, however, be so trifling or the association so remote that it would be unreasonable to suppose that it could have any effect upon the mind of the judge or magistrate concerned.

It has been held, for instance, that a magistrate is not disqualified because previously in his or her judicial capacity he or she dealt with a similar charge against the accused, although it may be better, on the whole, especially where a strong view has been expressed, that another magistrate should try the case—*Mukama* 1934 TPD 134. A presiding officer's mere knowledge of facts involved in the trial will not necessarily disqualify that officer from hearing the case, where he or she brings it to the notice of the parties, and where there is no issue between him or her and the accused about the correctness of that knowledge—*Essa* 1964 (2) SA 13 (N). The fact that a judge has knowledge of facts obtained in civil proceedings in which the accused was concerned does not disqualify him or her from presiding at the subsequent criminal trial—*Mampie* 1980 (3) SA 777 (NC). Nor does knowledge of an accused's previous convictions *ipso facto* disqualify a judicial officer from trying a case—*Khan v Koch NO* 1970 (2) SA 403 (R). It is, however, preferable to incline towards granting an application for recusal in cases of uncertainty. If it could not be said that an accused could not harbour a reasonable fear that the court would reject his evidence because of a finding on his credibility in another trial, it would be preferable for the judicial officer to recuse him- or herself—*Dawid* 1991 (1) SACR 375 (Nm).

Should a judicial officer refuse to recuse him- or herself in a case where this should properly have been done, such refusal would create a good ground for review of the case. The case will, however, only be submitted for review after conviction, because the court will interfere with unterminated proceedings only in rare instances—*Burns* 1988 (3) SA 366 (C).

Threatening a judicial officer will not materially affect his or her impartiality, and his or her refusal to recuse him- or herself is not irregular—*Radebe* 1973 (1) SA 796 (A).

Where a judge recuses him- or herself *mero motu* and the accused is then charged before and convicted by another judge, such recusal will not readily be construed as a failure of justice as regards the accused—*Suliman* 1969 (2) SA 385 (A). But a judicial officer should not recuse him- or herself unless he has asked the defence to make its submissions—*Suliman* (above).

Note that a judicial officer who recuses him- or herself becomes *functus officio*. The whole trial becomes void and an accused may accordingly not claim that he be either acquitted or found guilty, in terms of s 106(4). A new trial may thus be instituted—*Magubane v Van der Merwe NO* 1969 (2) SA 417 (N).

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2.5 Trial by jury (repealed)

The jury system in South Africa meant that all criminal trials in the previously called 'superior courts' (except those in the former Natal Native High Court and special courts) took place before a judge and nine jury members. Only white males could become members of a jury. In 1931 provision was made for juries consisting of women only when it was requested by a female accused or an accused under the age of eighteen years. Initially the decision of jury members had to be unanimous. Later a majority of seven votes out of nine was required.

The jury system was introduced in South Africa in 1827 via Britain but was eventually abolished by the Abolition of Juries Act 34 of 1969.

By 'jury' is meant a panel of lay persons who act in criminal cases as the sole judges of the *facts*. Judgment on legal questions and the eventual imposition of sentences are matters for the judge alone. A jury may give judgment of 'guilty' or 'not guilty', or a special judgment on the facts. The accused or the prosecutor may object to the members of the jury as a group or as individuals.

The jury system exists in several countries, including Canada, England, Australia, New Zealand and the USA. In England and the USA the system is regarded as the cornerstone of an impartial and acceptable system of justice, because the cold logic of criminal law is tempered by the logic of a group of independent and theoretically impartial ordinary citizens of the country who come from all strata of society.

The main objection to the jury system is that it is a cumbersome and inefficient system and that judicial decisions should be left in the hands of specialists, ie trained judges. Where the jury system was introduced in Continental legal systems, it was generally abandoned for a system of trials by a bench consisting of trained judges and lay assessors who decide jointly on the questions of guilt, innocence and sentence, eg in France, Belgium, Germany, Italy and Spain.

Owing to the complex composition of South African society, the jury system in South Africa changed from a trial with jury members to a trial where the accused could demand to be tried without jury members. In such a case the judge could obtain two assessors to sit with him in an advisory capacity on the facts. At a later stage it became compulsory by statute to have two assessors in trials where the charge was treason, sedition, murder or rape or where the Minister of Justice had ordered a trial without a jury. After 1959 the compulsory taking of assessors was abolished and it was left to the discretion of the judge. In 1954 the jury system suffered a serious setback when the onus of requesting a trial by jury was placed on the accused. Magistrates were obliged, when committing an accused for trial after a preparatory examination, to inform him of his right to demand a trial by jury—a right which was exercised less and less frequently until it was realised that the system had become unsuitable for South Africa and it was abolished in 1969.

The jury system did not pass unnoticed but strongly influenced especially our law of evidence with its complicated rules. Its demise does not seem to be entirely irreversible: the reintroduction of the system in South Africa's future legal dispensation is the subject of speculation from time to time.

On the jury system in general see: W R Cornish *The Jury* (1968); Kalven & Zeisel *The American Jury* (1966); SA Strauss 1960 *Acta Juridica* 164 and SA Strauss 1973 *West*

Australian Law Journal 133; E Kahn 1992 *BML* 135, 163 and 201 as well as 1992 (109) *SALJ* 307; JPJ Coetzer 1992 *Consultus* 124.

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3 Impartiality and fairness

3.1 General

3.1.1 Introduction

The Criminal Procedure Act lays down certain rules of procedure which should be observed, but the trial is otherwise subject to the management of the judicial officer presiding over it. All orders given in the judicial discretion of the presiding judge or other judicial officer for the proper conduct of the trial must be obeyed by the parties, the court staff and the public, who are all, in the event of wilful disobedience, liable to be committed or fined summarily for contempt of court.

A famous formulation regarding the course of a criminal trial is that of Lord Hewart in Sussex Justices (1924) 1 KB 256 at 259:

. . . [I]t is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done . . . The rule is that nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

This eloquent passage has been repeated frequently, sometimes in a modified form, by our courts—cf *Sallem* 1987 (4) SA 772 (A) and *Marx* 1989 (1) SA 222 (A) at 225. One facet of the maxim that justice must be seen to be done is the requirement that witnesses and accused persons must be treated courteously by the court, the defence and the prosecution—cf *Abrahams* 1989 (2) SA 668 (E).

The concept of 'justice' in its procedural sense is closely related to the idea of legality (see Chapter 1); it is not a concept which presupposes that the accused is not guilty, but rather one which refers to a quality of the proceedings—cf *Mushimba* 1977 (2) SA 829 (A) at 844. It is clearly illustrated in *Dozereli* 1983 (3) SA 259 (C), where an accused was asked, contrary to s 197, why he had been in prison before (this section prohibits information regarding previous convictions, with certain exceptions, in the trial stages prior to sentencing). The reviewing court stated that this was not excusable, even though the magistrate affirmed that he had not based the conviction on this information; it also does not matter whether the accused is really guilty or not. The only question is whether the basic right of the accused to a fair trial has been affected by the irregularity to such a degree that it cannot in principle be said that justice was done. (*In casu* the reviewing court set the conviction aside.) Apart from what is stated in the following paragraph, the standards which a judicial officer should maintain in the questioning of witnesses and the accused have been summarised in *Mabuza* 1991 (1) SACR 636 (O) as follows:

(1) The court should not conduct its questioning in such a manner that its impartiality can be questioned or doubted.
(2) The court should not take part in the case to such an extent that its vision is clouded by the 'dust of the arena' and it is then unable to adjudicate properly on the issues.
(3) The court should not intimidate or upset a witness or the accused so that his answers are weakened or his credibility shaken.
(4) The court should control the trial in such a way that its impartiality, its open-mindedness, its fairness and reasonableness are manifest to all who have an interest in the trial, in particular the accused.

Judicial officers can only properly fulfil their demanding and socially important duties if they guard against their own actions, are attentive to their own weaknesses

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(such as impatience), personal opinions and whims, and continually restrain them. They must preserve the dignity of the judicial institution and their duties are imposed for the protection of the interests of the public at large—*Langa v Hlophe* 2009 (4) SA 382 (SCA).

3.1.2 Impartiality and courtesy

The presiding judge or magistrate must endeavour to be absolutely fair to both the prosecution and the defence. The individual has the right to equality before the law and to equal protection of the law (s 9 of the Constitution) and to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum—s 34 of the Constitution. (Every criminal court, therefore, is assumed to be impartial.) Impartiality denotes a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions—*Le Grange* 2009 (1) SACR 125 (SCA). See, generally, *Hlophe v Judicial Service Commission* [2009] 4 All SA 67 (GSJ).

In *Jacobs* 1970 (2) PH H152 (C) two witnesses who had initially stated that they did not know the accused, having been threatened by the magistrate with a whipping in the cells unless they told the truth, then identified the accused. On the review it was held that the procedure adopted constituted such a serious irregularity that a failure of justice *per se* had resulted. Setting aside the conviction and sentence the judge said (at 291, emphasis added):

> I think that it is hardly necessary for me to say that what happened in this case constituted a very gross irregularity. While it is true that it is the function of a criminal court to determine the guilt or innocence of the accused, *it performs this function in accordance with certain accepted norms of procedure. These involve, inter alia, the concepts of fairness to the accused, courtesy to witnesses and an adherence to certain civilised standards of behaviour*. It has never been recognised in the courts of this country that, because guilty persons should be punished, any procedure, however unfair or unseemly, may be employed if it helps to establish the guilt of the accused.

In *Rall* 1982 (1) SA 828 (A) the Supreme Court of Appeal stated some of the limitations within which judicial questioning of witnesses should be confined. Cf also *Omar* 1982 (2) SA 357 (N) regarding unfair cross-examination of an accused and *Zungu* 1984 (1) SA 376 (N) regarding doubts as to a presiding judicial officer's impartiality as a result of circumstances arising after the conclusion of a trial and before its reopening. Witnesses and accused persons should not be addressed by means of the impersonal terms 'witness' and 'accused', but should be addressed by surname, eg 'Mr Gwebu'—*Gwebu* 1988 (4) SA 155 (W); *Abrahams* 1989 (2) SA 668 (E); *Gqulagha* 1990 (1) SACR 101 (A); *T* 1990 (1) SACR 57 (T). It is also disrespectful, if not degrading, to address an adult as a juvenile (*in casu* by addressing him by his first name)—*Kuse* 1990 (1) SACR 191 (E).

3.1.3 Audi alteram partem

No ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their views—*Suliman* 1969 (2) SA 385 (A). The principle of *audi alteram partem* should always be observed—*Bidi* 1969 (2) SA 55 (R); *Zuma* [1996] 3 All SA 334 (N). Indeed, in terms of s 35(3)*(i)* of the Constitution every accused has the right to adduce and challenge evidence.

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3.1.4 Decisions solely upon evidence; the oath

Judicial officers must base their decisions solely upon evidence heard in open court in the presence of the accused. A judicial officer should have no communication whatever with either party in a case before him except in the presence of the other, and no communication with any witness except in the presence of both parties—*Maharaj* 1960 (4) SA 256 (N); *Harricharan* 1962 (3) SA 35 (N); *Seedat* 1971 (1) SA 789 (N). Nor may a judicial officer take

notice of documentary information (eg contained in the police docket) which had not been tendered as evidence—*Du Toit* 1972 (1) PH H50 (E).

Evidence must be given upon oath or upon a solemn affirmation in lieu of an oath or upon a serious admonition to speak the truth—ss 162-4 of the Criminal Procedure Act. In *I* 1973 (3) SA 794 (A) the complainant was a five-year-old girl who did not know the difference between the truth and untruth. Her evidence was inaudible except to her mother who repeated it to the court. The mother was unsworn. On appeal the conviction was set aside on account of such irregularity.

It is the duty of the court to be impartial; the presiding judicial officer or, in the case of a superior court, the presiding judge or the registrar of the court shall administer the oath in respect of witnesses—s 162(1). The prosecutor may not do so—*Bothma* 1971 (1) SA 332 (C); cf s 112 of the Magistrates' Courts Act. An interpreter, in the presence of the judge or magistrate, may naturally also be used—s 165.

Witnesses must be allowed to give evidence in their own words in their own way and at their own tempo. Only in that way can the truth be ascertained, and this is usually all the more so when the court is dealing with those who are less knowledgeable and sophisticated—*Hendriks* 1974 (2) PH H91 (C).

3.2 Fairness to the accused

At the heart of the right to a fair criminal trial is the need for justice to be done and also to be seen to be done—*Dzukuda* 2000 (2) SACR 443 (CC). Where the accused is undefended the court should ensure that the accused is aware of his rights at all times and that he is given every opportunity of conducting his defence adequately; cf *Nhantsi* 1994 (1) SACR 26 (Tk). These rights have to be explained to the accused by the presiding judicial official (not, for instance, by the interpreter)—*Mzo* 1980 (1) SA 538 (C). Likewise, his duties, such as the duty to discharge a particular onus in certain cases, should be carefully explained to him—*Sibisi* 1972 (2) SA 446 (N). In certain circumstances such an explanation should be given even before pleading—*Guess* 1976 (1) PH H37 (C). In accordance with the above principles, where a deaf person is unable to follow the proceedings, a failure of justice will result—*Mbezi* 2010 (2) SACR 169 (WCC).

The accused's rights include the right to cross-examine (*Sebatana* 1983 (1) SA 809 (O); *Dipholo* 1983 (4) SA 751 (T)); this includes also the right to give evidence and cross-examine in the language of his choice irrespective of his apparent race (*Leseana* 1993 (2) SACR 264 (T)); to put his defence to State witnesses during cross-examination (*Govazela* 1987 (4) SA 297 (O)); to call witnesses (*Selemana* 1975 (4) SA 908 (T); *Hlongwane* 1982 (4) SA 321 (N)); to produce relevant documents, facts and figures; to record the evidence if he so wishes (*Mohlabane* 1969 (2) PH H137 (O)); to testify and to present argument to the court

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and to make representations regarding sentence (cf *Sibisi*, above). At the close of the State's case he must be fully informed of his legal rights—*Radebe* 1988 (1) SA 191 (T).

The presiding officer should be patient with the accused and be courteous at all times—*Mpofu* 1970 (2) SA 162 (R). If the accused is unduly hampered by the court in his cross-examination of State witnesses, it may result in his conviction being set aside upon review or appeal—*Leeuwner* 1972 (1) PH H51 (E). In *T* 1990 (1) SACR 57 (T) the conviction was set aside owing to the magistrate's obstruction of the cross-examination of an undefended accused. In *Sallem* 1987 (4) SA 772 (A) a conviction was set aside where the magistrate had not controlled his impatience and had thereby committed a series of irregularities and misdirections. A conviction will also be set aside if an unrepresented accused is prejudiced by a failure of the judicial officer to inform him of his legal

rights—*Radebe* 1988 (1) SA 191 (T); *Khambule* 1991 (2) SACR 277 (W). Where a magistrate engages counsel in a debate on the elements of the offence while a witness is testifying, thereby alerting the State to a deficiency in its case, the presiding officer contaminates the proceedings and causes a failure of justice—*Mosesi* 2009 (1) SACR 31 (W).

It is a general principle of our law, stemming from its accusatorial character, that the court is not entitled to question the accused on the merits of the case unless he *suo motu* testifies under oath. This principle must be respected in the course of the trial—*Grotes*; *Jawuka* 1970 (1) SA 368 (C). The accused, therefore, may 'defend' himself by keeping silent. This is his procedural right. However, while an accused is not compelled to speak, in certain circumstances his silence may damage his case: It is a factor which may be taken into account in assessing the weight of the evidence in its totality. But where the State's case depends, for example, upon the drawing of inferences from circumstantial evidence, the accused's silence may well be explained as resulting from his confidence that the evidence adduced by the State does not establish guilt and does not require to be answered. Cf *Khomo* 1975 (1) SA 344 (D), and the textbooks on the law of evidence. See also *K* 1956 (3) SA 353 (A) at 358, and *Dube* 1915 AD 557; *Nomakhalala* 1990 (1) SACR 300 (A).

The accused's 'right to silence' (or more correctly, the 'right not be questioned') has been qualified only by s 115 relating to the 'plea explanation' procedure—see Chapter 14 below. Such questioning by the presiding officer, however, may take place *only* on arraignment and not during the course of the trial. After an accused has been convicted, the court is entitled to know, and it is the duty of the prosecution to inform it, of the previous convictions of the accused, in order to assist it in assessing the proper punishment to impose on the accused. However, during the trial all knowledge of previous convictions of the accused should be withheld from the court, since such knowledge may influence the court to the prejudice of the accused—see s 211. The prosecution is entitled only in exceptional circumstances to prove such previous convictions before verdict, such as where the accused has attacked the character of a State witness or has given evidence of his own good character—s 197. It may be pointed out in passing that it will in practice not always be possible to keep from a judge the fact that an accused has a previous criminal record. If, for instance, an accused is indicted in the High Court for a petty offence, it should be evident to anyone with any knowledge of procedure that the accused's record of previous convictions must be considerable to have justified his trial in the High Court and not in the magistrate's court.

The accused will, however, not be entitled to complain of such inferential knowledge, whereas, if such information is improperly disclosed to the court, the conviction will generally be set aside even though the magistrate might state that he or she had not been influenced by the information (*Persotam* 1934 TPD 253), *unless* the court of appeal is, in the circumstances of the particular case, satisfied that no failure of justice has resulted from such disclosure—s 322. Of course, if during the trial the fact of the accused's previous convictions is revealed by the defence, such knowledge will, as a rule, not invalidate the conviction of the accused.

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Chapter 14
Arraignment and plea of an accused

JP Swanepoel

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The Constitution and this chapter:

Section 3—Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right—
(a) to be informed of the charge with sufficient detail to answer it;
(b) to have adequate time and facilities to prepare a defence;

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(c) to a public trial before an ordinary court;
(d) to have their trial begin and conclude without unreasonable delay;
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

. . .

(m) not to be tried for any offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

See 1, 4.2, below

Section 28—Children

(1) Every child has the right—

. . .

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result . . .

(2) A child's best interests are of paramount importance in every matter concerning the child.

See 1, 2.4, 4.2, below

Section 84—Powers and functions of President:

(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for—

. . .

(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures;

See 4.5, below

The Child Justice Act 75 of 2008 and this chapter:

Section 64—Referral of children in need of care and protection to children's court

If it appears to the presiding officer during the course of proceedings at a child justice court that a child is a child in need of care and protection referred to in section 50, the court must act in accordance with that section.

See 5, below

Section 63—Child justice courts and conduct of trials involving children

(1) *(a)* Any child whose matter has been referred to the child justice court in terms of section 49 (2), must appear before a court with the requisite jurisdiction to be dealt with in terms of this Chapter.

(b) A child justice court must apply the relevant provisions of the Criminal Procedure Act relating to plea and trial of accused persons, as extended or amended by the provisions as set out in this Chapter and Chapter 10.

(2) Where a child and an adult are charged together in the same trial in respect of the same set of facts in terms of sections 155, 156 and 157 of the Criminal Procedure Act, a court must apply the provisions of—

(a) this Act in respect of the child; and

(b) the Criminal Procedure Act in respect of the adult.

(3) Before plea in a child justice court, the presiding officer must, in the prescribed manner—

(a) inform the child of the nature of the allegations against him or her;

(b) inform the child of his or her rights; and

(c) explain to the child the further procedures to be followed in terms of this Act.

(4) A child justice court must, during the proceedings, ensure that the best interests of the child are upheld, and to this end—

(a) may elicit additional information from any person involved in the proceedings; and

(b) must, during all stages of the trial, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child.

(5) No person may be present at any sitting of a child justice court, unless his or her presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him or her permission to be present.

(6) Section 154 (3) of the Criminal Procedure Act applies with the changes required by the context regarding the publication of information.

See 1, below

Section 67—Child justice court may divert matter

(1) *(a)* A child justice court may, at any time before the conclusion of the case for the prosecution, make an order for diversion in respect of a child in accordance with the provisions of section 52 (5).

(b) A child justice court that makes a diversion order must postpone those proceedings, pending the child's compliance with the diversion order and warn the child that any failure to comply with the diversion order may result in any acknowledgment of responsibility being recorded as an admission in the event of the trial being proceeded with as referred to in section 58(4)*(b)*.

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(2) The child justice court must, on receipt of a report from the probation officer that a child has successfully complied with the diversion order, and if the child justice court is satisfied that the child has complied, make an order to stop the proceedings

See also 4.4.1, below

1 Arraignment and general principles

The term 'arraignment' is not defined in the Criminal Procedure Act 51 of 1977. It is described as follows in *Kerr v R* 1907 ECD 324:

> The bringing of the accused to court, informing him of the offence with which he is charged, calling upon the accused for his plea and entering it constitute the arraignment of the accused and when his plea has been recorded he is said to stand arraigned.

Arraignment does not embrace procedural aspects only, but from a fundamental perspective the process must comply with the broader demands of s 35(3)*(a)-(m)* of the Constitution, which provides that every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it, to have adequate time and facilities to prepare a defence, to have a public trial before an ordinary court, to have his trial begin and conclude without unreasonable delay, to be present when being tried, and to have legal counsel either of his own choice or assigned to him at state expense, if substantial injustice would otherwise result. The right to a fair trial is broader and encompasses rights other than those that are specifically set out in s 35(3)*(a)-(m)* of the Constitution, such as maintaining the integrity of the administration of justice, which is an important principle of fundamental justice (*Du Toit v The Magistrate* 2016 (2) SACR 112 (SCA)). It is therefore also the fundamental task of a presiding officer to explain the rights of an unrepresented accused at the outset of the proceedings before pleading and to record the content of such explanation. The presiding officer alone has to discharge this duty; it cannot in an adversarial criminal justice system be delegated to the prosecutor (*Mbathsha* 2014 (2) SACR 143 (ECG)) or to the interpreter (*Malatjii* 1998 (2) SACR 622 (W)). Courts are obliged to act as guides to the undefended accused at all stages of the trial process (*Ramulifho* 2013 (1) SACR 388 (SCA)) and even to assist the obviously inexperienced legal counsel—*Musiker* 2013 (1) SACR 517 (SCA). However, where the undefended accused will not suffer substantial injustice, the right to legal representation is not absolute but subject to reasonable limits. It does not allow an undefended accused to abuse this constitutional right where the court assisted the accused throughout the trial, but the accused's conduct fluctuated between defending himself and requesting legal representation—*Moyce* 2013 (1) SACR 131 (WCC).

Where a child appears before a child justice court in terms of Chapter 9 and is not represented by a legal representative of his own choice, at his own expense, the presiding officer must refer the child to Legal Aid South Africa for the matter to be evaluated by the

Board as provided for in section 22(1)*(b)* of the Legal Aid South Africa Act, 2014. No plea may be taken until a child offender has been granted a reasonable opportunity to obtain a legal representative or a legal representative has been appointed.

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Where a number of accused are charged with the same offence on separate charges, each individual charge must be read out to each of the accused. The presiding officer should ensure that each accused should know exactly what he is required to plead to—*Gwebu, Xaba* 1968 (4) SA 783 (T).

A conviction will be set aside if an accused is arraigned on a serious charge at such short notice that he could not have been afforded sufficient time to prepare his defence or to seek legal representation—*Masilela* 1990 (2) SACR 116 (T).

The holding of a 'mass trial' of a number of accused at one and the same time on charges which are in no way related to each other is highly irregular—*Marimo*, *Ndhlovu* 1973 (2) SA 442 (R).

Nothing in the Criminal Procedure Act prescribes the place where the accused should stand. As a matter of practice he stands in the dock, but the court has a discretion to allow him to stand at another suitable place. If an accused has some objection to being seated in the dock, and if his objection is a genuine one and not taken simply with the object of defying or being contemptuous of the court, the court in the exercise of its discretion should always accede to the accused's request—*Mpofu* 1970 (2) SA 162 (R). An accused should be addressed courteously and not as 'Accused'—*Tyebela* 1989 (2) SA 22 (A). The basic concept of our legal system is that an accused must be fairly tried. That presupposes that the trial be conducted in accordance with the rules and principles of the law of criminal procedure. A trial should not be tainted by an irregularity or illegality that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted—*Rudman* 1992 (1) SA 343 (A).

The general principle of the South African criminal procedure is that the accused must be informed of the charge in open court and required to plead instantly thereto, subject to ss 77, 85 and 105A —s 105. Formal objections to the indictment or charge must be taken before the accused has pleaded, not afterwards (s 85). The defect, if any, can, however, be rectified during the trial in terms of s 86 or s 88. If not, the point can still be raised at the end of the trial as a reason for acquittal—*David v Van Niekerk* 1958 (3) SA 82 (T). When an accused is requested to plead he can do so himself or his legal representative can plead on his behalf provided he is duly instructed and not prohibited by law from appearing—*Mpongoshe* 1980 (4) SA 593 (A).

When the legal adviser replies in writing or orally to any question by the court in terms of s 115(3) (see the discussion of the plea of not guilty) the accused must also confirm this. (See *Mbuyisa* 2012 (1) SACR 571 (SCA) on the content of such statement.)

An accused's plea must be recorded, otherwise a conviction cannot stand—*Brandt* 1972 (1) PH HS17 (NC); *contra Williams* 1977 [1] WLR 400 (CA), where the English Court of Appeal held that where an accused intended to plead not guilty, but by an oversight had not been asked to plead, the defective arraignment had not invalidated the ensuing trial.

Where a child and an adult are charged together in the same trial in respect of the same set of facts in terms of sections 155, 156 and 157 of the Criminal Procedure Act, a court must apply the provisions of the Child Justice Act in respect of the child and the Criminal Procedure Act in respect of the adult. Before pleading in a child justice court, the presiding officer *must inform* the child of his rights and the nature

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of the allegations against him or her and also explain to the child the further procedures to be followed in terms of the Child Justice Act—s 63(3). During the court proceedings the court must ensure that the best interests of the child are upheld, and to this end the court may elicit additional information from any person involved in the proceedings; and *must during all stages of the trial*, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child (see s 63 of the Child Justice Act and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) at [63].

2 When plea by accused may be dispensed with

2.1 Refusal to plead

The court shall enter a plea of not guilty if the accused will not plead or answer directly to the charge—*Monnanyane* 1977 (3) SA 976 (O). Such a plea entered by the court has the same effect as if the accused had actually pleaded (s 109). In *Mothopeng* 1965 (4) SA 484 (T) the opinion was expressed that the provisions of s 109 should not be invoked where an accused *bona fide* refuses to plead. Where the case was formally postponed to a certain date, but thereafter brought on before such date, and the accused, on being required to plead, refused to do so because he would thereby have been prejudiced in his right to request further particulars or to object to the charge sheet, the correct procedure would have been not to enter a plea of not guilty, but to let the matter stand down until the date to which it had originally been postponed.

To insist that an accused should plead after he has informed the court that he wishes to consult a legal representative constitutes a gross departure from the established rules of procedure, and is in conflict with the fundamental right of an accused to have legal assistance—*Mkhize* 1978 (3) SA 1065 (T).

2.2 Ambiguity in plea

If, upon being required to plead, the accused does not do so directly, but makes a statement in which he admits certain facts, or pleads guilty adding reservations and refutations (eg ‘guilty, but he attacked me first’) the court should enter a plea of not guilty and then question the accused in terms of s 115 to ascertain what facts he is prepared to admit.

2.3 Obstructive and rowdy behaviour

If the accused’s refusal to plead is accompanied by such improper behaviour that it obstructs the conduct of the proceedings of the court, the court may order him to be removed and may direct the trial to proceed in his absence—s 159(1). This power must be exercised with circumspection. A warning to the effect that if he should disrupt the proceedings, it would be competent for the judicial officer to complete the trial in his absence must, if possible, be given to the accused, as it might influence him to change his attitude and state his case—*Mokoa* 1985 (1) SA 350 (O).

2.4 Mentally disabled accused

If, when the accused is called upon to plead to a charge or at any stage of the proceedings (generally before sentencing), it appears to be uncertain for any

reason whether he is capable of understanding the proceedings at the trial, so as to be able to make a proper defence, an enquiry into his mental state should be made in accordance with the procedure laid down in s 77 and s 79.

If it is alleged at criminal proceedings at any stage (generally before sentencing) that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that

the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and reported on in accordance with the provisions of s 78 read with s 79.

2.4.1 Enquiry in terms of s 79: capacity to understand proceedings; mental illness and criminal responsibility

In terms of both s 77 and s 78, the investigation is made by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by him or her, at request of the court. In any particular case relevant to specific offences (such as rape, compelled rape, murder or culpable homicide involving serious violence), or if it is in the public interest, or where the court so directs, the enquiry must be made by four persons:

(i) the medical superintendent (or his designate as requested by the court) of a psychiatric hospital designated by the court;
(ii) a psychiatrist (who is not in the full-time service of the state) appointed by the court on application by the prosecution;
(iii) a psychiatrist appointed by the court for the accused; and
(iv) a clinical psychologist where the court so directs (s 79(1)*(b)* and cf *Magongo* 1987 (3) SA 519 (A)).

For the purposes of this enquiry the prosecution must issue a report relevant to the mental capacity of the accused and the court may for purposes of the enquiry commit the accused to a psychiatric hospital into lawful custody for periods not exceeding 30 days at a time. When the period of committal is extended for the first time, such extension may be granted in the absence of the accused unless the accused or his legal representative requests otherwise—s 79(2)*(b)*. The report of the enquiry must include a diagnosis of the mental condition of the accused and a finding as to whether the accused is capable of understanding the proceedings so as to make a proper defence—s 79(4). However, the report must be a holistic assessment of all the relevant facts and circumstances; assessing the accused for one day only does not meet the standards set out in ss 79(3) and (4)—*Chauke* 2016 (1) SACR 408 (SCA).

If the finding in the report is unanimous and is not disputed by either the prosecutor or the accused, the court may determine the matter without hearing further evidence, but if the finding is not unanimous, or is disputed by the prosecutor or the accused, the court must determine the matter after hearing evidence. (In either case the accused must, however, be present in court—*Eyden* 1982 (4) SA 141 (T); *Kahita* 1983 (4) SA 618 (C).) A statement made by the accused during the relevant enquiry shall not be admissible as evidence against the accused in subsequent criminal proceedings, except when the evidence is relevant to the accused's mental condition—s 79 (7).

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2.4.2 Findings and directions in terms of s 77: capacity to understand proceedings

If the court finds that the accused is capable of understanding the proceedings, the proceedings continue in the ordinary way. If the court finds that the accused is not capable of understanding the proceedings, so as to make a proper defence, the court, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in s 77(1) (unless it can be proved on a balance of probabilities that, on the limited evidence available, the accused committed the act in question), *may* order that such information or evidence be placed before the court if it deems fit so as to determine whether the accused has committed the act in question. The court *must* direct that the accused—

(i) if charged with the offences of murder, culpable homicide, rape or compelled rape, or
(ii) if charged with another charge involving serious violence, or

(iii) if the court considers it necessary in the public interest where the court finds that the accused committed the act in question,

be detained in a psychiatric hospital or a prison pending the signification of the decision of a judge in chambers—s 77(6)*(a)*(i). Note that the mandatory provisions of s 77(6)*(a)*(i) do not prohibit the director of public prosecutions from stopping the proceedings against the accused in terms of s 6*(b)*. An order of detention of a person in terms of this section is reviewable by a higher court—*Maluka* 2015 (2) SACR 273 (GP).

Where the accused is charged with less serious offences (those other than the offences mentioned in s 77(6)*(a)*(i) above), the court may direct that the accused—

(aa) be admitted to and detained in an institution stated in the order and treated as if he were an involuntary mental health care user, contemplated in section 37 of the Mental Health Care Act 17 of 2002; or

(bb) be released subject to such conditions as the court considers appropriate; or

(cc) be released unconditionally—s 77(6)*(a)*(ii) as amended by the court in *De Vos NO v Minister of Justice and Constitutional Development* 2015 (2) SACR 217 (CC).

In *De Vos* the provisions of s 77(6)*(a)*(i) and s 77(6)*(a)*(ii) were challenged on the basis of constitutional invalidity. The court found that, in respect of children, a presiding officer must be afforded a discretion so as to ensure that detention is undertaken as a last resort and for the shortest possible period. In respect of other accused, imprisonment should only be available for accused persons who pose a serious danger to society or themselves. If an accused person does not pose a serious danger to society or to him- or herself, he or she should not be kept in prison. The court found that the mandatory detention of children in prison in terms of s 77(6)*(a)*(i) is unconstitutional and the peremptory provision failed to appreciate the complexity of mental disability. The order of unconstitutionality was suspended for 24 months pending legislation.

If the court so directs under s 77(6)*(a)*, after the accused *has pleaded* to the charge, the accused shall not be entitled under s 106(4) to be acquitted or to be convicted in respect of the charge in question. If the court makes a finding in terms of s 77(6)*(a)* after the accused *has been convicted* of the offence charged, but before sentence is passed, the court must set the conviction aside, and if the accused has pleaded

guilty it shall be deemed that he has pleaded not guilty. However, where a direction has been issued, the accused may at any time thereafter, when he or she is capable of understanding the proceedings so as to make a proper defence, be prosecuted and tried for the offence in question.

An accused is permitted to appeal against a finding that he was capable of understanding the proceedings if he is subsequently convicted, or against a finding that he is incapable provided that he did not himself allege this at the trial. An example of an instance where the accused was found to be incapable of understanding the proceedings by reason of mental illness or defect is the case of *Pratt* 1960 (4) SA 743 (T), who was indicted for the attempted assassination of the then Prime Minister, Dr Verwoerd. A similar finding was made in the case of *Tsafendas*, who assassinated Dr Verwoerd in 1966 (the case is not reported, but a full, translated version of the judgment is printed in G C Steyl *Regters aan die Woord* (1971) 7).

The so-called psychopath is generally capable of standing trial as well as being criminally liable (he does not fall under the provisions of ss 77 to 79)—*Mnyanda* 1976 (2) SA 751 (A); *Pieterse* 1982 (3) SA 678 (A); *Lawrence* 1991 (2) SACR 57 (A); see 1976 *CILSA* 1-56.

2.4.3 Findings and directions in terms of s 78: criminal responsibility

If it appears reasonably possible that an accused might not have been criminally responsible at the time when he committed the offence or, at least, that his moral blameworthiness might have been considerably reduced, having regard to his mental state at the time of the commission of the offence, the court is obliged by s 78(2) of the Act to direct that an enquiry into the mental condition of the accused be undertaken—*Tom* 1991 (2) SACR 249 (B); *Volkman* 2005 (2) SACR 402 (C).

If a court finds that the accused committed the act in question but, by reason of mental illness or mental defect, he was not criminally responsible, the court must in terms of s 78 find the accused *not guilty* and must direct—provided the offence charged was murder, culpable homicide, rape or compelled rape, or a charge involving serious violence, or if the court considers it to be necessary in the public interest—that the accused be detained in a psychiatric hospital or prison, pending the decision of a judge in chambers (s 78(6)(i)*(aa)*); or be admitted to and detained in an institution and treated as if he were an involuntary mental health care user (s 78(6)(i)*(bb)*); or released unconditionally or conditionally (s 78 (6)(i)*(dd)-(ee)*); If the court so finds after conviction but before sentence, it must set aside the conviction and find the accused not guilty—s 78(6)*(b)*. In the case of offences other than those offences mentioned in s 78(6)(i), the court must direct the accused to be admitted to and detained in an institution, and to be treated as an involuntary mental health care user as contemplated in s 37 of the Mental Health Care Act, 2002, or to be released conditionally or unconditionally—s 78(6)(ii)*(cc)-(dd)*.

2.5 Objections to the charge

Before the introduction of the Criminal Procedure Act, 1977, objections to a charge or indictment went under varying appellations, depending upon the defect or omission complained of. Thus, in the case of a formal defect (eg the accused incorrectly named) one *objected* to the charge. Where the charge disclosed no offence, one *excepted* to it. Where the charge was lacking in particularity so as to prejudice or embarrass the accused in his defence, he had to bring a *motion to quash*

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it. This antiquated terminology has now been abolished, and the term ‘objection’ embraces all these instances.

Section 85(1) provides:

> An accused may, before pleading . . . object to the charge on the ground—
>
> *(a)* that the charge does not comply with the provisions of this Act relating to the essentials of a charge;
> *(b)* that the charge does not set out an essential element of the relevant offence;
> *(c)* that the charge does not disclose an offence;
> *(d)* that the charge does not contain sufficient particulars of any matter alleged in the charge: Provided that such an objection may not be raised to a charge when he is required in terms of section 119 or 122A to plead thereto in the magistrate’s court; or
> *(e)* that the accused is not correctly named or described in the charge. . . .

Reasonable notice must, however, be given to the prosecution that the accused intends raising an objection. If the court upholds the objection it may order the prosecution to amend the charge or to deliver particulars to the accused. Where the prosecution fails to comply with such an order, the court may quash the charge—s 85(2); *Nathaniel* 1987 (2) SA 225 (SWA). As a matter of procedure, an objection in terms of s 85 should properly have been raised before the accused pleaded to the charge. However, there is nothing which precludes an accused from raising such a point of law at the close of the case for the prosecution. Cf *Mayekiso* 1988 (4) SA 738 (W).

Examples of notorious cases where the court quashed an indictment are *Basson* 2007 (1) SACR 566 (CC) and *Andrews* 1948 (3) SA 577 (Spec Crim Ct). The accused in *Andrews* had

been charged with sedition. In reply to a request for further particulars as to 'the acts by which it was alleged that the various accused took part in the seditious acts alleged', the director of public prosecutions had referred the accused to the preparatory examination record. Before pleading, all the accused objected to the indictment. The court held that as the indictment was embarrassing to all the accused, the court was bound either to quash the indictment or to order it to be amended in the manner applied for by the Crown (State). Accordingly, the court held that as the amendment would cause prejudice to the accused, the indictment should be quashed and leave granted to the Crown to frame an indictment afresh. See also *C* 1955 (1) SA 464 (T).

In the great treason trial before a special court in Pretoria during the 1950s in which a large number of accused were charged, the defence objected to the indictment on the ground that the accused persons would be prejudiced by its lack of particularity. Upon the facts the court quashed one of the charges, but refused at that stage to quash the remaining charges, provided that the State delivered further particulars—*Adams* 1959 (1) SA 646 (Spec Crim Ct).

Section 88 (discussed above) does not affect the accused's right to object to an indictment.

3 Plea bargaining

Plea bargaining in the form of traditional plea negotiation and agreement between the parties have always taken place in practice in various formats. Its main object is to lighten the burden which the accused has to bear in the sense that the accused faces less serious implications as far as sentence is concerned, and to spare the State the time and expense involved in a lengthy criminal trial with all of

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its attendant evidentiary risks. Statutory plea bargaining or negotiation was introduced for the first time in South African criminal procedural law by the insertion of s 105A into the Criminal Procedure Act 51 of 1977, by way of the Criminal Procedure Second Amendment Act of 2001. The operation of a traditional informal plea bargaining system in our criminal process by means of pleas of guilty under s 112, and the established practice of accepting pleas of guilty on the basis of *bona fide* consensus reached, have not been supplanted by the statutory regime incorporated by the statutory amendment in 2001—*Steyl v National Director of Public Prosecutions* (27307/2013) [2015] ZAGPPHC 407 (9 June 2015) (unreported decision in the Gauteng High Court, Pretoria) and quoted with approval in *Van Heerden v Regional Court Magistrate, Paarl* (883/2015) [2016] ZASCA 137 (29 September 2016) at [17]. The fact is that there are two independent systems of negotiation within the South African criminal justice system: (a) formal negotiations under statute (*Esterhuizen* 2005 (1) SACR 490 (T); *Armugga* 2005 (2) SACR 259 (N) at 265*b*) and (b) informal negotiations mostly based on trust (*EA* 2014 (1) SACR 183 (NCK)).

3.1 Traditional plea bargaining

To achieve this object a plea to a lesser offence (which may be an offence which is a competent verdict to the offence charged, or an alternative charge) is negotiated between the accused or his legal representative and the prosecutor, in which the latter agrees to accept the plea tendered, for example, an accused who is charged with murder tenders a plea of guilty to culpable homicide. Alternatively, the accused pleads guilty to the charge, but on a different basis from that alleged by the State, for example, the accused is charged with murder committed with *dolus directus*, and tenders a plea of guilty on the basis of *dolus eventualis* instead. In both these examples an agreement is reached with the prosecutor on the facts which are to be placed before the court to justify a conviction on the basis agreed to.

Another form of plea bargaining occurs when more than one accused stands arraigned on a particular charge or charges, and an agreement is reached wherein it is stated that the accused, who is undoubtedly guilty, will plead guilty in return for the withdrawal of the charge(s) against the other accused. An accused may also undertake to supply vital information to the investigating officer, which expedites and is necessary for the proper investigation of the case, on the understanding that the accused will not be prosecuted. This would entail that the investigating officer is approached, with the consent of the prosecutor, to initiate negotiation. Where an accused faces numerous charges, an agreement can be reached with the prosecutor that the accused pleads guilty to a specified number of charges, in return for an undertaking that the remaining charges will be withdrawn. This procedure is often followed to avoid a lengthy and expensive trial or when statutory negotiations failed or the process is no longer available during the trial after the plea.

The disadvantage of entering into an informal plea agreement is that the prosecutor and accused cannot reach a binding agreement with regard to the facts and sentence to be imposed without the co-operation of the presiding officer. At most, the parties can reach an informal agreement in terms of which the prosecutor undertakes to *recommend* that a reduced sentence be imposed or undertakes not to motivate for a harsher sentence The prosecutor and the defence *cannot bind the court to a sentence*, The prosecutor may, however, agree to suggest to the court a possible light, or lighter, sentence—for example, a fine and not imprisonment. The

negotiating process may in some instances be simple. The legal representative will make an offer that the accused will plead guilty to the lesser offence, which will then be accepted by the prosecutor. In more involved matters the negotiating process may take months to complete.

In accordance with notions of basic fairness and justice, the State is to be held to a plea bargain it has made—see *North Western Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 (2) SACR 669 (C) and *Van Eeden v Director of Public Prosecutions, Cape of Good Hope* 2005 (2) SACR 22 (C).

3.2 Statutory plea bargaining

Section 2 of the Criminal Procedure Second Amendment Act 62 of 2001 inserted s 105A into the Criminal Procedure Act and formalised the process of plea bargaining in terms of that Act. It is, in essence, a codification of the age-old practice described above. The central innovation is that the prosecutor can now also reach an agreement with the defence on the sentence to be imposed. Certain mandatory formalities are prescribed, such as that the whole agreement must be in writing. The time for entering into an agreement (or agreements) is before the commencement of the trial, ie before plea. Section 105A does not apply to a charge or charges on acceptance of plea during trial. It is also a once-off situation: if the court has ruled for a *de novo* trial (on the merits or the sentence), the parties may not enter into a plea and sentence agreement in respect of a charge arising out of the same facts. In determining whether a plea agreement complies with the requirements stipulated in s 105A, a court will also examine sub-s (1)*(b)*(iii), which provides for the participation of the complainant/victim—*Sassin* [2003] 4 All SA 506 (NC). The mandatory formal scheme of s 105A is broadly as follows:

An ‘authorised’ prosecutor (that is, a prosecutor who has been authorised in writing by the National Director of Public Prosecutions) and a legally represented accused may negotiate an agreement on plea and sentence. Non-represented accused are excluded from the provision. The judicial officer is not to participate in the negotiations. It may be asked what the ambit of the prohibition is: It would be a pity if it were to preclude the parties from obtaining an

intimation from the judicial officer as to whether he or she would be willing to consider, for example, a non-custodial sentence.

In court the judicial officer must question the accused on the contents of the agreement to ascertain whether he is in fact admitting all the allegations in the charge. If the court is satisfied, it proceeds to the sentencing phase without, for the moment, recording a conviction. When considering the sentence agreement, the court must be satisfied that the sentence agreement is just, and if so, the court convicts the accused and imposes upon the accused the sentence agreed upon.

If the court is not so satisfied, it informs the parties of the sentence which the court considers just. A trial court may not impose a sentence contrary to that contained in a plea agreement without advising the State and the accused that it is of the opinion that the proposed sentence is unjust, as contemplated in s 105A(9) of the Act—*Jansen v The State* 2016 (1) SACR 377 (SCA). In the latter event, two possibilities arise:

(i) The prosecutor and the accused may elect to abide by the agreement on the merits and the court then convicts the accused and proceeds to consider sentence in the normal way;

(ii) The other possibility is that the parties (or one of them) may opt to withdraw from the agreement: This will mean that the trial must start *de novo* before another judicial officer.

Once a trial starts *de novo*, s 105A dictates that the agreement is *pro non scripto*: No regard may be had, or reference made, to any preceding negotiations on the agreement itself, although the accused may consent to all or certain of the admissions made by him, either in the agreement or in the course of the proceedings. The parties may not, however, plea bargain in terms of s 105A in respect of a charge arising from the same facts. This, nonetheless, does not preclude traditional plea bargaining as it exists in practice.

In *Armugga* 2005 (2) SACR 259 (N) (at 265*a*-*c*) the court noted that—

> [p]lea bargaining could be defined as the procedure whereby the accused relinquishes his right to go to trial in exchange for a reduction in sentence. The system involves bargaining on both sides, the accused bargaining away his right to go to trial, in exchange for a reduced sentence and the prosecutor bargaining away the possibility of a conviction in exchange for a punishment which he feels would be retributively just and cost the least in terms of the allocation of resources. In the process of bargaining, numerous assumptions are made and mistakes are bound to happen . . . . [T]he fact that the assumptions turn out to be false does not entitle such a party to resile from the agreement.

In *De Koker* 2010 (2) SACR 196 (WCC) plea bargaining is described as the settlement of the *lis* between the State and the accused once and for all.

4 Pleas which may be raised by accused

4.1 Pleas mentioned in the Act

Section 106 provides that the accused may plead—

(1) that he is guilty of the offence charged or of any offence of which he may be convicted on the charge;
(2) that he is not guilty;
(3) that he has already been convicted of the offence with which he is charged (*autrefois convict*);
(4) that he has already been acquitted of the offence with which he is charged (*autrefois acquit*);
(5) that he has received a free pardon from the President for the offence charged;
(6) that the court has no jurisdiction to try the offence;
(7)

that he has been discharged from prosecution in terms of s 204 after giving satisfactory evidence for the State;

(8) that the prosecutor has no title to prosecute; or

(9) that the prosecution may not be resumed or instituted owing to an order by a court under s 342A(3)*(c)*.

The section further provides that two or more pleas may be pleaded together, except that the plea of guilty cannot be pleaded with any other plea to the same charge. Section 106(4) provides that except for the plea that the court lacks jurisdiction, or where the court enters a plea of not guilty on behalf of the accused, an accused who pleads to the charge shall be entitled to a conviction or an acquittal—see below.

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Truth and public benefit: In terms of s 107 the accused may plead this where the charge is one of criminal defamation. This defence must be specially pleaded and may be pleaded with any other plea except the plea of guilty. It is noteworthy that the Act does not make provision for the plea that the defamatory words were excused as fair comment or that they were privileged or spoken in jest.

Lis pendens (that the issue before the court is the subject of adjudication before another court): This is not specially provided for in the Act and the admissibility of such a plea will be discussed below.

4.2 Guilty

4.2.1 General

Generally speaking, where an accused pleads guilty at his trial there is no issue between him and the State and he may be convicted and sentenced, there and then, on his plea.

Before the coming into operation of the Criminal Procedure Act of 1977, an accused who pleaded guilty before a High Court to any offence, other than murder, could be convicted without any evidence being led. As the judge generally had the preparatory examination record before him, he would be familiar with the circumstances of the case and be in a position to pass sentence. A lower court, on the other hand, having no preparatory examination record, could generally only convict an accused who pleaded guilty where there was proof (in the form of evidence) that the offence had been committed—though it was not necessary to show that it was the accused who had committed it. (This latter provision was commonly known as the 'evidence *aliunde*' rule.)

The above procedures were replaced in 1977 by s 112, which abolishes the distinction between proceedings before the higher and lower courts, as well as the *aliunde* rule.

Section 112(1) lays down two different procedures where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge, and the prosecutor accepts such plea: one for serious and one for less serious offences. Section 112 provides as follows:

> (1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea—
>
> *(a)* the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette* [R5 000 since 30 January 2013—Government Notice R 62 in *GG* 36111], convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and—
>
> (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount [R5 000] determined by the Minister from time to time by notice in the *Gazette*; or
>
> (ii) deal with the accused otherwise in accordance with law;

(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount [of R5 000

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as from January 2013] determined by the Minister from time to time by notice in the *Gazette*, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence *and impose any competent sentence*.

(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)*(b)*, convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: *Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement*.

(3) Nothing in this section *shall prevent the prosecutor from presenting evidence on any aspect of the charge*, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or *from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence*. (Emphasis added and amounts inserted in brackets.)

If the presiding official is of the opinion that the offence does not merit imprisonment or any other form of detention without the option of a fine, or a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette* (the amount of R5 000 was so determined in 2013), he *may* convict the accused on his plea of guilty only and impose a sentence other than those mentioned above—s 112(1)*(a)*(ii). Section 112(1)*(a)* must be used sparingly and only where it is certain that no injustice will result from its application. It is still intended for minor matters, as its predecessor always was—*Addabba* 1992 (2) SACR 325 (T).

If the presiding official is of the opinion that the offence does merit one of the above-mentioned sentences, or if he is requested thereto by the prosecutor, he *must* question the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge to which he has pleaded guilty. If satisfied that the accused is guilty of the offence to which he has pleaded guilty, he may convict and sentence him—s 112(1)*(b)*.

Section 112(2) not only requires a series of admissions but also the facts upon which those admissions are based—*B* 1991 (1) SACR 405 (N). It is, therefore, on a charge of reckless driving not enough for the accused to admit that he drove recklessly. It is necessary to admit facts from which the court can draw the conclusion that the accused did in fact drive recklessly—*Morris* 1992 (1) SACR 537 (A). An accused may also admit an element of an offence of which he bears no personal knowledge, for example, a certificate indicating the alcohol level in his blood—*Martins* 1986 (4) SA 934 (T); *Goras* 1985 (4) SA 411 (O).

A statement tendered on behalf of a child must in view of a child offender's age and criminal capacity comply with s 112(2) of the Act to satisfy the court of the child's guilt. Hence, where a child offender is between 10 and 14 years of age, the court, prosecutor and defence counsel must be alive to the fact the offender is rebuttably presumed to be criminally non-responsible. The burden of rebutting this presumption rests on the prosecution. The prosecution would obviously have been relieved of that obligation had an appropriate admission been made by the accused in the statement in terms of s 112(2). An important step in s 112(2)

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proceedings is to ascertain whether the child's development was sufficient to rebut the presumption. The statement must inform the presiding officer about the child's state of mind at the time of committing the offence or of his level of perception then, or whether he was mature enough to answer for his behavior. From this factual basis the court must be satisfied as to the guilt of the accused. A simple regurgitation of what must have been the content of the charge sheet in the statement does not comply with s 112(2)—*Mshengu v the State* 2009 (2) SACR 316 (SCA).

Note the following aspects with regard to s 112:

4.2.1.1 Questioning by the presiding official

An uneducated and unrepresented accused may plead guilty to an offence, meaning no more than that he performed the act (eg stabbing) alleged in the charge sheet. With the provision in the Criminal Procedure Act 51 of 1977 for questioning an accused who pleads guilty, the danger of a wrong conviction has been considerably diminished.

This procedure should be applied with caution—*Van Deventer* 1978 (3) SA 97 (T); *Phikwa* 1978 (1) SA 397 (E). The magistrate's questions must be directed at satisfying himself that an accused fully understands all the elements of the charge when pleading guilty and that his answers reveal that he has in fact committed the actual offence to which he has pleaded guilty—*Tshumi* 1978 (1) SA 128 (N); *Jacobs* 1978 (3) SA 440 (E); *Lebokeng* 1978 (2) SA 674 (O); *Mthetwa* 1978 (2) SA 773 (N); *Jacobs* 1978 (1) SA 1176 (C); *Tito* 1984 (4) SA 363 (Ck); *Naidoo* 1985 (2) SA 32 (N); *Londi* 1985 (2) SA 248 (E). This is especially the case when an accused is illiterate and unsophisticated and has no legal assistance, and even more so when he is a young child with a limited grasp of the proceedings—*M* 1982 (1) SA 240 (N). The primary purpose of this questioning is to protect an accused against the consequences of an incorrect plea of guilty. It is not correct to rely on inferences in order to determine the guilt of the accused. The accused's answers cannot be used as 'evidence' to draw unfavourable inferences which establish the required conviction that he is guilty—*Nagel* 1998 (1) SACR 218 (O). The provisions of s 112(1)*(b)* are intended to eliminate the need to present evidence (and thereby unnecessary costs). The intention is certainly not to make a trial a mere formality when an accused pleads guilty. The presiding judicial officer must still—particularly in cases where heavy sentences are possible—ensure that sufficient information is placed before him to enable him to impose sentence properly—*Serumala* 1978 (4) SA 811 (NC).

Where possible, questions from the bench should be as few as possible, and preferably only those necessary *(a)* to elucidate what the accused has volunteered, *(b)* to canvass any allegations in the charge not mentioned by the accused, and, of course, *(c)* to confine the accused to the relevant detail. Leading questions should, as far as possible, be avoided. It is totally inadequate for the court simply to ask the accused whether he admits, one by one, each of the allegations in the charge—*Mkhize* 1981 (3) SA 585 (N). It must be clear that the accused understands the nature of the offence, its elements and the nature and effect of the admissions he has made. In questioning the accused no purpose is served by putting legal conclusions to him. Facts must be established which can form the basis for legal conclusions—*N* 1992 (1) SACR 67 (Ck); *De Klerk* 1992 (1) SACR 181 (W); *Morris* 1992 (1) SACR 537 (A).

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Section 112 applies not only where a plea of guilty is tendered before the commencement of a trial but also when an accused changes his plea to one of guilty during the course of the trial (*Abrahams* 1980 (4) SA 665 (C); *Sethoqa* 1990 (1) SA 270 (A).).

Questioning in terms of s 112(1)*(b)* is mandatory and can also operate in favour of the accused. Failure to comply with the requirements of this section will result in the conviction and sentence being set aside (*Fikizolo* 1978 (2) SA 676 (NC); *Molauzi* 1984 (4) SA 738 (T))

or in the case being remitted under s 312(1) in order to comply with the provisions of s 112—*Govender v Buys* 1978 (2) SA 292 (N); *Malikhethla* 1978 (3) SA 11 (O); *Gabriel* 1981 (2) SA 156 (SWA); *Mmatli* 1988 (2) SA 533 (T). (Admissions made at the first trial may be used as part of the evidential material at the *de novo* trial—*Mbothoma* 1978 (2) SA 530 (O).) Court decisions that held that an accused is not required to be informed of his right to remain silent when pleading guilty to a charge should be revised in the light of the constitutional advances requiring criminal trials to be conducted according to basic notions of fairness and justice—*Director of Public Prosecutions, Natal v Magidela* 2000 (1) SACR 458 (SCA).

If, in the course of questioning of the accused, it appears that he is not guilty of the offence charged but that he admits his guilt to a lesser offence, the court should record a plea of not guilty in terms of s 113—if the plea of guilty on the lesser charge is not accepted by the State. (*Tladi* 1978 (2) SA 476 (O) at 480B-C. Cf also *Mabaso* 1980 (2) SA 20 (N); *Sibiya* 1980 (2) SA 457 (N), and see below.)

The use of a roneoed form for the questioning of an accused in terms of s 112(1)*(b)* is highly undesirable—*Ntomane* 1978 (3) SA 596 (T). See also *Baron* 1978 (2) SA 510 (C).

Co-accused should be questioned separately—*Faber* 1979 (1) SA 710 (NC). The questions to answers must be fully recorded—*Maxekwa* 1978 (1) SA 419 (O); *Khiba* 1978 (2) SA 540 (O).

4.2.1.2 Accused's version

An accused should be encouraged to tell his version. The court's function is not to evaluate the answers as if it were weighing evidence or to judge their truthfulness or plausibility. It is simply to interpret them to see whether they substantiate the plea. The test, in short, is what the accused has said, not what the court thinks of it—*Mkhize* 1978 (1) SA 264 (N). See also *Mkhafu* 1978 (1) SA 665 (O); *Doud* 1978 (2) SA 403 (O); *Somyali* 1979 (2) SA 274 (E).

If the accused's version does not accord with that of the State, a plea of not guilty must be entered (see s 113 below), except where the dispute does not concern the crux or substance of the offence, and affects sentence only—*Balepile* 1979 (1) SA 703 (NC). Cf also 1978 *SACC* 71; 1979 *De Iure* 175. The judicial officer must determine whether the accused admits the allegations in the charge concerning the time and place of the offence, incorporated in the charge in terms of s 84(1), even if such allegations are not elements of the offence charged. Section 113 should be applied where such allegations are not admitted—*Heugh* 1998 (1) SACR 83 (E).

As in the case of s 115 (see below; note in particular *Mathogo* 1978 (1) SA 425 (O)), the court should also, in a s 112 procedure, explain to an undefended accused that exculpatory statements, made in consequence of the court's s 112 questioning, do not constitute evidence for the defence; the latter can be given in the usual way only after the State's case—cf *Afrika* 1982 (3) SA 1066 (C).

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4.2.1.3 The prosecutor's role

The prosecutor should give the court a brief summary of the State's case. If the summary reveals the offence charged, the magistrate is obliged to question the accused. Without such summary the court has no idea of the seriousness of the offence, on which to assess an appropriate sentence. The fact that such a summary has been furnished, as well as its contents, must be noted on the record because it is part of the proceedings in court—*Sejake* 1981 (1) SA 1215 (O). And, if the accused disputes the details of the State's case, the prosecutor will have to tender evidence to prove them—*Ngobe* 1978 (1) SA 309 (NC); *Rakanang* 1978 (1) SA 591 (NC); *Sikhindi* 1978 (1) SA 1072 (N). See also *Witbooi* 1978 (3) SA 590 (T); *Faber* 1979 (1) SA 710 (NC). In *Mkhize v The State* 1981 (3) SA 585 (N) it was

stated that in nearly all cases it would be far better for the court to hear what the accused has to say with reference to the charge *before* inviting the prosecutor to outline the case.

The acceptance of a plea of guilty by the prosecutor is of importance only where the accused pleads guilty, not to the offence with which he is charged, but to an offence of which he can be convicted on the charge, and the prosecutor does not wish to proceed with the offence charged. If, however, the prosecutor wishes to proceed with the offence charged, and therefore does not accept the plea, the presiding judicial officer must note a plea of not guilty and act in terms of s 115—*Phundula* 1978 (4) SA 855 (T). The wording of s 112(1) makes it clear that the prosecutor's acceptance of a plea at the time of pleading is necessary only where an accused pleads guilty, not to the offence charged, but to a lesser offence of which he can, on the charge, be convicted. Thus, when an accused pleads guilty to the offence charged, acceptance of the plea by the prosecutor is unnecessary—*Nyambe* 1978 (1) SA 311 (NC). In *Sethoga* 1990 (1) SA 270 (A) at 275B the court held that a plea of guilty tendered after an initial plea of not guilty that was purportedly accepted by the State after evidence had been led was viewed differently from a plea tendered at the commencement of the trial, as the court was during the trial, after pleadings and evidence had been presented, seized with the duty of determining all the issues raised by the initial plea of not guilty. The court held that the acceptance by the prosecutor of a plea of guilty to a lesser offence at that stage does not have the same effect as the acceptance of such a plea before the commencement of the trial.

It may happen that on arraignment, an accused tenders a plea of guilty to a lesser offence which is a competent verdict (see below) on the main charge (eg a plea of guilty to common assault where the charge is assault with intent to do grievous bodily harm). Here, the prosecutor may accept the plea of guilty without the leave of the court—*Cordozo* 1975 (1) SA 635 (O). The position is the same where the accused pleads guilty to an alternative count—*Bokopane* 1964 (1) SA 695 (O). The acceptance of a plea of not guilty to a serious charge (eg murder) and the acceptance of a plea of guilty to a less serious charge (eg culpable homicide) is neither a withdrawal of the main charge in terms of s 6*(a)* nor a stopping of the prosecution in terms of s 6*(b)*. It is rather a *sui generis* act performed by the prosecutor which limits the extent of the *lis* between State and accused, in accordance with the accused's plea. The accused can thus only be convicted of the less serious offence. (See *Hlokulu* 1988 (1) SA 174 (C).) Once the trial is in progress, however, the situation is different. The leave of the court is then necessary if the prosecutor wishes to accept a subsequent plea of guilty to a lesser or an alternative offence. The

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prosecutor cannot compel the court to convict in such a case—*Komo* 1947 (2) SA 508 (N); *Mlangeni* 1976 (1) SA 528 (T). *Contra Bokopane* (above); *Papenfus* 1978 (4) SA 32 (T); *Mokoena* 1981 (1) SA 148 (O); *Prokureur-generaal, Venda v Magistraat Streekafdeling* 1982 (2) SA 659 (V); *Sethoga* 1990 (1) SA 270 (A); *Kethani* 2006 (2) SACR 150 (Ck).

4.2.2 Statement by accused instead of questioning

The court may, in lieu of the questioning under s 112(1)*(b)*, convict the accused and sentence him (in terms of this subsection) on the strength of a written statement by the accused (handed in to court by the accused or his legal adviser) in which he sets out the facts which he admits and on which he has pleaded guilty. The court must be satisfied that the accused is guilty of the offence to which he has pleaded guilty, and may put any question to the accused in order to clarify any matter raised in the statement—s 112(2). A written statement which is simply a regurgitation of what appears in the charge sheet or a repetition of the allegations is undesirable—*Mbuyisa* 2012 (1) SACR 571 (SCA). The statement must set out not only a series of admissions but also the facts upon which those admissions are based—*B* 1991 (1) SACR 405 (N).

A statement of the accused made *verbally* by his legal representative is not a statement as intended by s 112(2)—*Calitz* 1979 (2) SA 576 (SWA). Section 112(2) does not stipulate who should draft the written statement. A statement prepared by the prosecutor and signed by the accused theoretically complies with the requirements of s 112(2), but due to the inherent danger of abuse, strict safeguards are required when resorting to this procedure—*Sellars* 1991 (1) SACR 491 (N).

4.2.3 Evidence or questioning with regard to sentence

For the purposes of an appropriate sentence, the prosecutor may present evidence on any aspect of the charge, and the court may hear evidence (including evidence or a statement by or on behalf of the accused) or question the accused on any aspect of the case—s 112(3). This subsection relates only to evidence. The court is not entitled to have regard to evidence given in terms of s 112(3) in considering whether or not the accused is guilty—*Khumalo* 1978 (4) SA 516 (N); *Balepile* 1979 (1) SA 703 (NC); *Quinta* 1979 (2) SA 326 (O); *Phakati* 1978 (4) SA 477 (T). The court is not entitled to take into account against an accused, who has already been convicted on the basis of facts contained in the written explanation of plea in terms of s 122(2), contradictory evidence adduced by the state under s 112(3) in aggravation of sentence—*Jansen* 1999 (2) SACR 368 (C). Where a magistrate has convicted an accused in terms of s 112, another magistrate may, in the absence of the aforementioned, sentence the accused at a later stage—s 275. Cf also *Harbour* 1988 (4) SA 921 (T).

4.2.4 Correction of plea of guilty

If the court at *any stage* of the proceedings under s 112 and *before sentence* is passed is in doubt whether the accused is—

(1) in law guilty of the offence to which he has pleaded guilty, or is satisfied that
(2) the accused does not admit an allegation in the charge, or
(3) the accused has incorrectly admitted any such allegation, or

(4) the accused has a valid defence to the charge, or
(5) the court is of the opinion for any other reason that the accused's plea of guilty should not stand,

the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution—s 113. The conviction apparently lapses automatically—*Osborne* 1978 (3) SA 173 (C). See also *Du Plessis* 1978 (2) SA 496 (C); *Olckers* 1978 (4) SA 169 (SWA); *Lukele* 1978 (4) SA 450 (T); *Chetty v Cronje* 1979 (1) SA 294 (O); *Aranoff* 1979 (2) SA 179 (T); *Mazwi* 1982 (2) SA 344 (T); *Jada* 1985 (2) SA 182 (E).

Admissions already made stand as proof of the relevant facts. Where such admissions embrace all the facts the State must prove in order to establish the offence and the guilt of the accused in respect thereof, the accused can be convicted—*Ncube* 1981 (3) SA 511 (T). The court must weigh the accused's admissions and his failure to testify in order to decide whether all the elements of the offence have been proved—*Mathe* 1981 (3) SA 644 (NC). A prosecutor may not substantially contradict the version of an accused who has pleaded guilty, unless a plea of not guilty is noted—*Swarts* 1983 (3) SA 261 (C). Note that doubt and not a probability is sufficient to compel the court to record a plea of not guilty and that the provisions of s 113 are mandatory. On the other hand, the phrase 'is satisfied' in s 113(1) postulates no other test than that the court must be in reasonable doubt whether the accused admits an allegation in the charge, or has correctly admitted such allegation, or is reasonably left in doubt whether the accused has a valid defence to the charge—*Attorney-General, Transvaal v Botha* 1993 (2) SACR 587 (A). The question whether the accused's non-admission of an allegation in the charge sheet is false or not is not relevant at this stage

of the proceedings—*Malili* 1988 (4) SA 620 (T). In other words, the reasons why the accused made the allegations are not relevant—*Mokonoto v Reynolds NO* 2009 (1) SACR 311 (T).

Allegations admitted by the accused up to the stage at which the court records a plea of not guilty, other than allegations incorrectly admitted by the accused, stand as proof in any court of such allegation—s 113(1).

Where an accused has pleaded guilty to the charge but a plea of not guilty has been entered, the trial could be resumed before another magistrate in terms of s 118—*Ndiwe* 1988 (3) SA 972 (NC), provided no evidence has yet been tendered—s 118.

The following may serve as an example of the implementation of s 113: on a charge of being found in possession of property suspected of being stolen, and failing to afford a reasonable explanation of his possession, the inability to account of the finder (accused) is an element of the case for the State. He should give evidence (although he is not compelled to do so), and a conviction in terms of s 112 without evidence and only on a plea of guilty is not possible. The court should record a plea of not guilty in terms of s 113 in order to hear at least the evidence of the finder—*Shabalala* 1982 (2) SA 123 (T). The correction of a plea of not guilty must be effected on the front page of the charge sheet. In order to give a true reflection of what transpired, the plea must be noted as follows: 'Guilty (changed to "not guilty" in terms of s 113)'—*Mugwedi* 1988 (2) SA 814 (V). If the court records a plea of not guilty before any evidence has been led the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise—s 113(2).

4.2.5 Committal for sentence by regional court

If a magistrate's court, after conviction following on a plea of guilty but before sentence, is of the opinion (1) that the offence is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court, or (2) that the previous convictions of the accused are such that the offence merits punishment in excess of the jurisdiction of a magistrate's court, or (3) that the accused is a dangerous criminal (as referred to in s 286A(1)), the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction—s 114(1). The accused is then sentenced by the regional court. If the regional court is satisfied, however, that the plea of guilty by the accused was incorrectly recorded or is not satisfied that the accused is guilty of the offence or has no valid defence to the charge, the court shall enter a plea of not guilty and proceed with the trial as a summary trial—s 114(3)*(b)*.

The record of the proceedings in the magistrate's court is, upon proof thereof in the regional court, received by the latter court, and forms part of the record of that court—s 114 (2). Cf *Loggerenberg* 1984 (4) SA 41 (E).

Note that there is no provision for committing an accused to a division of the High Court for sentence. This is because it is highly unlikely that the accused in such a case would be arraigned before a district magistrate's court in the first place. In the past it was the practice, where an accused pleaded guilty to murder, for the court to enter a plea of not guilty—*Nzuza* 1963 (3) SA 631 (A). (This practice originated in England, where conviction on a charge of murder resulted in a mandatory death sentence.)

4.2.6 Amendment of plea from 'guilty' to 'not guilty'

The accused may, with the leave of the court, withdraw his plea of guilty. At common law, this will be allowed only if he can give a reasonable explanation why he pleaded guilty and now wishes to change his plea. A reasonable explanation could be, for example, that the plea was induced by fear, fraud, duress, misunderstanding or mistake. (Cf *Britz* 1963 (1) SA 394 (T); *Sewela* 2007 (1) SACR 123 (W).)

An application by an accused who had no legal representation when he pleaded, but is represented when his trial starts, to alter his plea from guilty to not guilty should not succeed where there is no indication that the accused did not understand the charge and where the trial court offers the accused an opportunity to give an explanation by way of evidence which the accused, without any reason for his refusal, declines to use—*Hattingh* 1972 (3) SA 843 (O). An application to change a plea of guilty to one of 'not guilty' may be brought after conviction but before sentence. In such a case there is an onus on the accused to show on a balance of probabilities that the plea was not voluntarily made—*De Bruin* 1987 (4) SA 933 (C). See also *Booysen* 1988 (4) SA 801 (E) at 804. A contrary decision was given in the full court judgment in *Botha* 1990 (1) SA 665 (T), where it was held that at common law, an application for amendment of a plea of guilty, brought before sentencing, does not shift the onus to the accused. The explanation of the accused must be reasonable and more persuasive if the application to amend the guilty plea is brought at a late stage in the proceedings. The decision in *Botha* was confirmed on appeal—*Attorney-General, Transvaal v Botha* 1993 (2) SACR 587 (A). Cf also *Fourie* 1991 (1) SACR 21 (T). The court is not *functus officio* until the sentence has been imposed—*Van Heerden v De Kock* 1979 (3) SA 315 (E).

Even when an explanation as to why the accused pleaded guilty is somewhat improbable, the court should not refuse an amendment to the plea unless it is satisfied not only that the explanation is improbable but that it is beyond reasonable doubt false. If there is any reasonable possibility of his explanation being true then he should be allowed to withdraw his plea of guilty—*Kannigan* 1975 (4) SA 639 (N); *Pitso v Additional Magistrate, Krugersdorp* 1976 (4) SA 553 (T); *Zwela* 1981 (1) SA 335 (O).

Before the amendment of s 113 in 1996, the test was one of reasonable doubt: if the court had a reasonable doubt whether the accused had actually or correctly admitted the allegations in the charge, or whether the accused had a valid defence to the charge, it was obliged to enter a plea of not guilty. Similarly, an accused who wished to withdraw a plea of guilty had to give an explanation as to why he pleaded guilty and now wished to change that plea. If the explanation was reasonably possibly true, the accused would be allowed to withdraw the plea. Since the amendment the requirement of reasonable doubt has been replaced with a lighter test. It is sufficient if it were alleged that the accused did not admit, or incorrectly admitted, an allegation in the charge, or that the accused has a valid defence to the charge. See *Mokonoto v Reynolds NO* 2009 (1) SACR 311 (T).

Where the application for amendment of plea from guilty to not guilty rests upon two bases, namely coercion on the one hand and actual innocence on the other, the merits of the matter in relation to the guilt or innocence of the accused must also be taken into account. The trial court will at least have to decide whether there is a reasonable possibility that the accused is innocent and that the application is *bona fide*. It is permissible to have regard to the accused's statements during explanation of plea in terms of s 112(1)*(b)*—*De Villiers* 1984 (1) SA 519 (O).

Only in the most exceptional circumstances will a change of plea from guilty to not guilty be allowed after verdict. Cf *Onward* 1972 (1) PH H68 (R). Where, however, the accused pleads guilty to certain charges and abuses the judicial process in order to obtain advantages with regard to the other charges, the court may refuse to allow him subsequently to change his plea—*Nathanson* 1959 (1) SA 258 (N). Cf in general *Simbi* 1975 (4) SA 700 (RA); *Booysen* 1988 (4) SA 801 (E) at 804C.

In *Mazwi* 1982 (2) SA 344 (T) the view taken was that the test to be applied in deciding whether to grant an application to withdraw a plea of guilty is that set out in s 113 (see above), and that there is no room for a common-law withdrawal of a plea of guilty. In *Hazelhurst* 1984 (3) SA 897 (T), however, it was held that s 113 is applicable only in

proceedings in terms of s 112 (ie in the course of questioning the accused to determine whether he admits the allegations in the charge to which he pleaded guilty) and the magistrate, without an application on the part of the accused, must change the plea to one of not guilty if certain facts emerge from the questioning. Section 113 does not supersede or exclude the common law—*Attorney-General, Transvaal v Botha* 1993 (2) SACR 587 (A). Where a matter arises for which s 113 does not make provision, the common-law position (see above) still applies. The accused is then only required to offer a reasonable explanation for having initially pleaded guilty. The court should reject the explanation only if it is convinced beyond reasonable doubt that it is false—*Botha* 1990 (1) SA 665 (T). There is no onus on the accused—*Fourie* 1991 (1) SACR 21 (T).

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4.3 Not guilty

4.3.1 Explanation of plea

Section 115 of the Criminal Procedure Act 51 of 1977 provides as follows:

> Plea of not guilty and procedure with regard to issues
>
> (1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.
>
> (2) *(a)* Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.
>
> *(b)* The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.
>
> (3) Where the legal adviser of an accused on behalf of the accused replies, whether in writing or orally, to any question by the court under this section, *the accused shall be required by the court to declare whether he confirms such reply or not*. (Emphasis added.)

Where an accused at a summary trial pleads not guilty, the presiding official may ask him whether he wishes to make a statement indicating the basis of his defence—s 115(1). Where the accused does not make a statement, as he is entitled to—*Mkhize* 1978 (3) SA 1065 (T) (see also *Khumalo* 1979 (3) SA 708 (T))—or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute—s 115(2)*(a)*. This discretion is to be exercised judicially—*Herbst* 1980 (3) SA 1026 (E); *Masike* 1996 (2) SACR 245 (T).

The court must inform the accused that he is not obliged to answer any questions. Failure to do this constitutes an irregularity, the effect of which would depend upon the circumstances. The nature of the information thus given by the court to the accused must appear clearly from the record. The State is entitled to rectify the record by leading the evidence of the magistrate and interpreter in order to show that the accused's statement and admissions are admissible—*Ndlovu* 1987 (3) SA 827 (N). Spontaneous admissions made immediately after plea, before the accused has been warned of his right to remain silent, are admissible—*Shikongo* 2000 (1) SACR 190 (NmS).

The court may, in its discretion, put any question to the accused in order to clarify any matter with regard to the statement made to indicate the basis of his defence, or his replies to questions put to him in order to establish which allegations in the charge are in dispute—s 115(2)*(b)*. The questioning by the court should not go beyond the matters in issue in the case and should be limited to those issues in respect of which the accused's statement is unclear and requires clarification. To go beyond that only creates material for possible later

cross-examination, and to do that is not permissible—*Msibi* 1992 (2) SACR 441 (W). The conviction and sentence will be set aside where the questioning by the court bordered on cross-examination, seriously prejudiced the accused and would not be categorised as questions in clarification of the plea—*Molelekeng* 1992 (1) SACR 604 (T). The accused should,

none the less, not be inhibited: having stopped an accused from giving a full plea explanation, there is no basis upon which the judicial official could properly draw an inference adverse to the accused—*Hlangabezo* 2008 (1) SACR 216 (E).

It is not required of an accused that his statement intended to indicate the basis of his defence be made under oath—*Xaba* 1978 (1) SA 646 (O).

It is important that presiding officers bring home to accused, especially where they are unrepresented, that the statement in clarification of the plea is still not evidence under oath, but only directed at preventing unnecessary evidence being led by the State—*Mothlaping* 1988 (3) SA 757 (NC). The explanation of plea is, therefore, not evidential material upon which a conviction can be based—*October* 1991 (1) SACR 455 (C). The manner in which the accused ought to lay his account of events before the court, if he wants to do so, is by way of giving evidence after the State's case has been closed—*Mathogo* (above). See also *Dreyer* 1978 (2) SA 182 (NC); *Mkize* 1978 (2) SA 249 (N); *Thomas* 1978 (2) SA 408 (B); *Mogoregi* 1978 (3) SA 13 (O); *Moloyi* 1978 (1) SA 516 (O); *Nkosi* 1978 (1) SA 548 (T); *Molele* 1978 (2) SA 668 (O).

The procedure prescribed in s 115 must be completed after plea and before the commencement of the State's case. The magistrate should record *verbatim* the questions put by him to the accused and the accused's reply to each question. Meticulous care in recording both such questions and answers will leave no doubt as to what facts have been formally admitted by the accused and what facts still remain to be proved by the leading of evidence—*Mayedwa* 1978 (1) SA 509 (E). See also *Xungu* 1978 (1) SA 663 (O); *Semenya* 1978 (2) SA 110 (T) at 113; *Rakanang* 1978 (1) SA 591 (NC); *Sepiri* 1979 (2) SA 1168 (NC).

See *Mothlaping* 1988 (3) SA 757 (NC) for the court's findings on the evidential value of an explanation of plea.

4.3.2 Admissions made in the course of explanation of plea

The court must enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty may be recorded as an admission and, if the accused consents, such admission is duly recorded—s 115(2)*(b)*. The accused can reduce the total number of facts which are put in issue by a plea of not guilty, and which have to be proved by the State, by admitting facts which will then no longer be in issue. If he consents thereto, that admission will be recorded and deemed to be an admission in terms of s 220. Such an admission is sufficient proof of the relevant facts and absolves the State of the burden of proving these facts. Sufficient proof is naturally not conclusive proof, and can later be rebutted by the accused, for example, on the grounds of duress or mistake or by other legally acceptable facts—*Seleke* 1980 (3) SA 745 (A). An accused is not obliged to consent to his admission being recorded. Where he does not consent, the onus remains on the State to prove by admissible evidence all the facts which were put in issue by the plea of not guilty. The mere fact that an accused refuses to consent to the recording of an admission cannot, however, affect the nature of his statement. Such an admission does not apply as sufficient proof of the fact to which it has reference. At the end of the case the court considers the evidential value of the admission in the light of the evidence as a whole—*Sesetse* 1981 (3) SA 353 (A). See also *Shivute* 1991 (1) SACR 656 (Nm).

The judicial officer is entitled to question the accused only where it is not clear

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from such statement to what extent the accused denies or admits the allegations which comprise the charge against him. Where it is clear from the accused's statement which elements of the charge he admits and which he denies, the judicial officer is not entitled to question the accused regarding the facts upon which he relies to substantiate his denial of the charge or elements thereof—*Muzikayifani* 1979 (3) SA 661 (D); *Herbst* 1980 (3) SA 1026 (E).

Admission of facts made during an explanation of plea and formally recorded as admissions in terms of s 220 constitute sufficient proof of such facts. 'Sufficient proof' does not mean 'conclusive proof' but proof in the sense that no further or better proof is required. Any fact admitted by the accused, but not formally recorded with the consent of the accused, will have to be proved by the State—not as conclusively, perhaps, as an allegation which is expected to be disputed has to be proved, but, regard being had to the *onus* resting upon the State, to such a degree, nevertheless, as to amount to the discharge of that burden. It amounts to probative material and there is no impediment preventing a trial court from making use of the material afforded by such a statement against the accused. Such informal admissions do not require additional proof before they may be used against the accused, because they are made in court. What is stated above does not mean that other statements made by an accused at the enquiry in terms of s 115 have no evidential value at all. On the contrary, the court must consider whatever the accused has said and such statements form part of the probative material—*Mjoli* 1981 (3) SA 1233 (A). The statement in terms of s 115 may, however, not be used in favour of an accused. It is not evidential material in his favour—*Mothlaping* 1988 (3) SA 757 (NC). An accused may also be cross-examined regarding the contents of his statement where, for example, he later deviates from it in his evidence, and it can have an effect on his credibility—*Sesetse* 1981 (3) SA 353 (A); *Selane* 1979 (1) SA 318 (T). *Contra*, however, *Mogoregi* 1978 (3) SA 13 (O).

When the court asks the accused under s 115(2)*(b)* whether an admission may be recorded, the accused must be properly informed regarding the effect of such a step, and that he is under no obligation to make any admission or to assist the State in proving the case against him. See *Evans* 1981 (4) SA 52 (C) and *Daniëls* 1983 (3) SA 275 (A); cf 1977 *SACC* 3.

4.3.3 Accused's participation

It is generally irregular for a court to put questions directly to an accused who is represented. An accused is entitled to legal representation, and the legal practitioner is in fact acting as a shield, presenting his own knowledge on behalf of his client. However, it appears that s 115(1) and (2) provides for a court to put questions directly to an accused. Section 115(3) makes it clear that the practitioner may act on behalf of his client and answer questions—*Salie* 1986 (2) SA 295 (K); *contra K* 1982 (4) SA 422 (B). Note the consequences where another person advances a plea on behalf of the accused, as expressed in s 106(4). However, where a legal adviser replies on behalf of the accused, either orally or in writing, to any question put by the court, the accused is required to declare whether he confirms such reply or not—s 115(3). This provision reduces the risk of any misunderstanding between the court, the accused and the counsel.

What an accused says in his explanation of plea may under no circumstances be used against a co-accused, except when the accused repeats his allegations in his

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explanation of plea in evidence under oath, in which event it is in fact evidence—*Ngobeni* 1981 (1) SA 506 (B). Even an admission as envisaged by s 220, made during plea explanation, can under no circumstances be admissible against a co-accused—*Long* 1988 (1) SA 216 (NC).

With regard to the accused's right to remain silent, note that the position where an accused has pleaded not guilty and is then questioned is quite different from that where he has actually pleaded guilty. On the plea of not guilty the questioning is primarily directed at establishing the issues in the case, and it is necessary that the accused should be protected from inadvertently jeopardising his plea of not guilty. On the plea of guilty the accused has already admitted the State's case. The questioning by the court is not primarily directed to self-incrimination by the accused, but indeed to the protection of the accused against the consequences of an unjustified plea of guilty. An explanation of the accused's right to remain silent would conflict with the whole spirit of s 112(1)*(b)*—*Nkosi* 1984 (3) SA 345 (A).

Section 115 has a dual purpose: first, an invitation to the accused to indicate the basis of his defence and, secondly, questioning to ascertain which allegations in the charge are in dispute. In respect of both, the accused must be informed by the court of his right to remain silent—*Salie* 1986 (2) SA 295 (C).

Merely to state in an explanation of plea that 'everything is in dispute' means in effect: 'None of the things alleged by the State happened. It is all fabricated.' If the accused subsequently says that some of the allegations are true, his credibility will be seriously affected. If he does not wish to reduce the issues in dispute, he must refuse to give an explanation of his plea. Then he exposes himself to an adverse inference although, should he enter the witness-box, he will be given an opportunity to explain his silence—*Mathope* 1982 (3) SA 33 (B); *K* 1982 (4) SA 422 (B).

4.3.4 Committal to regional court

Where an accused pleads not guilty in a magistrate's court, the court shall, subject to the provisions of s 115, at the request of the prosecutor made before any evidence is tendered, refer the accused for trial to a regional court having jurisdiction. The record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the records of that court—s 115A. See s 116 regarding the committal of an accused for sentence by a regional court after conviction in a magistrate's court following on a plea of not guilty. Note that the provisions regarding the committal of an accused by a magistrate of a magistrate's court for sentence by a regional court in terms of s 116(1) are the same as those in s 114(1). See *Selebogo* 1984 (2) SA 486 (NC). Cf further *Sethuntsa* 1982 (3) SA 256 (O); *Bron* 1986 (4) SA 394 (C).

4.3.5 Amendment of plea of not guilty

An accused may at any stage change his plea of not guilty to one of 'guilty' to the offence charged, with the leave of the court—*Alli* 1958 (2) SA 50 (C). Leave is seldom refused in such cases. In such a case s 112 is also applicable—*Abrahams* 1980 (4) SA 665 (C); *Sethoga* 1990 (1) SA 270 (A). After pleading not guilty and once evidence has been led, the accused may change his plea to one of guilty, make oral admissions and then be found guilty—*Adam* 1993 (1) SACR 62 (E).

Where an accused pleads not guilty and then seeks to change his plea to guilty after evidence has been led, acceptance by the prosecutor of the plea at that stage

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of the proceedings does not have the same effect as acceptance of a plea before commencement of the trial in that the prosecutor is no longer *dominus litis* and the court is not bound by his acceptance of the plea of guilty. Once the accused pleads not guilty it is the court's duty to determine the issues raised between the State and the accused by the latter's

plea and the prosecutor cannot interfere with that duty and compel the court to enter a plea of guilty on a lesser charge, thereby seeking to limit the *lis* between the State and the accused. Any acceptance by the prosecutor of a plea of guilty to a lesser offence can accordingly take place only with the court's consent—*Sethoga* 1990 (1) SA 270 (A). The issue of whether s 112 is applicable after a change of plea from not guilty to guilty after evidence has been led was addressed in a number of cases and confirmed in *S v Brown* 2015 (1) SACR 211 (SCA). In this case Mr J Arthur Brown initially pleaded not guilty to a number of charges preferred against him. After several witnesses had testified on behalf of the State, he changed his plea to one of guilty and in due course was convicted and sentenced on two counts, and given a very lenient sentence, against which the state appealed. The dispute in this case has its origins in the acceptance by the State, with the approval of the trial court, of a plea of guilty, in the middle of the trial. The court of appeal held that the trial court had been obliged, when the plea was tendered, to consider whether the plea ought to be accepted, with particular regard being paid to the effect of the evidence led up until that stage. It could have put it to counsel that the evidence was such that it could confidently be concluded that the appellant was guilty of the charges on the basis of *dolus directus*, contrary to his statement that he acted with *dolus eventualis*.

4.3.6 The plea explanation procedure in essence

The 'plea explanation' (a term also adopted by the Supreme Court of Appeal (then the Appellate Division)—*Imene* 1979 (2) SA 710 (A) at 717G) procedure contained in s 115—which originated in the proposal by Mr Justice Hiemstra in 1963 that our system of criminal procedure be reformed to bring it into line with the Continental inquisitorial process—is undoubtedly the most controversial provision in the 1977 Act and must be approached with great caution (*Mathogo* 1978 (1) SA 425 (O)). Its purpose is to shorten the proceedings by making it unnecessary for the prosecutor to call evidence on matters which are not in dispute. It should be noted that the questioning is discretionary only. Cf *Bepela* 1978 (2) SA 22 (B). No doubt, in most cases a judicial officer would deem it desirable to invite an accused to indicate the basis of his defence, more particularly where he feels that it may assist an undefended accused to bring out his defence before any evidence is led in order that the court may be able to assist him by ensuring that the defence is properly put to State witnesses or to safeguard him from the suggestion that he is fabricating his evidence if he were to depose to facts not put by him to State witnesses in cross-examination—*Herbst* 1980 (3) SA 1026 (E); *Kibido* 1988 (1) SA 802 (C). One thing seems clear: Extensive questioning of an accused by the presiding officer will result in the setting aside of the proceedings on appeal, on the basis that the latter 'descended into the arena'—cf *Yuill v Yuill* [1945] 1 All ER 183. It is clear that s 115 does not contemplate any form of cross-examination. What is contemplated is an objective attempt at determining the facts which are really in dispute, with, if necessary, questions for clarification—*Seleke* 1980 (3) SA 745 (A).

With regard to both the pleas of guilty and of not guilty, see in general Van der

Merwe, Barton & Kemp *Plea Procedures in Criminal Trials* (1983). Time and again, this work touches upon the significance of ss 112 and 115 in relation to the inquisitorial approach to criminal procedure.

4.4 Prior conviction or acquittal

4.4.1 General principles

4.4.1.1 The Constitutional provision—s 35(3)(m) of the Constitution:

> Every accused person has the right to a fair trial, which includes the right . . . not to be tried for an offence in respect of an act or omission for which that person has previously been either *acquitted* or *convicted*. (Emphasis added.)

The right to be protected from the harassment of a second trial on the same cause of action gave rise to the above constitutional provision, known in American jurisprudence as the rule against double jeopardy. The Latin maxim is: *Nemo debet bis vexari pro una et eadem causa*—no person shall be harassed twice for the same cause; differently stated, no person shall be put in jeopardy twice for the same or substantially the same offence.

An accused may evade a second prosecution, even though he was acquitted previously on the same charge, by pleading *autrefois acquit*. If he was convicted in a previous trial, the accused may evade a second prosecution, even though he was convicted previously on the same charge, by pleading *autrefois convict*.

4.4.1.2 Basic notions of fairness, finality and justice to the accused relevant to the plea of autrefois acquit or autrefois convict

The institution of a second prosecution on the same facts against an accused for the same offence as in the first trial may fail by virtue of the application of the principles of equity and justice even though the elements of the plea of *autrefois acquit* or *autrefois convict* have not been proved or raised during the second trial. These principles were applied in the following instances:

(a) The prosecution is not entitled to try accused in piecemeal fashion

Where an accused could have been tried for two offences, or the more serious offence preferred at the first trial, he should have been so charged—*Khoza* 1989 (3) SA 60 (T); *McIntyre en Andere* 1997 (2) SACR 333 (T). In *McIntyre* the accused had in the first trial been acquitted of a charge of assault with intent to commit grievous bodily harm. However, the prosecution instituted a second prosecution on the same facts on a charge of murder. In this case the victim had died of the injuries sustained during the assault, on the day on which the assault took place. The prosecution alleged that the police had not disclosed the fact that the victim died on the day of the assault that led to the first trial. The court rejected this allegation because it had been possible for the prosecution to prefer the more serious charge of murder at the time when the first trial was instituted.

(b) Plea bargaining

Where the prosecuting authority gave an undertaking not to prosecute or made a representation to that effect in exchange for a plea or full co-operation, the prosecution has to be kept to its bargain and cannot institute a new trial on the same facts. See *National Director of Public Prosecution v Zuma* 2009 (1) SACR 361 (SCA) at [39].

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(c) Diversion

Once a child has successfully completed a diversion programme, the child offender cannot by virtue of s 59(1) of the Child Justice Act be charged again on the same facts for the same offence once he attains majority. However, before the Child Justice Act came into operation, the *ratio* for preventing a trial on the same facts in respect of the child offender was based on the child offender's *legitimate expectation* that he would not be charged again once he had completed the programme—*S v EA* 2014 (1) SACR (183) (NCK).

(d) Preparatory examination

Section 142 of the Criminal Procedure Act prohibits the prosecution of an accused where the DPP has declined to prosecute after a preparatory examination had been concluded and the accused advised of the DPP's decision.

(e) Delays

The right given to an accused to demand an acquittal or discharge in terms of s 106(4) should not be denied him by careless or negligent actions by the State which cause infinite delays—*Lethopa* 1994 (1) SACR 553 (O), and see also *Basson* 2007 (1) SACR 566 (CC) at [248]-[259].

4.4.1.3 The common law and the statutory provisions

The plea that a person has already been convicted or acquitted of the same offence is known as the common-law defences of *autrefois convict* or *autrefois acquit*. The Criminal Procedure Act recognises the common law by incorporating them in s 106(1)*(c)* and *(d)*. The difference between the elements of *autrefois acquit* and *autrefois convict* are insignificant and are similar in respect of the content of the elements subject to the different plea appellation.

Section 106(1) provides as follows:

> When an accused pleads to a charge he may plead—
>
> . . .
>
> *(c)* that he has already been convicted of the offence with which he is charged; or
> *(d)* that he has already been acquitted of the offence with which he is charged . . .

Section 108 provides that if an accused pleads any plea other than the plea of guilty, he is by such plea without any further form deemed to have demanded that the issues raised by such plea shall be tried by the court. The *onus* of providing proof for a plea of previous conviction or previous acquittal rests upon the accused. Proof of the previous trial is usually rendered by producing the record (or a copy thereof) and by oral evidence that the accused is the same person who was previously tried.

It is even possible to raise this plea after the commencement of the trial or on appeal. It is easily conceivable that there could be a case where the existence of a previous acquittal could be discovered during the course of a hearing and after the accused has pleaded. The accused will then be entitled to raise a plea of previous acquittal at this stage—*Mkhuzangewe* 1987 (3) SA 248 (O).

In *Burns* 19 SC 477 it was held that a plea of *autrefois acquit* cannot be raised for the first time on appeal, but in *Mgilane* 1974 (4) SA 303 (Tk) the court correctly considered this rule, when applied rigidly and especially in the case of an unsophisticated and uneducated person who is not represented, to be 'repugnant to one's feeling of fair play and justice'. See also *Kgatlane* 1978 (2) SA 10 (T).

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Unless it is shown that the accused knowingly waived his right to rely at his trial on the plea of *autrefois convict/acquit*, there is no good reason in law why he should not advance this defence for the first time in an appeal or in review proceedings—*Mngadi* 2000 (1) SACR 152 (W).

4.4.2 Plea of autrefois acquit

The essentials of this plea (as with the twin plea of *autrefois convict*) are that the accused has previously been acquitted—

(a) of the same offence;
(b) upon the merits
(c) by a competent court . . .

4.4.2.1 The concept of 'the same offence'

In order to ascertain whether the offence is the same as that of which the accused has previously been found not guilty, the court will pay attention to the true essence of the offence and not to technicalities; it is the *ratio decidendi* of the previous judgment which is

binding—*Manasewitz* 1933 AD 165; 1934 AD 95. It will be sufficient if the offences are substantially the same. This test is not a formal one: The question is *not* whether the appellation (names) of the respective offences is the same.

The plea is also available where the offence with which the accused is now charged *is a lesser* one than that of which he was convicted or acquitted, and the current offence is one of which he could have been convicted or acquitted on the previous charge—*Long* 1958 (1) SA 115 (A). If the accused has previously been convicted or acquitted of murder, he cannot now be charged with culpable homicide. If the accused has previously been charged with murder and convicted of assault, he cannot now be charged with culpable homicide. (Conviction or acquittal on the latter two offences is competent upon a charge of murder.)

On the other hand, the plea is not available where it *was impossible* at the previous trial to prefer the more serious charge now presented. Thus, if the victim of an assault dies after the accused has already been convicted of assault, the accused may be indicted for murder or culpable homicide. Likewise, conviction of negligent driving of a motor vehicle is not a defence on a charge of culpable homicide—*Dayzell* 1932 WLD 157; *Gabriel* 1971 (1) SA 646 (RA) at 652-5. But where it was possible to prefer the more serious charge, the plea should prevail, for example where a person is charged with murder after he has already been convicted of culpable homicide. Cf *Tieties* 1990 (2) SA 461 (A) and see in general *Sepiri* 1979 (2) SA 1168 (NC).

The plea can also be relied upon where the offences are substantially the same. In *Long* 1958 (1) SA 115 (A) 117 the court stated:

> It is not enough to support the plea that the facts are the same in both trials. The *offences* charged must be the same, but substantial identity is sufficient. If the accused could have been convicted at the former trial of the offence with which he is subsequently charged there is substantial identity, since in such a case acquittal on the former charge necessarily involves acquittal on the subsequent charge.

Another way of putting it is that he must legally have been in jeopardy on the first trial of being convicted or acquitted of the offence with which he was charged in the second trial—*Watson* 1970 (1) SA 320 (R).

If at the trial there is *not a substantial difference* between the facts alleged in the charge and the facts proved by the evidence, the accused may be convicted (at any rate, where the charge is amended); and should he be acquitted, he may therefore plead *autrefois acquit* when subsequently charged on an amended charge. See *Manasewitz* 1933 AD 165, 1934 AD 95. An illustration of this principle is to be found in *Vorster* 1961 (4) SA 863 (O). The accused was initially charged with driving a lorry, OP 181, in Rabie Street, Luckhoff, while drunk. According to the evidence led at the first trial the accused attempted to drive another motor vehicle with a different registration number. The prosecutor stopped the case and the accused was acquitted. At the second trial it was alleged that the accused drove a light delivery van, OP 351, in Barnard Street, Luckhoff, on the same day. His plea of *autrefois acquit* was upheld on appeal on the ground that the variation between the averments in the charge sheets and the evidence led (at the first trial) was not material and that he stood in jeopardy of being convicted.

If the accused has previously been acquitted on an indictment for murder and is now indicted on the same set of facts and convicted of assault, he may avoid conviction with a plea of *autrefois acquit*. The reason for this is that on a charge of murder he might have been convicted of assault. The principle here is that there exists substantial identity of subject-matter when the crime charged in the second indictment would have been a competent verdict on the first indictment. But even though the offence alleged in the second indictment would not have been a competent verdict on the first indictment, it is still possible that the offences charged in the two indictments are similar enough to found a plea

of *autrefois acquit*. The court must consider the essential ingredients of the criminal conduct respectively charged in the two indictments, and apply the test used in *Kerr* (1907) 21 ECD 324, namely whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first indictment—*Ndou* 1971 (1) SA 668 (A); *Nyati* 1972 (4) SA 11 (T). Even if a plea of *autrefois acquit* fails on the latter ground (ie because the evidence necessary for the second indictment would not have been sufficient to procure a conviction on the first indictment), the court still has a discretion to prevent the second trial from proceeding on the basis that a trial should not be allowed to proceed in *piecemeal fashion* to the prejudice of the accused. The policy is that if an accused could have been charged with the two offences at the first trial, he should have been so charged—he should not be tried in two separate trials. See *Khoza* 1989 (3) SA 60 (T).

4.4.2.2 Upon the merits

It is required that the acquittal must have been 'on the merits' in a final judgment. This means that the court (whether at the trial or ultimately upon appeal) must have considered the merits of the case, *whether in fact or in law*, and must not have acquitted the accused merely because of a *technical irregularity* in the procedure—*Bekker* 1926 CPD 410; *Manasewitz* 1933 AD 165; *Moodie* 1962 (1) SA 587 (A); *Naidoo* 1962 (4) SA 348 (A); *Rudman* 1992 (1) SACR 70 (A).

Where the trial proves a nullity because of such a fatal irregularity, the accused may be brought to trial *de novo* and the plea of *autrefois acquit* cannot prevail.

Even where the merits have in fact been considered by the trial court, the irregularity may be of such a nature as to preclude a valid consideration of the merits—*Moodie* at 597. An acquittal is 'on the merits' even if the State has led no

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evidence at all (such as when the state, after the accused has pleaded, on authority of the DPP, closes its case without leading any evidence), because the real distinction is between an acquittal on the merits and an acquittal on a technicality—*Mthetwa* 1970 (2) SA 310 (N) at 315E-F.

Even when a court erred *in law* in acquitting an accused and the evidence had to be considered in arriving at the legal decision, the acquittal is 'on the merits'—*Bizi* 1971 (1) SA 502 (RA) at 504. It is not always easy to decide whether an irregularity is merely technical or not. In *Moodie's* case there was a tenth man present at the jury's deliberations. The court of appeal held that this constituted such a gross departure from established rules of procedure that the accused had not been properly tried. In other words, the court held that the trial was a nullity and on that account it did not consider the merits at all. Compare *Rudman* 1992 (1) SACR 70 (A). For a further example, see *Mkhise* 1988 (2) SA 868 (A), where the accused's 'legal representative' falsely masqueraded as an advocate.

In *Naidoo's* case, the interpreter at the trial was not sworn in in respect of three witnesses, with the result that their evidence could not be taken into account. This in itself *did not constitute so gross a departure from established rules of procedure as to render the trial per se a nullity*. The court on appeal therefore considered the rest of the evidence which had been properly adduced, and came to the conclusion that it could not be said that the jury would inevitably have convicted on that evidence. In this case, therefore, the plea of *autrefois acquit* was upheld when the accused was re-indicted. From these cases it can be seen that the question of whether the acquittal can be said to have been on the merits depends to a large extent on the nature of the irregularly. See also ss 313 and 324.

Section 322(3) now provides that where a conviction is set aside on the ground that a failure of justice has resulted from the admission of evidence otherwise admissible but not properly placed before the trial court due to some defect in the proceedings, the court of

appeal may remit the matter to the trial court with instructions to deal with any matter, including the hearing of such evidence as the court of appeal may think fit. This innovation is to overcome the objections to the result of the *Naidoo* case.

With regard to defective charge sheets, it is submitted that s 88 affects the plea of *autrefois acquit*. Prior to the enactment of s 88 the accused was in no jeopardy of being convicted where the charge was fatally (materially) defective. Since the enactment of this section, however, conviction can lawfully take place (unless the accused objects to the charge and it is not amended). It can therefore be said that the accused is in jeopardy of being convicted on a materially defective charge. Should he be acquitted on the merits in these circumstances, the plea of *autrefois acquit* must be upheld. See *Makhutla* 1969 (2) SA 490 (O) for an example of the opposite situation. In *Basson* 2007 (3) SA 582 (CC) the accused did not succeed with his argument that the quashing of some charges, and the court hearing argument on the reasons for quashing those charges, would open the door to a plea of *autrefois acquit*, should the charges be re-introduced in a new trial, because he was never acquitted on the merits, as he had never pleaded on the quashed charges. The court held as follows at para [254]:

> The requirement that the previous acquittal must have been on the merits, or to put it differently, that the accused must have been in jeopardy of conviction, means that, if the previous prosecution was vitiated by irregularity, then it cannot found a plea of *autrefois*

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> *acquit* in a subsequent prosecution. That is because the accused was not acquitted on the merits and was never in jeopardy of conviction because the proceedings were vitiated by irregularity.

In terms of ss 322(4) and 324, where a decision on a question of law reserved has been given in favour of the prosecutor, the court may order that proceedings be reinstated against the accused, on the same or different charges. The court pointed out that the question is whether these provisions are in conformity with s 35(3)*(m)* of the Constitution, which provides that an accused person has the right not to be tried for an offence of which he has previously been convicted or acquitted. However, when an acquittal was based on the wrong answer to a legal question, a retrial would not infringe s 35(3)*(m)*. If an acquittal was based on a trial judge's failure to call a witness whose evidence he thought was essential to a just decision of the case, this would amount to an error of law and such a serious defect in the proceedings that it would vitiate the trial. Accordingly, the accused had not been in jeopardy: his acquittal was set aside and the institution of a retrial before a different bench ordered—*Director of Public Prosecutions, Transvaal v Mtshweni* 2007 (2) SACR 217 (SCA).

4.4.2.3 The concept of a 'competent court'

The plea of *autrefois acquit* can be sustained even where it is based on the judgment of a foreign court—*Pokela* 1968 (4) SA 702 (E). The court in the first trial must have been competent as to its composition and jurisdiction and the court must have had the power to finally absolve or convict the accused on the charge; a court conducting a mini preparatory examination does not have such competency. The procedure in terms of s 119 (see chapter 11) is not to be regarded as the beginning or part of the subsequent trial before a competent court—*Singh* 1990 (1) SA 123 (A).

4.4.3 The plea of autrefois convict

The essentials of this plea of *autrefois convict* are that the accused has previously been convicted—

(a) of the same offence;
(b) by a competent court;
(c) on the merits

The element of 'on the merits' is sometimes mentioned, somewhat superfluously, as a person is normally convicted on the merits. The elements have been discussed above and the requisites for the plea of *autrefois convict* are the same as those of *autrefois acquit* except that the requirement of previously 'acquitted' must be replaced by previously 'convicted'. What is stated above applies *mutatis mutandis* to the plea of *autrefois convict*. Obviously a conviction and an acquittal are not the same but both could be based on either a legal or a factual decision which could be right or wrong in deciding the merits.

4.4.4 Section 106 and the plea of autrefois acquit or autrefois convict

Section 106(4) provides that an accused who has pleaded to a charge is entitled to demand that he be acquitted or convicted. This may result in an acquittal 'on the merits' even if the State did not lead any evidence—see the reference to *Mthetwa*. For instance, this may happen if the accused has pleaded, there have been several

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postponements, the State witnesses are still not available and the court (in the regular exercise of its discretion) refuses a further postponement. The accused is acquitted 'on the merits', there being simply no evidence against him.

The above scenario can occur only if the accused has pleaded before a tribunal which has the power to find him guilty or not guilty on a particular charge, if the tribunal is hearing the accused with this in mind. In other words, the accused must have been 'in jeopardy'. Some of the plea proceedings which we have dealt with do not conform to the a foregoing and consequently cannot be used as a springboard for the pleas of *autrefois acquit or autrefois convict*, for example, a plea in a magistrate's court on a charge justiciable in a superior court (s 119) and the equivalent procedure relating to the regional court (ss 122A-122D). If an accused pleads not guilty in a magistrate's court in terms of s 122A, and is committed for trial in the regional court in terms of s 122D, but the case is withdrawn in the regional court and the matter is sent back for trial in the magistrate's court, a plea of *autrefois acquit* should not succeed in the last-mentioned court. This is simply so, first, because no evidence has been led during any of these proceedings, and secondly, because any court presiding in any pre-trial examination does not have the jurisdiction to conduct the hearings to finality, ie to a verdict. The DPP remains *dominus litis* in deciding the charge after the examination. The position after conducting a *preparatory examination* in terms of ss 123-141 might be viewed differently but is debatable as preparatory examinations are also not trials. However, a viable argument could be set forth: once the accused has been informed that the DPP declined to prosecute and the accused is charged again, a plea of *autrefois acquit* might succeed if the accused could successfully rely on the constitutional protection in s 35(3)*(m)* of the Constitution and argue that he was in jeopardy of a conviction during the proceedings but acquitted on the merits: he was discharged after evidence had been led. See *Attorney General, Eastern Cape v Linda* 1989 (2) SA 578 (E); *Lubbe* 1989 (3) SA 245 (T); *Singh* 1986 (4) SA 263 (C); *Hendrix* 1979 (3) SA 816 (D); *Singh* 1990 (1) SA 123 (A).

4.4.5 Which plea is appropriate to plea?

Which plea, *autrefois acquit* or *autrefois convict*, would be the appropriate one to be raised in a second trial, should the accused be tried again for the same offences in the following three instances?

(i) Conviction following the first trial

A conviction may follow by way of the first court's verdict or may be confirmed after an appeal or review on the conviction is dismissed. The latter means that the accused's appeal or review (automatic review or review instituted by the accused against his conviction) was unsuccessful and the conviction is upheld by the appeal or review court. *Autrefois convict* would be the correct plea in the second trial.

(ii) Acquittal following the first trial

An acquittal may follow by way of the first court's verdict or where the State on legal grounds or on a reservation of a question of law appeals against the acquittal and succeeds. The accused who is charged again with the same offence in the second trial will not succeed with either of the two pleas, as the court of appeal does not make a finding of a conviction but makes a finding on the law. The accused

may plead *autrefois acquit* because he was 'acquitted' at the first trial and not convicted on appeal or review. However, his chances of success would be slim, because he was never in jeopardy to be tried twice, based on the first court's incorrect application and acquittal on the law (ss 311(1)*(b)*, 313 and 324).

Section 322(4) of the Criminal Procedure Act provides that—

> Where a question of law has been reserved on the application of a prosecutor *in the case of an acquittal*, and the court of appeal has given a decision in favour of the prosecutor, the court of appeal may order that such of the steps referred to in section 324 be taken as the court may direct. (Emphasis added.)

Section 324 of the Criminal Procedure Act provides that—

> Whenever a conviction and sentence are set aside by the court of appeal on the ground—
>
> *(a)* that the court which convicted the accused was not competent to do so; or
> *(b)* that the indictment on which the accused was convicted was invalid or defective in any respect; or
> *(c)* that there has been any other technical irregularity or defect in the procedure,
>
> proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if the accused *had not previously been arraigned, tried and convicted*: Provided that no judge or assessor before whom the original trial took place shall take part in such proceedings. (Emphasis added.)

(iii) When the court of appeal found that the irregularity of the first trial vitiated the proceedings of the first trial

See above for the meaning of 'on the merits'. Depending on the gravity of the irregularity, the plea would then either be the same as the finding by the court in the first trial (gross irregularity) or the finding of the appeal court in the second trial (irregularity but merits nevertheless assessed).

4.5 Pardon by the President

The accused may plead that he has received a pardon from the President for the offence charged—s 106*(e)*. The President has powers vested in him by the Constitution and legislation, including those necessary to perform the functions of head of state and head of the national executive—s 84(1) of the Constitution. These powers include pardoning or reprieving offenders and remitting any fines, penalties or forfeitures—s 84(2)*(j)*.

4.6 Plea to the jurisdiction of the court

This plea in terms of s 106(1)*(f)* cannot be raised and decided as an objection to the jurisdiction of the court prior to the plea proceedings, as in doing so the court is assuming jurisdiction in circumstances where it does not have jurisdiction—*Mamase* 2010 (1) SACR 121 (SCA).

Such a plea may be based on an allegation that the offence was committed outside the area of jurisdiction of the court or that some condition precedent necessary to confer jurisdiction on the court has not been satisfied; for example, where the authority of the magistrate's court to try certain military offences was derived by law from the written

direction of a military official, a conviction was quashed in the absence of proof that such a direction had been given—*O'Carroll* 17 ECD 79.

A plea of diplomatic immunity presumably also falls under this subsection—*Penrose* 1966 (1) SA 5 (N) at 6C. Prescription of an offence would probably also be raised by this plea.

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If during a trial it appears that the accused is before a court by which he is not properly triable, he is not by reason thereof entitled to an acquittal (s 106(4)), but the court may at the request of the accused direct that he be tried before the proper court and remand him to such court. If the accused fails to request removal, the trial must proceed and the verdict and judgment are valid. See s 110 and *Meyers* 1946 AD 57.

This section does not affect the plea to the jurisdiction as affecting the right of the court to try a case which is by law placed beyond its jurisdiction. If the plea to the jurisdiction is dismissed, the court will not grant an interdict restraining the presiding officer from proceeding with the case. The proper course for the accused to follow is to appeal—*Lawrence v A R M Johannesburg* 1908 TS 525; *S v Basson* 2005 (12) BCLR 1192 (CC) at [152]. In *De Beer v The State* [2006] SCA 78 (RSA) the 4 km rule was incorrectly applied to extend the jurisdiction of the High Court beyond its ordinary territorial jurisdiction within the Republic of South Africa. When the accused raised a plea against the High Court's jurisdiction, the court instead of adjourning the case to the court having jurisdiction, as it was obliged to do in terms of s 110(2) of the Criminal Procedure Act, dismissed the objection. On appeal against the dismissal before the trial, the Supreme Court of Appeal upheld the appeal and plea and adjourned the matter to the appropriate court having jurisdiction.

4.7 Discharge of witness from prosecution

Section 204 of the Criminal Procedure Act deals with the immunity accorded to accomplices who give satisfactory evidence for the State in criminal proceedings. In terms of this section, if the prosecutor informs the court that any person called as a witness on behalf of the State will be required to answer questions which might incriminate him, the court must inform such witness that he will be obliged to answer such questions but that if he answers 'frankly and honestly' he will be discharged from liability to prosecution. If the witness does in fact answer the questions put to him frankly and honestly, the court must discharge him from prosecution. Cf *Waite* 1978 (3) SA 896 (O); *Bosman* 1978 (3) SA 903 (O); *Suliman v National Directorate of Special Operations* 2010 (2) SACR 169 (WCC). An accomplice should not be granted a discharge from prosecution directly after the completion of his evidence and before the conclusion of the case—*Mnyamana* 1990 (1) SACR 137 (A).

This section constitutes an exception to the rule that a witness in criminal proceedings may not be compelled to answer any question which might expose him to a criminal charge—s 203. For a discussion on the procedure in respect of the enquiry relating to the witness' indemnity or immunity from prosecution, see *Kuyler and Others* 2016 (2) SACR 563 (FB).

4.8 Lack of authority or title of the prosecutor to prosecute

This plea relates to the right or authority or *locus standi* of the prosecutor to appear as a prosecutor in the case. See *Ndluli v Wilken NO* 1991 (1) SA 297 (A) at 306C-D. It cannot be raised if the objection is against the prosecutor's alleged bias—*Porritt v National Director of Public Prosecutions* 2015 (1) SACR 533 (SCA). The National Director of Public Prosecutions is empowered only to authorise prosecutions in certain instances, for example, under the Prevention of Organised Crime Act 121 of

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1998 and the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. Clearly, such a plea is available if the prosecutor has not been properly appointed, and in that case the proceedings are a nullity. An advocate appearing on behalf of the director of public prosecutions may be asked for his delegation to prosecute.

4.9 *Lis pendens*

The *lis* or case pending in another court against the accused must be a criminal case. This plea is not recognised in the Criminal Procedure Act, but the general powers of postponement of the trial can be exercised on such a plea, which cannot have anything but a delaying effect. If the other trial is completed and a plea of *autrefois acquit* or *convict* does not then become effective, the fact that the other trial took place will be irrelevant at the trial where the plea of *lis pendens* has been raised. Cf *Lubisi* 1980 (1) SA 187 (T); *Motsepa* 1982 (1) SA 304 (O). See also *Mayisa* 1983 (4) SA 242 (T).

4.10 Pleas in the case of criminal defamation

These pleas are the same as the defences in a civil case, such as truth of the defamatory matter and public benefit that the matter should be published, but—subject to the remarks already made. Section 107 does not cover any justification as part of the plea such as fair comment or words spoken in jest. (Note that there is a possibility that criminal defamation may be removed as a crime, which could have an impact on this plea.)

4.11 Plea as to an order of court on an unreasonable delay in a trial

In terms of s 342A, a court before which criminal proceedings are pending must investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his legal adviser, the State or a witness. The court must consider a number of factors such as the reasons advanced for the delay, whether anybody is to blame, the duration for the delay, the effect of the delay on the administration of justice or the accused or the witnesses, and the adverse effects if the prosecution is stopped or discontinued. A long delay is not *per se* to be regarded as an infringement of the right of an accused to a fair trial. Systemic delays merit special attention because these failures are probably more excusable than cases of individual dereliction of duty. Nonetheless, there comes a time when systemic causes can no longer be regarded as exculpatory—see *The DPP and Minister of Justice and Constitutional Development v Phillips (803/11) [2012] ZASCA 140 (28 September 2012*). Trial-related prejudice must be established—*Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 SCA. The nature of the prejudice suffered by the accused—from incarceration to restrictive bail conditions and trial-related prejudice, even carried through to mild forms of anxiety suffered by the accused or even the complainant—must be considered. In *Bothma v Els* 2010 (2) SA 622 (CC) the Constitutional Court had to deal with delay by a victim, for 37 years, before lodging a complaint with the police. The Constitutional Court considered that in the balancing of the various factors relating to prejudice to the accused, the nature of the offence was a necessary counterweight to be taken into account. It referred with approval to the decision in *Zanner v Director of Public Prosecutions, Johannesburg*

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2006 (2) SACR 45 (SCA), in which it was considered important to have regard to those distressed by the horrors of the alleged offence.

If the court finds the delay to be unreasonable, the court may order, in the case where the accused has not yet pleaded, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the director of public prosecutions. If the accused is charged again, he may raise a special plea that the trial was stayed by an order of court made in terms of s 342A(3)*(c)*.

5 After pleading, accused entitled to verdict

Once an accused has pleaded, he is entitled to demand that he be either acquitted or found guilty, excepting where specially provided for in the Act or in any other law—s 106(4). This subsection will apply only where the court as it was constituted at the time that the plea was entered remains so constituted and retains its legal authority up to the time when it passes sentence. The following instances are examples of when an accused will not be entitled to acquittal or conviction:

(1) Where the magistrate has recused himself from the trial—*Punshon v Wise NO* 1948 (1) SA 81 (N); *Magubane v Van der Merwe NO* 1969 (2) SA 417 (N); *Suliman* 1969 (2) SA 385 (A).

(2) Where separation of trials takes place—s 157.

(3) Where a trial is referred to a regional court, or is converted into a preparatory examination—ss 116 and 123.

(4) Where the magistrate dies, resigns, or is dismissed—*Mhlanga* 1959 (2) SA 220 (T). In this case it was held that, also, where the magistrate is transferred the accused is not entitled to a verdict. See also *De Koker* 1978 (1) SA 659 (O); *Makgetle* 1980 (4) SA 256 (B). For a contrary decision, see *Gwala* 1969 (2) SA 227 (N), where it was held that since a magistrate who has been transferred may by administrative measures be placed in a position to finalise cases which had been initiated before him, another magistrate is not competent to hear the case *de novo*. A transfer is not equivalent to death, recusal or dismissal. Therefore, s 106(4) applies. In *Tlailane* 1982 (4) SA 107 (T), *Gwala* was followed in this connection, and *Mhlanga* rejected. Incapacity of a magistrate persisting for a considerable period is treated in the same way as death of a magistrate. The accused may be tried *de novo* before another magistrate—*Makoni* 1976 (1) SA 169 (R). Where a magistrate resigned, the case is to be resumed before another magistrate *de novo* without the need for an order to this effect from another court—*Polelo* 2000 (2) SACR 734 (NC). In this case of non-availability of the judicial officer, for whatever reason, where the accused has pleaded not guilty and no evidence has been tendered, the case must proceed before another judicial officer—s 118.

(5) Where it appears that the accused is before the wrong court.

(6) Where the director of public prosecutions makes an application in terms of s 13 that a private prosecution be stopped and that the accused be prosecuted *de novo* by the State.

(7) Where an enquiry is held in terms of the Prevention and Treatment of Drug Dependency Act 20 of 1992, the criminal trial is stopped, whether before or after conviction, and the proceedings at the trial become null and void (s 255

of the Criminal Procedure Act); or where a child offender who is in need of care and protection has been referred to a children's court, the court must stop the proceedings (s 64 read with s 50 of the Child Justice Act).

(8) If a court finds that an accused, after he has pleaded to the charge, because of a mental defect or mental illness is not capable of understanding the proceedings so as to make a proper defence, the court will make a finding either in terms of s a 77(6)*(a)* (i) or (ii) and the accused will not be entitled to be acquitted or convicted. If the court makes such a finding after the accused has been convicted but before sentence is passed, the court must set aside the conviction, and if the accused has pleaded guilty, it shall be deemed that he has pleaded not guilty—s 77(6). After recovery, the accused may again be charged and tried.

(9) Where an accused has pleaded in terms of s 119—*Hendrix* 1979 (3) SA 816 (D); *Singh* 1986 (4) SA 263 (C).

(10)

Where the prosecution has been stopped by the prosecutor without the required consent of the director of public prosecutions or any person authorised thereto by the DPP in terms of s 6*(b)*—*Prokureur-generaal, Venda v Magistraat Streekafdeling* 1982 (2) SA 659 (V). The question of whether an accused who is acquitted in terms of s 106 (4) may be retried must be answered on the basis of the principles relating to *autrefois acquit*.

(11) Where the accused pleads that the court does not have jurisdiction to try the case—s 106(4).

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Chapter 15
Miscellaneous matters relating to the trial

JP Swanepoel

1 Open justice: Who may attend the trial?
2 Witnesses
2.1 Securing attendance of witnesses
2.2 Recalcitrant witness
3 Trial of mentally disabled persons
4 Trial of drug-addicted persons
5 Adjournment (postponement)
5.1 Postponement through audio visual linkage
6 Speedy trial

The Constitution and this chapter:

Section 35—Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right—

(c) to a public trial before an ordinary court;

See 1, below

(d) to have their trial begin and conclude without unreasonable delay.

See 6, below

Section 28—Children

(1) . . .

(2) A child's best interests are of paramount importance in every matter concerning the child.

See 1, below

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The Child Justice Act 75 of 2008 and this chapter:

Section 63—Child justice courts and conduct of trials involving children

View the Table of Cases for this section

(1) *(a)* Any child whose matter has been referred to the child justice court in terms of section 49(2), must appear before a court with the requisite jurisdiction to be dealt with in terms of this Chapter.

(b) A child justice court must apply the relevant provisions of the Criminal Procedure Act relating to plea and trial of accused persons, as extended or amended by the provisions as set out in this Chapter and Chapter 10.

(2) Where a child and an adult are charged together in the same trial in respect of the same set of facts in terms of sections 155, 156 and 157 of the Criminal Procedure Act, a court must apply the provisions of—

(a) this Act in respect of the child; and

(b) the Criminal Procedure Act in respect of the adult.

(3) Before plea in a child justice court, the presiding officer must, in the prescribed manner—

(a) inform the child of the nature of the allegations against him or her;

(b) inform the child of his or her rights; and

(c) explain to the child the further procedures to be followed in terms of this Act.

(4) A child justice court must, during the proceedings, ensure that the best interests of the child are upheld, and to this end—

(a) may elicit additional information from any person involved in the proceedings; and

(b) must, during all stages of the trial, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child.

(5) No person may be present at any sitting of a child justice court, unless his or her presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him or her permission to be present.

(6) Section 154(3) of the Criminal Procedure Act applies with the changes required by the context regarding the publication of information

See 1, below

Section 48—Postponement of preliminary inquiry

(1) The inquiry magistrate may, subject to subsections (2) and (4), postpone the proceedings of a preliminary inquiry for a period not exceeding 48 hours—

(a) in the case where the child is in detention and the prosecutor indicates that diversion is being considered but an assessment has not been done and is required;

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(b) if it is necessary in order to—

(i) secure the attendance of a person essential for the conclusion of the inquiry;

(ii) obtain information essential for the conclusion of the inquiry;

(iii) establish the views of the victim regarding diversion and the diversion option being considered;

(iv) make arrangements in respect of a diversion option;

(v) find alternatives to detention; or

(vi) assess the child, where no assessment has previously been undertaken; or

(c) for the purposes of further investigation of the matter.

(2) The proceedings of a preliminary inquiry may be postponed for a further period not exceeding 48 hours, in addition to the period referred to in subsection (1) if the postponement is likely to increase the prospects of diversion, after which the preliminary inquiry, if it has not been concluded must, subject to subsection (4), be closed and the prosecutor must refer the matter to a child justice court to be dealt with in terms of Chapter 9.

(3) If the proceedings of a preliminary inquiry are postponed in terms of subsection (1)*(c)* in order to note a confession or an admission or hold an identity parade or a pointing-out, the inquiry magistrate must inform the child of the right to have a parent, an appropriate adult, guardian or a legal representative present during those proceedings.

(4) An inquiry magistrate may postpone the proceedings of a preliminary inquiry for a period not exceeding 14 days—

(a) if a probation officer has, in terms of section 40(1)*(g)*, recommended that a further and more detailed assessment of the child be undertaken or makes a recommendation to that effect during the course of the preliminary inquiry and the inquiry magistrate is satisfied that there are reasons justifying such an assessment; or

(b) in order to obtain the written indication from the Director of Public Prosecutions having jurisdiction for the diversion of the matter in terms of section 52(3).

(5) The proceedings of a preliminary inquiry may be postponed for a period determined by the inquiry magistrate in the case where—

(a) the child is in need of medical treatment for illness, injury or severe psychological trauma; or

(b) the child has been referred for a decision relating to mental illness or defect in terms of section 77 or 78 of the Criminal Procedure Act.

(6) Section 50(1)*(d)* of the Criminal Procedure Act applies in relation to the period of 48 hours as provided for in this section.

See 3 and 5, below

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1 Open justice: Who may attend the trial?

The general principle is that the conduct of criminal trials should take place in open court and in the presence of the accused: an accused's right to a fair trial includes the right to a public trial as protected in s 35(3)*(c)* of the Constitution. This means that the public is generally entitled to be present—cf *Magqabi v Mafundityala* 1979 (4) SA 106 (E) and *Young v Minister of Safety and Security* 2005 (2) SACR 437 (SE). The concept of courts open to the public underscores the more comprehensive notion of open justice. The concept of open justice embraces issues relevant to an open democracy, such as fairness, accessibility, transparency, accountability of the judicial system and freedom of expression. In a pre-*Charter* decision by the Canadian Supreme Court, in *Attorney General (Nova Scotia) v MacIntyre* [1982] 1 SCR 175, 185, Justice Dickson said the following about open justice:

> Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby

fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.

Freedom of expression is essential to open democracy and crucial to the rule of law, requiring that the courts are seen to function openly. In the probing light of public scrutiny, the press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly (*Edmonton Journal v Alberta (Attorney-General)*, 1989 CanLII 20 (SCC), [1989] 2 SCR 1326). In South Africa open justice was demonstrated in the matter of *Multichoice (Proprietary) Limited v National Prosecuting Authority: In Re S v Pistorius; Media 24 Limited v Director of Public Prosecutions North Gauteng* 2014 (1) SACR 589 (GP), where the court allowed full audio coverage but limited audiovisual and photographic coverage of the trial of the former sport icon Oscar Pistorius. This is in line with s 16 of the Constitution, as restrictions on broadcasting limit the information that may be imparted by the media and received by the public—*South African Broadcasting Corporation Limited v National Director of Public Prosecutions* 2007 (1) SA 523 (CC).

The principle of open justice is based on two main considerations. The first is the notion of a fair trial, of which openness is regarded as an important component. The second is a consideration of publicity: members of the public are entitled to be informed of the conduct of criminal proceedings, and the administration of justice benefits from the publicity given to such proceedings—*Geiges* 2007 (2) SACR 507 (T). The latter consideration embraces the notion that open justice demonstrates that justice dispensed in the courts is accessible to all, and is fundamental to the proper functioning of a transparent justice system, to enhancing accountability and deterring misconduct. However, while recognising that the open court principle is not absolute, given the potential conflict with the demands of privacy, security and protection, the question is how the courts have to balance the constitutional rights of an accused on the one hand and protecting the interests of the administration of justice, vulnerable witnesses and children on the other hand. The Criminal Procedure Act 51 of 1977 and the Child Justice Act 75 of 2008 provide for the following exceptions to the open court or public trial rule and the resulting publication of identities and information regarding witnesses and accused:

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(1) In terms of s 153(1) of the Criminal Procedure Act all courts are empowered to exclude the public from their proceedings whenever it appears to be in the interests of the security of the State or of good order, public morals, or the administration of justice. Section 154(1) authorises the court to order that no information relating to such proceedings may be published; but the court must allow publication of personal information of the accused, his plea, the charge, verdict and sentence, unless the court finds that such publication may defeat the object of its direction under s 153(1). Where the accused or a witness is under 18 years of age, exclusion of the public and publication of information must be dealt with in terms of s 63(5) of the Child Justice Act, read with s 154(3) of the Criminal Procedure Act and discussed below. See in general *Pastoors* 1986 (4) SA 222 (W). Once the public has been excluded from a trial in terms of s 153, special circumstances must exist before this ruling is relaxed. The court must be satisfied that such relaxation will not cause harm to the witnesses or their relations—*Mothopeng* 1979 (4) SA 367 (T).

(2) The best interest of a child offender is paramount and hence no person may be present at any sitting of a child justice court unless his or her presence is necessary in connection with the proceedings of that court, or the presiding officer has granted him or her permission to be present—s 63(5) of the Child Justice Act. However, if the court finds it to be just and equitable and in the Interest of the child, the court may allow publication of some information—s 154(3 of the Criminal Procedure Act.

(3) Persons under the age of 18 are not entitled to attend any criminal trial unless they are actually giving evidence (in which case the court may be cleared of all members of the public), unless such a person is specially authorised to be present, or is the parent or guardian of a witness—ss 153(5) and 153(6) of the Criminal Procedure Act.

(4) The court may order that a witness shall testify behind closed doors (*in camera*) if it appears to the court that there is a likelihood that the witness may come to harm as a result of testifying—s 153(2)*(a)*—and that nobody other than the person testifying, court personnel and any person authorised by the court may be present at the proceedings. The court may also direct that the identity of such a witness may not be revealed, or may not be revealed for a period of time specified by the court—s 153(2)*(b)*. This provision is not applicable to the accused—s 153(2).

(5) A court may *mero motu* or on application by the prosecutor order that a witness or an accused, with his consent, give evidence by means of a closed circuit television or similar electronic media, but only if these facilities are readily available or obtainable—s 158(2)–(3). In *Nzama* 1997 (1) SACR 542 (D) the court ordered that the witness should be permitted to testify behind closed doors; that the witness be excused from disclosing his real name to the court and be permitted to adopt any pseudonym for the purposes of the trial; that no person be permitted to reveal the witness's identity; and that his evidence be published only to the extent that it will not disclose or tend to disclose his identity. Section 158(5) of the Criminal Procedure Act requires a court to give

reasons for not allowing a child who is below the age of 14 years to give evidence by means of closed circuit television or similar electronic media. For the principles involved when trials are held *in camera*, see *Niesewand (1)* 1973

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(3) SA 581 (RA) and cf also *Sekete* 1980 (1) SA 171 (N). The valid suggestions in *Klink v Regional Court Magistrate NO* [1996] 1 All SA 191 (SE) regarding the cross-examination of child witnesses, where the court found that a proper balance can be achieved between the protection of a child witness and the rights of an accused to a fair trial by allowing the witness to testify in congenial surroundings and out of sight of the accused, may be valid even today although s 158 (4) provides for such distance.

(6) Section 153(3) provides for the exclusion of the public at the request of a complainant or a minor's parent or guardian, where an accused is charged with committing or attempting to commit any sexual offence as contemplated in s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, towards or in connection with any other person, or extortion, either at common law or in terms of a statute, which inspired fear in the mind of such complainant. (Any person whose presence is not necessary at criminal proceedings concerning those offences mentioned in s 153(3) shall not be admitted at such proceedings while the person towards whom the offence was committed is giving evidence, unless such person requests his presence—s 153(3A)). Judgment and sentence in the cases just mentioned must be given in open court unless the court is of the opinion that it would be unjust and unreasonable that the complainant's identity would thereby be revealed—s 154(2). The identity of an accused who is charged in respect of any of the offences mentioned in s 153(3), above, may not be revealed before pleading—s 154(2)*(b)*.

2 Witnesses

2.1 Securing attendance of witnesses

Either the prosecutor or the accused may compel the attendance of witnesses by way of a subpoena. (See s 179 *et seq* dealing with witnesses generally.) In certain circumstances the court itself may also cause witnesses to be subpoenaed. (See s 186 and below.) If a witness fails to obey a subpoena, he may be arrested and brought before the court—s 188. Whenever a person is likely to give material evidence in criminal proceedings, and there is reason to believe that he is about to abscond, or has absconded, such person may be arrested (upon a warrant), and be committed to prison—s 184.

Whenever the Director of Public Prosecutions thinks that there is any danger that a potential State witness in respect of specified offences may be tampered with or intimidated, or that such witness may abscond, or whenever he deems it in the interest of the witness or of the administration of justice, he may apply to a judge in chambers for an order that such witness be detained pending the relevant proceedings—s 185. The witness may then be detained until the conclusion of the case or for a period of six months after his arrest (see the regulations pertaining to protective custody in *Government Gazette* 14196 of 31 July 1992). The offences in respect of which these powers apply are murder, arson, kidnapping, child-stealing, robbery, sedition, public violence, housebreaking, whether under the common law or a statutory provision, with intent to commit an offence, offences in terms of the Intimidation Act 72 of 1982 and any conspiracy, incitement or attempt to commit any of the above-mentioned offences, and treason—s 185 read with Part III of the

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Second Schedule to the Act. (This section is generally known as the '180-day clause'.)

In terms of the Witness Protection Act 112 of 1998, which created an office headed by a Director for Witness Protection, any witness who has reason to believe that his safety or that of his relatives may be or is threatened by any person or group of persons, whether known or unknown to him, may apply to the director or a witness protection officer to be voluntarily placed in protection. The director may allow or refuse the application.

2.2 Recalcitrant witness

In the case of a recalcitrant witness in a criminal trial (ie someone who refuses to take the oath or refuses to answer questions), s 189 empowers the court to institute a summary enquiry, and if such a person does not have a 'just excuse' for his refusal, he may be sentenced to a maximum imprisonment of 2 years or, where the criminal proceedings relate to an offence referred to in Part III of Schedule 2, to imprisonment for a maximum of five years. This may happen repeatedly. (Such a person will not, however, be sentenced to imprisonment unless the judge, regional court magistrate or magistrate is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order—s 205(4).) Appeal is possible. The primary criminal case may be concluded in the meantime. The following requirements have to be met before a witness may be

sentenced to imprisonment for refusing to take the oath as a witness or, having taken the oath, for refusing to answer questions put to him: the witness must have refused to take the oath or to testify; a proper enquiry must have been held into the refusal; and there must have been no just excuse for his failure or refusal—*Seals* 1990 (1) SACR 38 (C). In *Attorney-General, Transvaal v Kader* 1991 (2) SACR 669 (A) it was held that it is sufficient justification if a witness were to find himself in circumstances in which it would be humanly intolerable to have to testify. A 'just excuse' in terms of s 189 is a wider concept than 'lawful excuse'. See also *Sithole* 1991 (4) SA 94 (W). In *Molobi* 1976 (2) SA 301 (W) it was held that a witness's sympathy with an accused's political ideals does not constitute a just excuse. A witness's fear for his safety and that of his family is also not a just excuse. The demands of society and the interest of the administration of justice require that a witness should nevertheless give evidence—*Moloto* 1991 (1) SACR 617 (T). However, if it is not a proven necessity for the welfare of the community that the information be required specifically from the accused, the excuse will be considered just—*Cornelissen; Cornelissen v Zeelie NO* 1994 (2) SACR 41 (W). See also *Mthenjane* 1979 (2) SA 105 (A); *Haysom v Additional Magistrate* 1979 (3) SA 155 (C). A witness does not, however, have to answer any incriminating questions—s 203. Cf also *Wessels* 1966 (3) SA 737 (C).

Section 189 proceedings are not trials but they are still judicial proceedings and the rules of justice must be complied with. The witness has a right to—

(1) a fair opportunity to prepare for the proceedings; and
(2) legal representation.

Should the witness refuse or be unable to obtain legal representation, the court must explain to him the phrase 'just excuse' and allow him the opportunity to address the court or to adduce evidence—*Bekisi* 1992 (1) SACR 39 (C). See also

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Heyman 1966 (4) SA 598 (A); *Wessels* 1966 (4) SA 89 (C); *Smit v Van Niekerk NO* 1976 (4) SA 304 (E).

3 Trial of mentally disabled persons

At the commencement or during the trial of a person who is perceived or alleged to be mentally disturbed, the Criminal Procedure Act provides for procedures set out in ss 77-79 in order to establish whether the accused is mentally equipped to stand his trial and whether he is criminally responsible for his actions. Section 78(2) of the Act, as amended in 1998, provides (emphasis added):

> If it is *alleged* at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, *or if it appears to the court* at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of s 79.

It is clear that in the case of an allegation of mental illness or mental defect, the court is obliged to direct that an enquiry be made under s 79. The accused bears no onus: s 78(1A) and (1B) of the Act provide that every person is deemed mentally competent so as to be criminally responsible in terms of s 78(1), unless the contrary is proved on a balance of probabilities. Therefore, any allegation of criminal responsibility of the accused shall rest on the party who raises it. The accused therefore assumes the burden of proving his incapacity if he alleges it as a defence and is also then barred from appealing against a finding of being mentally competent (s 78(8)). The jurisdictional threshold set in s 78(2) is met when there is either an allegation of criminal incapacity with some indication of the reasons therefor (*Makoka* 1979 (2) SA 933 (A)), or an apparent mental disturbance based on a reasonable possibility, having regard to all the information before the court, that the accused is nor criminally responsible. The court is in the latter instance not obliged to act according to s 79. See *Malatji v S* (A259/10) [2013] ZAGPPHC 105 (18 April 2013).

If at any time at or after the commencement of any criminal proceedings it appears to the court that the accused is not of sound mind, he must be dealt with in the manner provided for by ss 77 and 79 of the Act. Regarding the capacity of the accused to understand the proceedings, s 77(1) provides:

> If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

The jurisdictional threshold set in s 77(1) is met when there is a reasonable possibility that the accused is not able to stand his trial due to a mental illness or mental defect. The court is then obliged to send the accused for psychiatric observation. See Chapter 14 (above) for a discussion of the procedure and findings. See also *Manupo* 1991 (2) SACR 447 (C); *Mokie* 1992 (1) SACR 430 (T); *Mphela* 1994 (1) SACR 488 (A). This means that the court must grant an adjournment for a medical examination. The court must refer the accused to an institution for observation. See *Nell* 1969 (1) SA 143 (A) (where the accused fell forward in the dock and later collapsed and started foaming at the mouth) and the comment on psychopaths in Chapter 14.

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The question whether an accused is fit to stand trial can be raised for the first time even after conviction and sentence; and there is no onus on the accused to prove his mental defect—*Ebrahim* 1973 (1) SA 868 (A).

4 Trial of drug-addicted persons

If it appears during the trial that the accused is probably a person such as is described in s 21(1) of the Prevention and Treatment of Drug Dependency Act 20 of 1992, the trial may be stopped and an inquiry in terms of s 22 may be held—s 255 of the Criminal Procedure Act. The prosecutor will not give his consent to stop the trial if the person, should he be convicted, would be liable to compulsory imprisonment. If the charge against the accused is withdrawn, conversion of the proceedings becomes impossible as it can only be converted during a trial—*In re Vorster* 1997 (1) SACR 269 (EC). If the trial is stopped, whether before or after conviction, the proceedings at the trial become null and void s 255 (5).

5 Adjournment (postponement)

If necessary a court may adjourn or postpone a case till a later date—ss 168 and 169. The court's powers to do so are regulated by s 170. When the court considers an application for postponement, whether it be by the State or the defence, the following two basic principles have to be considered:

(1) It is in the interest of society that guilty persons should be duly convicted and not discharged due to an error which could have been avoided had the case been adjourned; and
(2) An accused is deemed to be innocent and therefore has a right, once charged, to a speedy hearing.

A court of appeal will not interfere with a lower court's decision to adjourn a case, provided the discretion to do so was exercised judicially (ie without caprice, bias or the application of wrong principles, but on judicial grounds and for sound reasons)—*Zackey* 1945 AD 505; *Zimba* 1975 (2) PH H122 (N). Where a magistrate refused to adjourn a case to afford an accused the opportunity to find witnesses, the case was remitted for retrial (the accused had only eight days in which to prepare for the trial)—*Levin v Whitelaw NO* 1928 TPD 357. If a refusal to adjourn results in the exclusion of relevant evidence, the conviction will be set aside—*Hatch* 1914 CPD 68. Refusal of a reasonable and *bona fide* request for adjournment constitutes an irregularity rendering a trial unfair—*Saule* 2009 (1) SACR 196 (Ck). When the accused's legal representative is absent and it is not due to the fault of the accused, the case must be adjourned or a subsequent conviction will be set aside—*Seheri* 1964 (1) SA 29 (A). (This exposition is found in Hiemstra 438-441.) A request for postponement to allow the accused to obtain work to pay for the services of his legal representative is beyond the limits of acceptability—*Swanepoel* 2000 (1) SACR 384 (O).

If an accused fails to attend the trial on the date to which the case had been adjourned, he will be guilty of an offence, unless he satisfies the court that his failure to attend was not due to his fault—s 170. At a summary enquiry, the court should explain this onus and his rights to him (including his right to furnish evidence in terms of s 151)—*Bkenlele* 1983 (1) SA 515 (O).

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An application for a postponement on the ground that an application to the executive for indemnity in terms of the Indemnity Act 35 of 1990 has not yet been decided upon is no valid reason to curb the director of public prosecutions' duty to prosecute or to stand in his way to direct that the prosecution should continue—*Hlatswayo v Attorney-General, Witwatersrand* 1994 (1) SACR 232 (W).

5.1 Postponement through audio visual linkage

An accused person above the age of 18 years who is in a correctional facility (excluding a police cell or lock-up) awaiting trial, or whose trial is proceeding, and who is not required to be physically present in court, may have his proceedings postponed through audio visual linkage (live television communication). All the parties must be able to see and hear each other and to follow the proceedings, even though the accused is not physically present or required to be present—s 159A.

6 Speedy trial

Included in the concept of a fair trial is the right of every accused person to have his trial commenced and concluded without unreasonable delay—s 35(3)*(d)* of the Constitution, and see *Bothma v Els* 2010 (2) SA 622 (CC). The courts recognise three forms of prejudice that an accused can potentially suffer for want of a speedy trial:

(1) the loss of personal liberty resulting from detention or restrictive bail conditions;
(2) the impairment of personal security resulting from loss of reputation, social ostracism or loss of income or employment; and
(3)

trial-related prejudice such as the memories of witnesses fading or the witnesses themselves becoming unavailable—*Jackson* 2008 (2) SACR 274 (C). Unreasonable delays in the hearing of criminal trials, furthermore, are not only prejudicial to the accused, but bring the whole criminal justice system into disrepute—*Sochop* 2008 (1) SACR 552 (C).

The critical question is whether a lapse of time is reasonable taking into consideration the nature of the prejudice suffered by the accused, the nature of the case, the length of the delay, and the reasons advanced to justify the delay—*Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA). See also *Hendricks* [2010] 4 All SA 184 (SCA). Pre-trial incarceration of five months for a crime which has a maximum sentence of six months clearly points in the direction of unreasonableness. But it will be difficult to establish prejudice if an accused has constantly consented to postponements—*Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC). See also *Wild v Hoffert* 1998 (2) SACR 1 (CC).

Section 342A of the Criminal Procedure Act regulates the issue of unreasonable delays in pending criminal proceedings. In establishing whether the delay is unreasonable, the court is entitled to take a number of factors into consideration, such as the duration of the delay; the reasons advanced for the delay; whether any person could be blamed for the delay; the effect of the delay on the personal circumstances of the accused and witnesses; the seriousness, extent or complexity of the charge or charges; actual or potential prejudice caused to the State or the defence by the delay; the effect of the delay on the administration of justice; the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued; or any other factor the court considers

of importance—see s 342A(2). Section 342A(3) provides for the possible findings a court is entitled to make, should it find that the trial was unreasonably delayed.

The appropriate remedy for an infringement of the right to a speedy trial, such as a permanent stay of prosecution, is to be determined in the light of the circumstances of each particular case—*Wild v Hoffert* 1998 (2) SACR 1 (CC). An indefinite stay of the prosecution will seldom be granted in the absence of extraordinary circumstances or significant prejudice to the accused—*McCarthy v Additional Magistrate, Johannesburg* 2000 (2) SACR 542 (SCA). See, also, *Maredi* 2000 (1) SACR 611 (T); *Motsasi* 2000 (1) SACR 574 (W).

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Chapter 16
Joinder and separation of trials

SE van der Merwe

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2 Joinder or separation: The conflicting interests
3 Joinder of persons implicated in the same offence: Section 155 of the Act
3.1 The provisions of s 155(1)
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4 Persons committing separate offences at same time and place may be tried together: Section 156 of the Act
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6 Separation of trials: Section 157(2) of the Act
6.1 Court's power to raise the matter of separation
6.2 Test to be applied
6.3 Consequences of a successful separation
7 Prosecution of corporations and members of associations: Section 332(5) of the Act

The Child Justice Act 75 of 2008 and this chapter:

Section 63—Child justice courts and conduct of trials involving children

(2) Where a child and an adult are charged together in the same trial in respect of the same set of facts in terms of sections 155, 156 and 157 of the Criminal Procedure Act, a court must apply the provisions of—

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(a) this Act in respect of the child; and
(b) the Criminal Procedure Act in respect of the adult.

1 Introduction

'Joinder of offences' (as regulated by s 81 of the Act) was discussed in para 6 of Chapter 12 above. The present chapter deals with a different aspect, namely the 'joinder of accused' (as regulated by ss 155, 156 and 157(1)) and 'separation of trials' (as regulated by s 157(2)). In this chapter it will become evident that the prosecution as *dominus litis* (see para 4.13 in Chapter 3) may charge accused persons jointly, that is, in one trial, provided certain requirements have been satisfied. At the same time, however, the court

also has the power to order a separation of trials where circumstances so demand. See paras 6 to 6.2 below.

1.1 Numerical identification of co-accused

In the event of a joint trial, the accused are identified numerically, for example, accused one, two and three. The prosecution decides who should be accused one or two or three, as the case may be. It is the duty of the court to ensure that the correct numerical order is maintained during the course of the trial (*Chauke* 2010 (1) SACR 287 (GSJ)).

1.2 Adults and children as co-accused: The provisions of s 63(2) of the Child Justice Act 75 of 2008

The above section provides that where an adult and a child are charged together in the same trial in respect of the same set of facts in terms of ss 155, 156 and 157 of Act 51 of 1977, a court must apply the provisions of the Child Justice Act in respect of the child and the provisions of Act 51 of 1977 in respect of the adult. See further para 5.3.1 in Chapter 1 above.

2 Joinder or separation: The conflicting interests

The advantages of a joint trial are obvious. Time and costs are saved. A single prosecution of several accused in a joint trial ensures that prosecution witnesses only testify once and that only one court is occupied for the purpose of trying several co-accused. A joint trial is at times also to the tactical advantage of the prosecution if the co-accused blame each other. For example, it may be clear before the trial that accused number one, should he elect to testify, will incriminate accused number two, who will, should he also elect to testify in his own defence, incriminate accused number one. Where co-accused blame each other it will often be in the interests of justice to have a joint trial, which enables the court to hear all the evidence and to be in a good position to determine the various degrees of guilt. See generally Solomon 1934 CPD 194. In this case it was also pointed out that in the event of separate trials it becomes very easy for each accused to put the blame on the absent accused.

It is generally accepted that persons charged with the same count should in the best interests of the administration of justice be joined as co-accused in one trial

(*Bagas* 1952 (1) SA 437 (A)). The prosecution as *dominus litis* should in principle also not be hampered in the manner in which it wishes to proceed with the prosecution (*Kritzinger* 1952 (4) SA 651 (W)). Any application for separation must be assessed with these considerations in mind. See further para 6.2 below.

However, all the valid considerations which support a joint trial must of necessity also be balanced against the common-law and constitutional right of an accused to have a fair trial as envisaged in s 35(3) of the Constitution. See para 6.2 below. A co-accused (an accused in a joint trial) can apply for a separation of trials (s 157(2)). See para 6 below.

In *Ramgobin* 1986 (1) SA 68 (N) at 80C it was said that it is not the joinder of charges as such that is objectionable, but the joinder of accused in respect not only of different charges, but also of widely different periods of time and places of commission of these alleged crimes.

Sections 155 and 156 must also be applied to avoid the following type of prejudice to an accused (as per Blieden J in *Naidoo* 2009 (2) SACR 674 (GSJ)):

An accused could spend weeks in court while evidence affecting his or her co-accused was dealt with, which had nothing whatsoever to do with the objecting accused and the charges faced by him or her, merely because on other counts he was charged with an offence in which his co-accused was connected. This the Criminal Procedure Act does not permit.

3 Joinder of persons implicated in the same offence: Section 155 of the Act

3.1 The provisions of s 155(1)

The above section provides as follows:

> Any number of participants in the same offence may be tried together and any number of accessories after the same fact may be tried together or any number of participants in the same offence and any number of accessories after that fact may be tried together, and each such participant and each such accessory may be charged at such trial with the relevant substantive offence alleged against him.

Joinder is permissive and not imperative; and non-joinder can hardly ever lead to an unfair trial. In *Xolo v Attorney-General of the Transvaal* 1952 (3) SA 764 (W) at 770F-H it was said:

I fully appreciate that it is possible that separate trials may redound to the disadvantage of the accused both financially and in the sense that they may be exposed to a greater danger of conviction in the second trial; I can, however, see no danger to them of their being prejudiced by any unfairness creeping into their trials as a result of separate trials.

The prosecution's decision not to join A as a co-accused in the trial of B in circumstances where A may be suspected of involvement in the same offence with which B is charged (or a similar offence) does not infringe any established criminal procedural rule and cannot on its own constitute a failure of justice rendering the trial unfair—*Shaik* 2008 (1) SACR 1 (CC). In this case the Constitutional Court also observed as follows: 'The fact that there might often be cogent reasons for the holding of joint trials, does not . . . mean that a specific trial would be unfair because other possible perpetrators are not charged with an accused. The ultimate question is whether a particular trial was unfair . . .' It was also concluded that

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whilst a non-joinder might disadvantage an accused, such non-joinder does not necessarily render the trial unfair.

The word 'participants' as used in s 155(1) must be interpreted with reference to substantive criminal law principles governing the classification of people involved in the same offence. A participant is a 'perpetrator' or an 'accomplice'. Broadly speaking, it can be said that a perpetrator (or co-perpetrator) satisfies all the essential requirements for liability as set out in the definition of the crime, whereas an accomplice 'does not satisfy all the requirements for liability in the definition of the crime . . . but . . . nevertheless unlawfully and intentionally furthers its commission by somebody else'—Snyman *Criminal Law* 5ed (2008) 258. Thus, if A and B had killed the deceased with knives supplied by C for this very purpose, A and B (as co-perpetrators) and C (as accomplice but not a perpetrator) can in terms of s 155(1) be charged jointly (as accused one, two and three) for the murder of the deceased because the three of them were 'participants' as referred to in s 155(1), and stand implicated in the 'same offence' as required by s 155(1).

Section 155(1) caters separately for the joining of an accessory after the fact. This is necessary because an accessory after the fact is not a participant and is therefore neither a perpetrator nor a co-perpetrator nor an accomplice. Snyman *Criminal Law* 5ed (2008) 278 states that a person 'is an accessory after the fact to the commission of a crime if, after completion of a crime, he unlawfully and intentionally engages in conduct intended to enable the perpetrator of, or the accomplice in, the crime to evade liability for his crime, or to facilitate such a person's evasion of liability'. See also *Phallo* 1999 (2) SACR 558 (SCA); *Williams* 1998 (2) SACR 191 (SCA); and *Pakane* 2008 (1) SACR 518 (SCA). To return to the example in the previous paragraph: If D had met up with A and B after the murder of the deceased and then helped A and B to conceal the body of the deceased, D could be joined as accused four in the trial of A, B and C on account of the

provisions of s 155(1). This section requires that in such an instance D must in the joint trial be charged with the substantive offence of accessory after the fact.

If a person is charged as a participant (perpetrator or accomplice) and the court finds that he was only an accessory after the fact, he may in terms of s 257 be convicted as an accessory after the fact. A finding of this nature is referred to as a 'competent verdict', an aspect which is discussed in Chapter 18 below.

3.2 The provisions of s 155(2)

In terms of the above section a receiver of property obtained by means of an offence shall for purposes of s 155 'be deemed to be a participant in the offence in question'.

4 Persons committing separate offences at same time and place may be tried together: Section 156 of the Act

The above section provides as follows:

> Any number of persons charged in respect of separate offences committed at the same place and at the same time or at about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that evidence admissible at the trial of one of such persons will, in his opinion, also be admissible as evidence at the trial of any other such person or such persons.

Section 156 seeks, like s 155, to avoid successive trials involving different accused but based essentially on the same evidence on behalf of the prosecution. See

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Maringa 2015 (2) SACR 629 (SCA) at [14]. Section 156 supplements s 155. It provides for joinder quite apart from the criteria of 'participants' and 'same offence' as provided for in s 155(1).

4.1 The prosecutor's opinion

Section 156 comes into consideration upon the initiative of the prosecutor, that is, where the prosecutor informs the court that evidence admissible at the trial of one accused will, in his opinion, be admissible at the trial of the other accused (*Makganje* 1993 (2) SACR 621 (B)).

4.2 At the same place and the same time (or about the same time)

The separate offences must have been committed at the same place *and* at the same time *or* about the same time (*Ramgobin* 1986 (1) SA 68 (N)). In *Naidoo* 2009 (2) SACR 674 (GSJ) it was said that joinder is impermissible and irregular 'where there is no connection, either in time, space or fact, between the charges' levelled at the different accused in the same trial (at [11]). In this case the court was satisfied that according to the prosecution's allegations the various accused had all, in different capacities, been involved in an unlawful enterprise in contravention of s 2(1) of the Prevention of Organised Crime Act 121 of 1998. It was held that there was no misjoinder. None of the accused would have been exposed to evidence irrelevant to the case he had to meet.

Van Wyk 1994 (1) SACR 183 (NC) provides an example where the facts of the case were too tenuous to establish the required connection in time and space, so as to justify joinder. Seven accused were charged with the theft of varying numbers of sheep from the same farm. No evidence was led as to the size of the farm or on which parts of the farm the thefts had been committed; and the prosecution alleged that the sheep had been stolen over a period of fifteen months. These circumstances, held the court of appeal, meant that there was an irregular joinder in that the various offences had not been committed at the same place and time, or about the same time.

Another example of a case where the absence of a connection in time, space and fact led to a misjoinder is *Makganje* 1993 (2) SACR 621 (B). Accused no 1 was charged with raping a 12-year-old complainant on 17 July 1992; and his co-accused (accused no 2) was charged with the rape of the same complainant on 18 July 1992. Each accused had a completely independent charge of rape against him and it was not part of the

prosecution's case that they had assisted each other or had acted in collusion. There was no connection between the two offences, other than that the complainant was the same person. It was concluded that joinder in terms of s 156 was irregular as the two alleged rapes had not been committed at the same place and time, or about the same time; and, furthermore, the 'material evidence' against one accused would not have been admissible against the other, and *vice versa* (at 622*h-i*).

5 Stage at which an accused can be joined with any other accused: Section 157(1) of the Act

Joinder of accused in the same criminal proceedings may take place 'at any time before any evidence has been led in respect of the charge in question' (s 157(1)).

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The responses of an accused to the court's questioning in terms of s 112(1)*(b)* to test the validity of his plea of guilty do not constitute 'evidence' for purposes of s 157(1) —*Slabbert* 1985 (4) SA 348 (C); and the same applies to the situation where an earlier accused has pleaded not guilty and given an explanation of plea in terms of s 115—*Ngobeni* 1981 (1) SA 506 (B). In both these instances joinder would still be possible. However, the complete record up to that stage should be read to the accused so joined *before* they, in turn, are required to plead—*Ngobeni* 511G-511D. The earlier accused should then also be present when plea proceedings commence in respect of the accused persons who have been joined. See generally *Hartkopf* 1981 (1) SA 992 (T).

An inspection *in loco* (that is, where the court visits the scene of the crime to make and record certain observations) means that real evidence is being received. An accused can therefore not be added to proceedings where such an inspection has already been held (*Dippenaar* 1990 (1) SACR 208 (T)).

6 Separation of trials: Section 157(2) of the Act

The above section provides as follows:

> Where two or more persons are charged jointly, whether with the same offence or with the different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of such accused.

The court may 'at any time during the trial' direct separation (s 157(2)).

A refusal to grant separation is interlocutory (*Libaya* 1965 (4) SA 249 (O)). This means that in the course of the trial the matter of separation can be raised again for fresh consideration by the trial court, should there be new facts.

6.1 Court's power to raise the matter of separation

The fact that neither the prosecution nor the accused has asked for a separation of trials does not preclude the court from raising the issue of its own accord in order to avoid the kind of prejudice referred to in para 6.2 below. See *Ndwandane* 1970 (4) SA 502 (N). The court might indeed be required to take the initiative where the accused has no legal representative.

6.2 Test to be applied

The decision whether there ought to be a separation is in the discretion of the presiding judicial officer (*Tshamano* 1998 (1) SACR 359 (V)). This discretion must be exercised in a judicial manner, that is, not arbitrarily but with due regard to all relevant considerations and factors (*Bagas* 1952 (1) SA 437 (A)) as well as the interests of justice, which encompass the interests of the individual accused as weighed against the interests of society (*Shuma* 1994 (2) SACR 486 (E)). The prejudice likely to be caused to the applicant in the absence of separation should be assessed against the prejudice likely to be suffered by the other accused or the prosecution should separation be ordered (*Somciza* 1990 (1) SA 361 (A) at 376E-F).

The applicant must show that there is a probability—and not a mere possibility—that a joint trial will result in prejudice which would render his trial unfair (*Nzuza* 1952 (4) SA 376 (A); *Shuma* (above)). Prejudice is not presumed (*Bagas*

(above) 441). A court of appeal will only interfere if satisfied that the trial court's exercise of its discretion amounted to such a gross misdirection that it resulted in a failure of justice which deprived the appellant of his right to a fair trial.

Where some accused plead guilty and others not guilty, it has become standard practice to order separation and complete the trial of those who have pleaded guilty. See *Witbooi* 1994 (1) SACR 44 (Ck). In such an instance there is no need for a joint trial, as those accused who pleaded guilty are on the merits of the case in agreement with the prosecution (*Zonele* 1959 (3) SA 319 (A)) and, once convicted, can be available as prosecution or even defence witnesses in the trial of those who had pleaded not guilty. See generally *Shuma* (above) and *Leong* 1966 (1) SA 185 (T).

In *Zonele* (above) it was confirmed that where in a joint trial A pleads guilty and B not guilty and B needs A as a defence witness, their trials should be separated because A cannot be compelled to testify as long as he happens to be a co-accused.

In *Witbooi* 1994 (1) SACR 44 (Ck) A had pleaded guilty and B and C not guilty. The trial court had questioned A in terms of s 112(1)*(b)*. In his responses A incriminated himself as well as B and C. A was convicted and the joint trial proceeded, resulting in the conviction of B and C as well. On review it was held that non-separation caused prejudice to B and C—and that the prejudice was such that it caused a failure of justice. There is no failure of justice, however, when separation is refused where one accused's plea of not guilty is followed by an explanation of plea in terms of s 115 and in which he incriminates his co-accused. See *Witbooi* (above) 51*d*.

6.3 Consequences of a successful separation

In the event of a successful application for separation, the case proceeds against the remaining accused; and where all the accused have applied for a separation, it is for the prosecution to decide against whom it wishes to proceed forthwith.

The court abstains from giving a verdict (s 157(2)) and a successful applicant cannot at his later trial—which must start *de novo*—rely on a plea of prior acquittal as provided for in s 106(1)*(d)*.

A court that has granted a separation of trials has no power to determine the sequence in which the trials ought to take place (*Matsinya* 1945 AD 802). The court may, at most, suggest that a particular sequence would best serve the interests of justice.

The prosecution is entitled to proceed on different or new charges against those accused who were separated from the trial (*Shongwa* 1955 (2) SA 100 (O)).

7 Prosecution of corporations and members of associations: Section 332(5) of the Act

The above section exposes directors and employees of a corporate body to personal criminal liability for offences committed by the corporate body. Directors of a company may accordingly be charged jointly with the company. Section 332(5), however, also permits separate trials.

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Chapter 17
Trial principles and the course of the criminal trial

SE van der Merwe

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The Constitution and this chapter:

Section 35—Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right—

. . .

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

See 2.1, 5.1 and 5.3, below

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

See 2.1 and 3.3, below

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

See 2.6.1, below

The Child Justice Act 75 of 2008 and this chapter:

Section—63 Child justice courts and conduct of trials involving children

(4) A child justice court must, during the proceedings, ensure that the best interests of the child are upheld, and to this end:

(a) may elicit additional information from any person involved in the proceedings; and

(b) must, during all stages of the trial, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child.

See 2.3.3, below

1 Introduction

A criminal trial commences once an accused has pleaded in the court that has the required jurisdiction to hear evidence in order to pronounce on the guilt or otherwise of the accused concerned. This court is hereafter referred to as the 'trial court'. The present chapter deals with criminal trial principles and the course of the criminal trial, as opposed to review and appeal procedures dealt with below in Chapters 20 and 21, respectively.

1.1 The meaning of 'course of the criminal trial'

The phrase 'course of the criminal trial' refers to all the procedures which may or must be followed from the time an accused has pleaded until verdict on the merits (see Chapter 18) and, if the accused is convicted, the determination of an appropriate punishment imposed by the trial court (see Chapter 19).

1.2 The nature and purpose of a criminal trial

A criminal trial can, broadly speaking, be described as a state-sponsored public, judicial and primarily oral hearing in terms of which the alleged criminal liability of an accused must in the public interest be determined by an impartial adjudicator on the basis of constitutional, statutory and common-law rules and principles of fairness which promote reliable and acceptable outcomes in convicting and punishing the guilty, while protecting the innocent from incorrect conviction and wrongful punishment.

The process as described in the previous paragraph must of necessity be regulated by detailed and perhaps very technical rules. These detailed rules, however, must always be

interpreted and applied in the context of at least seven fundamental principles as identified in para 2 below. These principles, in turn, are also interwoven with or closely linked to the adversarial (accusatorial) nature of our trial system—a matter dealt with in para 4 of Chapter 1 above.

2 The seven fundamental principles which govern a criminal trial

Most of the detailed rules which govern the course of criminal trial stem from one or more of the following interrelated fundamental principles: trial fairness (see

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para 2.1 below); legality (see para 2.2 below); judicial impartiality (see para 2.3 below); equality of arms (see para 2.4 below); judicial control (see para 2.5 below); orality (see para 2.6 below) and finality (see para 2.7 below).

2.1 The fair trial principle

An accused's right to a fair trial under s 35(3) of the Constitution 'embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution come into force' (*Zuma* 1995 (1) SACR 568 (CC)). The right to a fair trial embraces *more* than what is contained in the list of specific rights identified in s 35(3)*(a)*-*(o)* of the Constitution (*Veldman v Director of Public Prosecutions, WLD* 2006 (2) SACR 319 (CC) at [22]-[23]). The s 35(3) rights which surface most pertinently in the course of the trial are the right to be presumed innocent (s 35(3)*(h)*); the right to adduce and challenge evidence (s 35(3)*(i)*); and the right not to testify during the proceedings (s 35(3)*(h)*). The words 'which include the right', preceding the listing of specific rights in paragraphs *(a)* to *(o)* in s 35(3), 'indicate that such specification is not exhaustive of what the right to a fair trial comprises' (*Dzukuda* 2000 (2) SACR 443 (CC) at [9]). At [11] the Constitutional Court also said (per Ackermann J):

> It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what . . . lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality.

No-one may be convicted without a fair trial (*Baloyi* 2000 (1) SACR 81 (CC) at [27]).

It has also been held that 'the right to a fair trial in terms of s 35(3) of the Constitution includes the right to a prosecutor that acts and is perceived to act without fear, favour or prejudice' (*Bonugli v Deputy National Director of Public Prosecutions* 2010 (2) SACR 134 (T) at 143*h*-*i*).

Trial fairness is not confined to the position of the accused, but extends to society as a whole, precisely because society has a real interest in the outcome of a case (*Sonday* 1995 (1) SA 497 (C) 507). All the judicial duties that have to be performed in respect of an unrepresented accused in order to ensure a fair trial were set out and confirmed in *Mofokeng* 2013 (1) SACR 143 (FB). However, the Supreme Court of Appeal has warned that a trial court should not give assistance to an accused to the point of unfairly disadvantaging the prosecution. See *Brown* 2015 (1) SACR 211 (SCA). In this case the trial judge had repeatedly intervened in the prosecution's case; and he was antagonistic to the prosecution, to the extent that his conduct was 'deserving of censure' (at [145]).

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The right to a fair trial demands that there should be informed participation by the unrepresented accused. A court is therefore required to explain all procedural rights and options to an unrepresented accused—and to do so at every critical stage. See *Ramulifho* 2013 (1) SACR 388 (SCA). The fact that the accused's rights have been explained should be properly recorded—*Motaung* 1980 (4) SA 131 (T). Perusal of the record must reveal precisely what was conveyed to an unrepresented accused regarding the right to consult with a legal practitioner of choice, the right to be provided with a legal practitioner at state expense and the right to dispense with a legal practitioner; and the reaction thereto must appear *ex facie* the record of proceedings—*Sibiya* 2004 (2) SACR 82 (W). A fair trial requires that any application for legal aid be carefully and completely noted in such a way that another court later burdened with the matter is properly appraised of that fact—*Cordier* 2004 (2) SACR 481 (T). It is the task of the presiding judicial officer to explain the rights to an unrepresented accused and such duty cannot in the ordinary course be delegated to an interpreter—*Malatji* 1998 (2) SACR 622 (W).

The fair trial principle also governs the sentencing phase of the criminal trial (*Dzukuda* (above) and *Mashinini* 2012 (1) SACR 604 (SCA)).

2.2 The principle of legality

In para 3.4.1 of Chapter 1, above, reference was made to the requirement that the prosecution must prove legal guilt in a properly conducted trial in accordance with the principle of legality, that is, in a trial where all relevant common-law, statutory and constitutional due process rules were followed. Factual guilt, ascertained at the expense of a fundamental right of the accused, falls short of the standard set by the principle of legality. Thus, it can be said that legal guilt is absent where the conviction rests on facts obtained in breach of the accused's privilege against self-incrimination (*Lwane* 1966 (2) SA 433 (A)) or his right to consult confidentially with his legal representative (*Mushimba* 1977 (2) SA 829 (A)).

2.3 The principle of judicial impartiality

In our adversarial trial system the presiding judicial officer is in principle a passive umpire who should not descend into the arena where the dust of the conflict might cloud his judicial vision (*Sussex Justices* (1924) KB 256 259; *Rall* 1982 (1) SA 828 (A); *Mseleku* 2006 (2) SACR 237 (N)). The role of the judicial officer was described as follows by Stewart AJ in *Nnasolu* 2010 (1) SACR 561 (KZP) at [38]:

> The presiding officer should not enter the arena. He or she is entitled and often obliged in the interests of justice to put such additional questions to witnesses, including the accused, as seem to him or her desirable in order to elicit or elucidate the truth more fully in respect of relevant aspects of the case. The presiding officer should not only ensure that justice is done, he or she should also ensure that justice is seen to be done. The trial should therefore be conducted in such a way that the open-mindedness, impartiality and fairness of the judicial officer are manifest to all those who are concerned in the trial and its outcome, especially the accused. The presiding officer should refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him or her from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him or her. The presiding officer should refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or her or unduly influence the quality or nature of the replies and thus affect his or her demeanour or impair his or her credibility.

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Cross-examination of an accused by a presiding judicial officer can 'only lead to the administration of justice falling into disrepute and a perception of bias on the part of the presiding officer'—*Du Plessis* 2012 (2) SACR 247 (GSJ) at [25].

A party who is aggrieved by the manner in which a presiding judicial officer conducts a trial can bring an application for the recusal of such officer—a matter that was dealt with in para 2.4 of Chapter 13, above.

The right of the parties to call witnesses in support of their respective cases and to cross-examine an opponent's witness explains why the adversarial system can afford and

maintain the relative inactivity of the presiding judicial officer in the course of the trial. However, due note should be taken of the statutory provisions set out in paragraphs 2.3.1 to 2.3.3, below.

2.3.1 Section 167 of the Act (power of court to examine witness or person in attendance)

The above section provides as follows:

> The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.

This statutory power to question a witness introduces an inquisitorial element but does not entitle the court to cross-examine the witness concerned. The purpose of the court's questions should be to elucidate obscure points or clear up ambiguities. The prosecutor and defence may put questions arising from the questioning by the court. The court should, if at all possible, only put its questions once the parties have completed their questioning of the witness (*Mseleku* 2006 (2) SACR 237 (N) at [10] to [13]). Section 167 does not entitle the court to take over the prosecutor's role (*Mosoinyane* 1998 (1) SACR 583 (T)). The 'frequency, length, timing, form, tone and contents' of the court's questioning (*Msithing* 2006 (1) SACR 266 (N)) can determine whether permissible judicial questioning was present or absent. An acceptable balance must be maintained between interference and detachment (*Gerbers* 1997 (2) SACR 601 (SCA)). The inexperience of the prosecutor and police may call for and justify a more active approach in order to ensure that justice is done between the parties (*Van den Berg* 1996 (1) SACR 19 (Nm); *Ncgobo* 1993 (3) BCLR 298 (N); *Mseleku*, above).

2.3.2 Section 186 of the Act (court may subpoena witness)

The above section provides as follows:

> The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.

Section 186 can be invoked 'at any stage' of the proceedings—even after the parties have delivered their final arguments on the merits (*Karolia* 2006 (2) SACR 75 (SCA)). The court may also rely on s 186 in order to recall an accused who has elected to testify in his own defence (*Naran* 1954 (1) SA 509 (SR)).

The views of the prosecution and the defence should always be established before a court decides to call a witness. See *Masooa* [2016] 2 All SA 201 (GJ) where the remarks in the minority judgment in *Gabaatlholwe* 2003 (1) SACR 313 (SCA) were preferred to the approach adopted in *Karolia* 2006 (2) SACR 75 (SCA).

A party adversely affected by the evidence of a witness called by the court in terms of s 186 should be given an opportunity to rebut this evidence, and any party desiring to cross-examine such a witness should normally be allowed to do so (*Lubbe* 1966 (2) SA 70 (O); *Chili* 1917 TPD 61). See also s 166(2).

Section 186 introduces an inquisitorial element and essentially caters for two situations, namely the court's discretion to call a witness and the court's duty to do so.

The first part of s 186 creates a discretion (the court 'may'). This is a discretion to be exercised judicially. In exercising this discretion the court is entitled to take into account that an accused has a constitutional right to have his trial concluded within a reasonable time (*Basson* 2007 (1) SACR 566 (CC)). It is an improper exercise of the court's discretion to call a witness where no evidence was led by the State and the defence and where the accused—but for the evidence of the court's witness—was entitled to an

acquittal (*Kwinika* 1989 (1) SA 896 (W)). The discretionary power allows a court to call a witness who is useful but not essential (*Majosi* 1956 (1) SA 167 (N)).

The second part of s 186 (the court 'shall') places a duty on the court to call a witness if it is essential to the just decision of the case. See *Helm* 2015 (1) SACR 550 (WCC). It is for the court to decide whether the evidence is essential (*Hepworth* 1928 AD 265). The inexperience of the prosecutor or the accused's legal representative can create the necessity for the court to call the witness to ensure that justice is done. See generally *Van den Berg* 1996 (1) SACR 1 (Nm); *Mseleku* 2006 (2) SACR 237 (N).

A court of appeal will only in rare circumstances interfere with the trial court's decision that the evidence was essential to the just decision of the case. See *Gabaatlholwe* 2003 (1) SACR 313 (SCA).

2.3.3 Section 63(4) of the Child Justice Act 75 of 2008

In terms of the above section a child justice court must ensure that the best interests of the child are upheld, and to this end—

(a) may elicit additional information from any person involved in the proceedings; and

(b) must, during all stages of the trial, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child.

2.4 The principle of equality of arms

In para 4 in Chapter 1 it was noted that the South African criminal trial system is essentially accusatorial (adversarial) in nature. Such a system is based on the premise that truth-finding is enhanced if the prosecution and defence are responsible for presenting their respective cases. However, this approach is only valid if the prosecution and defence have equal opportunities. It is in this context that the so-called 'principle of equality of arms' developed. See also the discussion of *Mpetha*

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1983 (1) SA 492 (C) in para 4.13(2) in Chapter 3 above. Silver 1990 *Wisconsin Law Review* 1007 1037 explains as follows:

> [T]o ensure that the adversarial process achieves its end, the optimisation of the search for truth . . . [a court] . . . must formally recognise a new right designed to restore and protect the delicate balance of power between the prosecution and defence . . . [T]he adversarial process functions effectively only when opposing counsel can fashion and present their strongest case from positions of relative equality. This equality, as significant as the other protections underlying the adversarial process in ascribing meaning to the nebulous guarantee of due process, must be extended formal protection.

In terms of the principle of equality of arms in the context of the course of the trial, it is for example irregular to deny a party the opportunity to cross-examine the opponent's witness (*Mgudu* 2008 (1) SACR 71 (N); *Nnasolu* 2010 (1) SACR 561 (KZP)). In *Msimango* 2010 (1) SACR 544 (GSJ) it was pointed out that s 166(1) of the Act vests reciprocal rights in both the accused and the prosecution to cross-examine opposing witnesses, and to re-examine their own witnesses. At [4] it was also said that '[s]imilarly, the right to cross-examine a co-accused or witness called by such co-accused is also extended to both an accused and the prosecution'.

There must, furthermore, also be equal opportunities in addressing the court on the merits (see para 6 below) and on the question of an appropriate sentence (see para 6.3 in Chapter 19 below). Equality of arms also requires that an accused should in principle have legal representation (see Chapter 4 above) in order to be on a par with the State, which employs a prosecutor. See *Legal Aid Board* 2011 (1) SACR 166 SCA at [1].

Equality of arms is difficult to maintain and enforce at the pre-trial investigative stage. The evidence-gathering process is loaded against the individual (suspect, accused) simply because of the state's vast financial and human resources that it can harness to investigate alleged criminal conduct. It is precisely because of this pre-trial imbalance

that the principle of equality of arms must at trial level be enforced with great care and vigour. In *Lavhengwa* 1996 (2) SACR 453 (W) Claassen J said (at 477*j*-478*b*):

> A fair trial envisages . . . equality of arms . . . A fair trial embraces equality before the law between litigants in a criminal trial. Although inequalities between accused persons are inherent in any criminal justice system . . . inequalities between opposing litigants in a criminal trial is contrary to the principle of a fair trial.

2.5 The principle of judicial control

In *Legote* 2001 (2) SACR 179 (SCA) Harms JA emphasised the principle that a criminal court must—without sacrificing its impartiality—control and manage proceedings within the bounds of the law of criminal procedure (at 184*d*-*e*). See also *Maliga* 2015 (2) SACR 202 (SCA) at [18]. Several statutory and common-law rules confirm this principle. To this end the court should, whenever necessary, issue orders that the prosecutor, defence lawyer, accused persons, court staff, witnesses and members of the public in attendance must obey. For present purposes, the following eight examples of judicial control and management will suffice:

(a) One of the purposes of the crime of contempt of court *in facie curiae* (contempt in the presence of the court whilst sitting) is to strengthen the hands of the judge or magistrate to control and manage proceedings in an orderly fashion.

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Thus, a legal representative who persists in shouting at a witness in the course of cross-examination commits contempt of court (*Benson* 1914 AD 357); and so does someone who grabs and tears up a court document (*Mongwe* 1974 (3) SA 326 (T)). Section 108 of the Magistrates' Courts Act 32 of 1944 lists three categories of contempt *in facie*: deliberate insults, deliberate interruptions and misbehaviour of some other kind.

(b) A presiding judicial officer may order the arrest of someone who commits an offence in the presence of the court—s 178(1).

(c) If any person, other than an accused, who is present at criminal proceedings, disturbs the peace or order of the court, the court may order that such person be removed from the court and detained until the rising of the court—s 178(2).

(d) If an accused behaves himself in a manner which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence—s 159(1). See further para 2.1 of Chapter 5 above.

(e) A court may, in circumstances as provided for in ss 168 and 169, adjourn proceedings to any date and place.

(f) A court has a common-law power to intervene where questioning of witnesses goes beyond acceptable limits or introduces irrelevancies. Vexatious, abusive and discourteous cross-examination must, for example, be disallowed (*Manqaba* 2005 (2) SACR 489 (W)). In *M* 1999 (1) SACR 664 (C) 673*f*–*i* it was held that irrelevant questions offending the dignity of the complainant should not be allowed.

(g) In certain circumstances a criminal court has the statutory right to curtail cross-examination. Section 166(3)*(a)* of the Act provides that if it appears to the court that cross-examination is being protracted unreasonably and thereby causing an unreasonable delay in the proceedings, the court may request the cross-examiner (that is, prosecutor, defence lawyer or unrepresented accused as the case may be) to disclose the relevancy of any particular line of examination and may, if necessary, impose reasonable limits on the length of the examination or any particular line of examination. The court may, in terms of s 166(3)*(b)*, order that any submission regarding the relevancy of the cross-examination (the purpose of the questions) be heard in the absence of the witness who is being cross-examined. The purpose of s 166(3)*(b)* is to ensure that the cross-examiner cannot claim that advance disclosure of the purpose of the questions would prematurely alert the witness to what counsel wishes to investigate or probe. It has been argued that s 166(3) is not unconstitutional, but has to be invoked and applied with great care to

protect the accused's constitutional fair trial right (Van der Merwe 1997 *Stellenbosch Law Review* 348 355–9).

(h) The presiding judicial officer must ensure that a proper record of the trial proceedings and evidence is kept. Such a record is necessary for review and appeal purposes. A record of the disposal or remand of cases must also be kept (*Cornelius* 2008 (1) SACR 96 (C)). It is the duty of the presiding judicial officer to ensure, with the assistance of the parties if necessary, that any demonstration given by a witness is described in detail in the record (*Nkombani* 1963 4 SA 877 (A)).

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2.6 The principle of orality

Dennis *The Law of Evidence* 3ed (2007) states at 16:

> The principle of orality is the principle that evidence on disputed questions of fact should be given by witnesses called before the court to give oral testimony of matters within their own knowledge. Historically the principle is intimately connected with the importance attached by the common law to the oath, to the demeanour of the witness, and to cross-examination as guarantees of reliability. Oral testimony from witnesses physically present before the court also helps to legitimize the adjudication in other ways. It reinforces the drama and solemnity of the occasion, and it allows for maximum participation in decision-making in the sense that parties confront their accusers and challenge the evidence against them in the most direct way possible by cross-examination.

In the course of the criminal trial the principle of orality must be observed (*Adendorff* 2004 (2) SACR 185 (SCA) at [20]). A witness must—except where the Act or any other law provides otherwise—give evidence orally—s 161(1). Oral evidence shall 'in the case of a deaf and dumb witness, be deemed to include gesture-language and, in the case of a witness under the age of eighteen years, be deemed to include demonstrations, gestures or any other form of non-verbal expression'—s 161(2) of the Act. In *Roux* 2007 (1) SACR 379 (C) the court could find no reason why the evidence of the complainant—a child with Down's syndrome—could not be given with the assistance of a speech therapist if the latter could interpret his speech. See also para 2.6.1 below.

In order to ensure that the principle of orality—with its emphasis upon confrontation—is enforced in an orderly fashion, the questioning of each witness is in principle subjected to the following successive stages: examination-in-chief, cross-examination, re-examination. Each of these stages is dealt with briefly in paragraphs 2.6.3 to 2.6.5 below. Books on the law of evidence deal comprehensively with rules regulating oral evidence and the exceptions where written evidence (for example, affidavits) and documentary evidence may be received.

2.6.1 Interpreters

Where necessary, interpreters must be used. See also s 35(3)*(k)* of the Constitution. The role played by an interpreter is a vital and crucial element of a fair trial in terms of s 35 (3) of the Constitution—*Manzini* 2007 (2) SACR 107 (W).

The presiding officer must make sure that the accused understands the language used by witnesses. But where the accused through his conduct leads the court to assume that he understands the language used, he will not easily, after his conviction, be able to claim a review on the grounds of an irregularity because he did not understand the proceedings—*Geidel v Bosman* 1963 (4) SA 253 (T).

The interpreter must be sworn in, either upon taking office or at the commencement of the case in which he acts as interpreter. If he is not sworn in, it amounts to an irregularity which may render the trial abortive—*Naidoo* 1962 (2) SA 625 (A). The poor performance by an interpreter in interpreting evidence during a trial affects the evaluation of that evidence and infringes an accused's right to a fair trial—*Manzini* 2007 (2) SACR 107 (W). See also *Mpondo* 2007 (2) SACR 245 (C). In *Sayed and Another v Levitt NO* 2012 (2) SACR 294 (KZP) at [14] and [15] it was held that the interpreter's lack of proficiency in the relevant language and her ignorance of the legal process had

contributed to the irregularities which 'impacted on the fairness of the trial'. Where an interpreter resorts to technical language, the

court should establish whether the words or terms are those of the interpreter or the witness concerned—*MM* 2012 (2) SACR 18 (SCA). For a general discussion of the role of an interpreter, see *Mabona* 1973 (2) SA 614 (A).

2.6.2 Oath (or affirmation or warning)

No witness can be examined unless the oath has been administered, except where ss 163 and 164 apply—s 162(1). Non-compliance renders the evidence inadmissible (*B* 2003 (1) SACR 52 (SCA); *Galant* 2008 (1) SACR 196 (E) at [4]). In the High Court, the judge or his registrar must administer the oath, and in lower court the magistrate must do so—s 162 (1). The prosecutor may not administer the oath (*Bothma* 1971 (1) SA 332 (C)).

A witness who objects to taking the oath is required to affirm that he will speak the truth—s 163; *Bakos* 2010 (1) SACR 5234 (GSJ). An affirmation has 'the same legal force and effect as if the person making it had taken the oath'—s 163(2).

A witness who does not understand the nature and import of the oath or affirmation shall be admonished by the court to speak the truth—s 164 (1). The mere youthfulness of a witness can justify the finding that the witness cannot understand the nature of the oath or affirmation—*Williams* 2010 (1) SACR 487 (ECG).

2.6.3 Examination-in-chief

The party who called the witness is responsible for taking the witness through the examination-in-chief by following the question-and-answer technique. The most important rule is that leading questions may not be asked in respect of matters in dispute. A leading question is a question that suggests the answer to the witness.

2.6.4 Cross-examination

The parties who did not call the witness have a fundamental right to cross-examine this witness.

The purpose of cross-examination is to elicit facts favourable to the cross-examiner's case. Cross-examination is therefore not confined to matters raised by the witness in his evidence-in-chief.

Leading questions are permitted. The cross-examiner has a duty to cross-examine on matters he disputes. See also para 3.3 below. Misleading questions may not be put. Vexatious, abusive or discourteous cross-examination is not allowed.

A court may on good grounds shown allow a party to reserve cross-examination. Once such reservation has been granted, a court cannot later deny a party the opportunity to cross-examine (*Mgudu* 2008 (1) SACR 71 (N)).

2.6.5 Re-examination

Re-examination follows cross-examination. It is conducted by the party who initially called the witness. It is in principle confined to matters covered in cross-examination. The rules which govern examination-in-chief apply and leading questions may therefore not be put. New matters (that is, matters not initially covered in evidence-in-chief) may not be introduced in re-examination without the permission of the court, who should then permit cross-examination on such new matters introduced in re-examination.

2.6.6 Questioning where an intermediary has been appointed

The above procedure is regulated by s 170A of the Act. Section 170A(1) provides that whenever it appears to the court that the proceedings would expose any

witness under the biological *or* mental age of eighteen years 'to undue mental stress or suffering' should he testify, the court concerned may appoint an intermediary in order to enable this child witness to give evidence through that intermediary. The purpose of the procedure is to protect a child witness from the harsh reality of a court session and the adversarial trial system where questioning—and especially cross-examination—may be extremely intimidating to the child (and especially the allegedly sexually abused child).

The child witness is in a separate room with the intermediary. All the people in court, however, can observe the child witness through a one-way mirror or closed-circuit television, as the case may be. The child witness only hears the prosecutor's and counsel's question as relayed by the intermediary, either in its original form or as amended by the intermediary who may convey the general purport of the question. The whole process is described as follows by Van der Merwe in Schwikkard & Van der Merwe *Principles of Evidence* 4 ed (2016) para 18 11:

> In terms of s 170A(2)*(a)* of the CPA no examination in chief, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary shall take place in any manner other than through that intermediary. This means that the parties may at no stage question the witness directly. It is only the court that may question the witness without intervention by the intermediary . . . A crucial provision is contained in s 170A(2)*(b)* of the CPA: 'The . . . intermediary may, unless the court directs otherwise, convey the general purport of any questions to the relevant witness.' This means that—subject to the court's final control—any question put by the prosecutor and the defence may be 'blocked' by the intermediary in the sense that the intermediary may 'relay' the question to the witness in a different form. The general purport of the question is conveyed and the *ipsissima verba* of the original question may be ignored. The court may *mero motu* or in response to objections raised by one or more of the parties direct the intermediary to put the original question or, if necessary, to make another attempt at conveying the general purport of the original question. Or the court may take a shortcut and put the original question in the form that it thinks fit. But the nature of the court's question must be such that the court does not descend—or is not perceived to be descending—into the arena. The court may not cross-examine.

Section 170A is not unconstitutional (*Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC); *K v Regional Court Magistrate NO* 1996 (1) SACR 434 (E)).

The Minister may by notice in the *Gazette* determine the category or class of persons who are competent to be appointed as intermediaries by a court—s 170A(4)*(a)*. Examples of such persons are certain doctors, social workers, child care workers, teachers and psychologists. Lawyers do not qualify.

2.7 The principle of finality

The above principle demands that neither the State nor the accused should be permitted to reopen their cases once closed, unless such reopening is necessary to introduce rebutting evidence where a party was taken by surprise. Thus, where new facts, which the prosecution could not have foreseen, are introduced during the course of the defence case, a reopening of the prosecution's case should be permitted to allow for evidence in rebuttal (*Christie* 1982 (1) SA 464 (A)). Similarly, an accused who is surprised by the unexpected incriminating evidence of a co-accused should be allowed to reopen his case to testify in his own defence or call witnesses in an attempt to rebut the co-accused's evidence (*Simelane* 1958 (2) SA 302 (N)).

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3 The case for the prosecution

3.1 Opening of the State's case

Before any evidence is led the prosecutor is entitled to address the court for the purpose of explaining the charge and indicating the evidence intended to be adduced for the prosecution, but without comment thereon—s 150(1). Although this subsection does not expressly say so, the prosecutor's address (except in cases where argument is necessary on an objection) is heard after the process of arraignment is completed. The subsection

clearly comes into operation only where an accused has pleaded not guilty and the prosecutor intends to lead evidence—*Sethole* 1984 (3) SA 620 (O).

In practice it is considered unnecessary for the prosecutor to deliver an opening address in simple cases. In complicated cases an address by the prosecution at the opening of the case can be of great assistance to the court. The prosecution is expected to give a summary of the essential features of the case for the State so that the court will be in a position to appreciate the significance of each item as it is presented in the light of the evidence which is still to be led by the State.

The prosecutor should avoid any reference to evidence which may not be admissible or to any contentious matter which may prejudice the case of the accused. Such matters should be dealt with, as a rule, when they arise in the course of the trial and, if necessary, in the absence of the assessors.

The defence may cross-examine a State witness on a discrepancy between his or her evidence and the prosecutor's opening address (*Mbata* 1977 (1) SA 379 (O)). The circumstances of each case will determine the credibility inference to be drawn from inconsistencies between the State's evidence and what the prosecutor said (*V* 1995 (1) SACR 173 (T)).

3.2 The calling of State witnesses and examination-in-chief by prosecutor

Each witness called by the prosecutor is by way of questions taken through examination-in-chief by the prosecutor, who is obliged to ensure that his questions comply with the evidential rules governing examination-in-chief, for example, the rule that no leading questions may be put in respect of matters in dispute. See para 2.6.3 above.

In terms of s 150(2)*(a)* the prosecutor may question the State witnesses 'and adduce such evidence as may be admissible to prove that the accused committed the offence referred to in the charge or that he committed an offence of which he may be convicted on the charge'.

In those exceptional cases where a document may be received in evidence upon its mere production, the prosecutor shall read out the contents of the document in court unless the accused has a copy or dispenses with the reading out thereof—s 150(2)*(b)*.

The prosecutor is not compelled to call all available witnesses to an occurrence (*Heilbron* 1922 TPD 99). It is ultimately a tactical decision; and much will depend on the facts of the case. But the prosecutor should always take into account that a failure to call an available and crucial State witness might in certain circumstances give rise to an adverse inference. See further Schwikkard and Van der Merwe *Principles of Evidence* 4ed (2016) para 30 10.

A prosecutor is obviously not obliged to call witnesses whom he on reasonable grounds believes to be untruthful, hostile to the State's case or in league with the

accused. In *Van der Westhuizen* 2011 (2) SACR 26 (SCA) Cloete JA also said (at [12]): 'Where an accused is represented, it is not the function of the prosecutor . . . to call evidence which is destructive of the State case, or which advances the case of the accused.' See also *Masoka* 2015 (2) SACR 268 (ECP) at [12]. See further para 4.16 of Chapter 3, above.

It is accepted practice that the prosecutor at a High Court trial is not obliged to call all the witnesses who made depositions at the preparatory examination. Where the cross-examination of a witness at the preparatory examination has shown that any such witness may be of importance to the defence, the prosecutor should, in any event, secure his presence at the trial so that he may be called by the defence or by the court.

The prosecutor is free to call at the trial a witness or witnesses although such witnesses have not given evidence at the preparatory examination and even though their names do not appear on the list which a director of public prosecutions has to supply to an accused who is arraigned in a High Court—s 144(3). Wherever practicable he should

give notice that such witness or witnesses will be called and a copy of their statements should be made available—as would be the situation in respect of copies of statements in the police docket.

3.3 Cross-examination of State witnesses by the defence

The defence has the right to cross-examine each and every State witness. See s 35(3)*(i)* of the Constitution as read with s 166(1) of the Act and *Mgudu* 2008 (1) SACR 71 (N) at 77 and *Msimango* 2010 (1) SACR 544 (GSJ) at [4]. In *Manqaba* 2005 (2) SACR 489 (W) the trial court had refused cross-examination of a child witness on statements made to the police. The purpose of the trial court's refusal was to protect the child from possible traumatisation. This refusal, the High Court held, amounted to an irregularity negating an accused's right to a fair trial. See further *Nkosi* 2010 (1) SACR 60 (GNP).

All questions put and procedures followed must be in line with the general rules and principles governing cross-examination. See generally para 2.6.4 above.

Cross-examination partly by the legal representative and partly by the accused must be avoided (*Baartman* 1960 (3) SA 535 (A) 538B). The legal representative is in principle in control of the case and, where required, the accused should have the right to give instructions to his legal representative during and at the end of the latter's cross-examination of a State witness (*Mdyogolo* 2006 (1) SACR 257 (EC)). In *Nkwanyana* 1990 (4) SA 735 (A) the accused had declined the services of legal aid counsel appointed for purposes of their trial, who had already consulted them. The trial court nevertheless requested counsel to remain in court and cross-examine State witnesses once the accused had done so. This procedure, Nestadt JA held, at 738E, was unacceptable: It not only detracted from the right of the accused to defend themselves, but also created the risk of answers adverse to the accused being elicited by their former counsel.

Where an accused has more than one legal representative (for example, senior and junior counsel), only one of them is allowed to cross-examine a particular State witness. See generally *Yanta* 2000 (1) SACR 237 (Tk) 250*h-j* and compare *Basson* 2001 (2) SACR 537 (T) as discussed in para 5.6 below.

Counsel is in principle required to put the defence of the accused to State witnesses who happen to be in a position to respond to it: 'This rule is followed to

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ensure that trials are conducted fairly, that witnesses have the opportunity to answer challenges to their evidence, and that parties to the suit know it may be necessary to call corroborating or other evidence relevant to the challenge that has been raised' (*Boesak* 2001 (1) SACR 1 (CC) at [26]). See also further *Mavinini* 2009 (1) SACR 523 (SCA) at [13]. The circumstances of each case will determine the extent to which the defence should be put and the evidential consequences of a failure to do so. In *Scott-Crossley* 2008 (1) SACR 223 (SCA) it was said (at [26]) that 'it is not necessary for an accused's version to be put in all its detail' to every State witness. In the same paragraph it was also said that 'the failure to put a version, even where it should have been put, does not necessarily warrant an inference that an accused's version is a recent fabrication'. The failure of an undefended and ignorant accused to cross-examine on matters in dispute ought not to have any adverse evidential consequences. It has rightly been said that the rule 'does not simply perfunctorily operate to the prejudice of [the accused] because of his legal representative's shortcomings or because of his own inability to cross-examine' (*Abader* 2008 (1) SACR 347 (W) at 356*c*).

3.4 Re-examination of State witnesses by the prosecutor

Cross-examination of a State witness is followed by the prosecutor's re-examination, if indeed such re-examination is necessary. See further para 2.6.5 above as well as s 166 (1) of the Act.

3.5 Closing the State's case

After all the evidence for the prosecution has been disposed of, the prosecutor must close his case. A presiding officer does not have the authority to close the State's case if the prosecutor is not willing to do so. If the prosecutor, however, after an application by him for the postponement of the trial has been refused, refuses to lead evidence or to close the State's case, it is presumed that the State's case is closed, and the judicial officer should continue with the proceedings as if the prosecutor had indeed closed the State's case—*Magoda* 1984 (4) SA 462 (C). See also para 4.13 in Chapter 3 for a discussion of the *Magoda* case in the context of the general principle that the prosecution is *dominus litis*.

4 Discharge of accused at the end of the State's case

4.1 The provisions of s 174

The above section provides as follows:

> If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

In *Masondo: In re S v Mthembu* 2011 (2) SACR 286 (GSJ) at [38] Kgomo J noted that—

> Processes under s 174 translate into a statutorily granted capacity to depart discretionarily, in certain specific and limited circumstances, from the usual course a case should take. It is meant to cut the tail off a superfluous process. Such a capacity does not detract from either the right to silence or the protection against self-incrimination. If an acquittal flows at the end of the State case, the opportunity or need to present evidence by the defence on the charge(s) in issue falls away. If discharge is refused, the accused still has the choice

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> whether to testify or close his case on the charge(s) in issue. There is no obligation on him to do either. Once the court rules that there is no *prima facie* case against an accused, there also cannot be any negative consequences as a result of the accused's silence in this context.

4.2 Background and interpretation

The historical background to s 174 was set out in *Cooper* 1976 (2) SA 875 (T). The origin of the section can be traced to trial by jury. Judges (who had the duty to decide matters of law) thought that they should be able to withdraw a case from the jury (who had to decide matters of fact) where it was clear, at the end of the case for the prosecution, that there was no evidence upon which a reasonable person might convict. See generally *Legote* 2001 (2) SACR 179 (SCA) at [8]. The judges accordingly ruled, as a matter of law, that they could in these circumstances, and in order to avoid a so-called perverse verdict, direct the jury to acquit the accused. This process came to be known as the 'discharge of the accused at the end of the State's case'. But such a discharge is for all purposes the same as an acquittal on the merits. It provides an accused with the plea of prior acquittal should he be recharged on the same subject matter.

The fact that the discharge of an accused at the end of the State's case is treated as a question of law means that assessors (as finders of fact and remnants of the jury) are not entitled to decide with the judge or magistrate, as the case may be, whether a discharge as provided for in s 174 should be granted (*Magxwalisa* 1984 (2) SA 314 (N)).

There is a general rule that in deciding whether to grant a discharge, a judge or magistrate may not take into account the credibility of the State witnesses (*Dladla (2)* 1961 (3) SA 921 (D)). This rule is rather peculiar, but must be understood in the historical context as explained above. Once the judges in jury trials had claimed that discharge was a question of law and not fact, they were for the sake of consistency obliged to accept that credibility (clearly a matter of fact to be decided by the jury) could not play a role in granting or refusing discharge. However, cases decided since *Dladla* (above) have shown greater flexibility (*Nandha Gopal Naidoo* 1966 (1) PH H104 (W)). In *Mpetha* 1983 (4) SA 262 (C) it was held that the credibility of State witnesses should play a limited role, and that their evidence should only be ignored where the quality is so poor that no reasonable person would accept it. See further *Swartz* 2001 (1) SACR 334 (W).

Where the State's case consists of circumstantial evidence permitting various inferences, a discharge may be refused if one of the inferences indicates that the accused is guilty (*Cooper* (above) 889). The standard of proof beyond reasonable doubt does not apply at this stage (see para 4.3 below) and the rules of logic set out in *R v Blom* 1939 AD 188 to ensure compliance with this final standard do not apply. It is accordingly possible that an accused who has not been discharged in terms of s 174 may close his case without leading any evidence and yet be acquitted on account the difference in the standards of proof applicable to each stage. See further *Masondo: In re S v Mthembu* 2011 (2) SACR 286 (GSJ) at [45] and [46].

A discharge in terms of s 174 cannot be considered once the defence has commenced the presentation of its case. See *Phuravhaltha* 1992 (2) SACR 544 (V), where multiple accused were involved.

An accused may be discharged in respect of one or some or all of the charges against him. See *Manekwane* 1996 (2) SACR 264 (O).

An accused's denial of unlawfulness in response to questions put by the court in terms of s 112(1)*(b)* cannot be taken into account for purposes of a discharge in terms of s 174 (*Adams* 1993 (1) SACR 330 (C)).

A court should, where appropriate, of its own accord raise the question of a discharge, and should do so even where the accused has legal representation (*Legote* 2001 (2) SACR 179 (SCA)). The court's failure to advise an unrepresented accused of his right to apply for a discharge in terms of s 174 can amount to a fatal irregularity in the proceedings (*Zwezwe* 2006 (2) SACR 599 (N)); *Amerika* 1990 (2) SACR 480 (C)).

A court's refusal to discharge an accused is not appealable (*Ebrahim* 2000 (2) SACR 173 (W)). The reason for this is that a refusal to discharge does not decide 'anything with final effect' against the accused (*Van Deventer* 2012 (2) SACR 263 (WCC) at [6]).

4.3 The test for discharge

4.3.1 The so-called 'Schuping test'

In the pre-constitutional era the following test as stated in *Schuping* 1983 (2) SA 119 (B) at 120H-121I came to be accepted in most High Court decisions:

> At the close of the State case, when discharge is considered, the first question is (i) is there evidence on which a reasonable man might convict; if not (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence.

4.3.2 The 'Schuping test' in the constitutional era

The two-legged test (the '*Schuping* test') as set out in the previous paragraph was subjected to constitutional scrutiny in various High Court decisions. Taking into account constitutional rights such as the privilege against self-incrimination and the right to human dignity and personal freedom, the Supreme Court of Appeal in *Lubaxa* 2001 (2) SACR 703 (SCA) took the following view:

(a) An accused must be discharged at the end of the State's case if a conviction would only be possible if the accused were to testify and incriminate himself. At [19] it was said that the constitutional right to dignity (s 10 of the Constitution) and the constitutional right to freedom (s 12 of the Constitution) call for a discharge if 'the prosecution has exhausted [its] evidence and a conviction is no longer possible except by self-incrimination'. The prosecution, it was said, was instituted on the basis of the common-law principle that the prosecution had reasonable and probable cause to believe that the accused was guilty; and if by the end of the State's case possible self-incrimination is the only form of incrimination left, a fair trial demands a discharge.

(b) The approach in *(a)* above would, according to the court in *Lubaxa* (above), not apply in a case where there are co-accused and 'the prosecution's case against one

accused might be supplemented by the evidence of a co-accused' at [20]). In such an instance the refusal to discharge is not based on an expectation of self-incrimination. It is the prospect of incrimination by a co-accused which can justify refusal to discharge.

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However, if there is at the end of the State's case nothing whatsoever to indicate that a co-accused will incriminate an accused, refusal of a discharge would 'undoubtedly [deny the accused] a fair trial' (*Nkosi* 2011 (2) SACR 482 (SCA) at [27]).

5 The defence case

The defence is required to proceed with its case if there is no discharge as provided for in s 174 of the Act. Various options are available to the accused.

5.1 The passive defence right: closing the defence case as a response

The accused has a passive defence right in the sense that he can refuse to testify in his own defence *and* can also refuse to call any possible defence witnesses. This is a legitimate response. The accused has a constitutional right to refuse to testify—s 35(3)*(h)* of the Constitution. The defence case can be closed without any defence evidence having been led. The court—after having been addressed by the parties—is then required to consider its verdict. See Chapter 18 below. The possible evidential consequences of an accused's decision not to testify in his own defence were discussed in para 3.5 of Chapter 1, above.

5.2 Defence address

If the accused intends to adduce defence evidence, he or his legal representative 'may address the court for the purpose of indicating to the court, without comment, what evidence [will be led] on behalf of the defence'. See s 151(1)*(a)* of the Act. The accused's right to deliver a defence address is rarely exercised and hardly ever necessary because the earlier cross-examination of State witnesses would in most instances have disclosed the nature of the defence.

5.3 The active defence right

The active defence right of an accused has two basic components: his constitutional and statutory right to testify in his own defence *and* his constitutional and statutory right to call defence witnesses if any are available (s 35(3)*(h)* of the Constitution and s 151 of the Criminal Procedure Act).

There is nothing that prevents an accused from combining elements of his active and passive defence rights. He may, for example, refuse to be a witness in his own defence (he exercises his passive defence right) and yet insist on calling defence witnesses (he relies on this component of his active defence right).

5.4 The active defence right and the sequence of defence witnesses

An accused who wishes to testify in his own defence *and* wants to call one or more defence witnesses is in terms of s 151(1)*(b)* of the Act required—in principle—to testify before calling his defence witnesses. However, the court may 'on good cause shown' allow a deviation from this sequence. See s 151(1)*(b)*(i); *Nene* 1979 (2) SA 520 (D). The purpose of s 151(1)*(b)* is to avoid a situation where an accused, having heard his defence witnesses first, can tailor his testimony to fit theirs. Where an accused decides to testify in his own defence after having called his defence witnesses, 'the court may draw such inference from the accused's conduct as may be reasonable in the circumstances' (s 151(1)*(b)*(ii)).

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5.5 Evidence-in-chief of defence witnesses

All defence witnesses—including the accused as a defence witness—give evidence-in-chief in terms of the process identified in para 2.6.3 above. An accused who wishes to testify from the dock, and not the witness-box, should be permitted to do so (*Tsane* 1978 (4) SA 161 (O); *Bulala* 1997 (2) SACR 267 (BVHC)).

5.6 Cross-examination of defence witnesses by the prosecution

In terms of s 166(1) of the Act a prosecutor may cross-examine any defence witness, including an accused, called on behalf of the defence. Such cross-examination must take place in terms of the rules identified in para 2.6.4 above. The fact that the legal representative of the accused fails to object to rude, hectoring and unreasonable cross-examination by the prosecutor does not absolve the trial court from its duty to intervene in order to secure a fair trial (*Omar* 1982 (2) SA 357 (N)). Unfair cross-examination of an accused may result in a constitutional irregularity (*Tshoma & others v Regional Magistrate Uitenhage & another* 2001 (8) BCLR 860 (E)).

In para 3.3 above reference was made to the rule that where a party has more than one legal representative, only one of them would be allowed to cross-examine a particular witness. But in *Basson* 2001 (2) SACR 537 (T) the court was prepared to deviate from this rule for the sake of shortening a long and complicated trial. It did so at the request of the prosecuting team which consisted of four state advocates. The accused faced several fraud charges and other charges. The state advocate who led the team in respect of the fraud charges was allowed to cross-examine the accused on these charges, whereas the state advocate who led the team in respect of the other charges was allowed to cross-examine in respect of those charges. The court, however, also set certain conditions, for example, that the state advocate who commenced cross-examination would not be permitted to put further questions once his colleague started cross-examining.

5.7 Re-examination of defence witnesses

All defence witnesses—including an accused who has testified in his own defence—can be taken through re-examination if necessary. Such examination takes place in terms of the rules described in para 2.6.5 above.

6 Final arguments by prosecution and defence

Once all the evidence has been adduced, the prosecutor may address the court on the merits, that is, the question of guilt or innocence; and the defence may thereafter also address the court—s 175(1); *Dlamini* 1992 (2) SACR 533 (N). The prosecutor has the right to reply on any matter of law raised by the defence in its address; and the prosecutor may also, with the court's permission, respond to any matter of fact raised by the defence in its address—s 175(2).

The court's duty to explain to an undefended accused that he has the right to address the court may not be delegated to the interpreter (*Lekhetho* 2002 (2) SACR 13 (O)). The refusal of an accused to address the court means that he either abandons or loses this right (*Vermaas* 1997 (2) SACR 454 (T)). The court's failure to allow an address can infringe the constitutional fair trial right of the accused. See generally *Muller* 2005 (2) SACR 451 (C); *Adams* 2009 (1) SACR 394 (C) and *Shamatla* 2004 (2) SACR 570 (E).

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7 The verdict on the merits

This matter is dealt with in the next chapter.

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Chapter 18
The verdict

SE van der Merwe

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The Constitution and this chapter:

Section 35—Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right—

(a) to be informed of the charge with sufficient detail to answer it;

See 4.2, below

(d) to have their trial conclude without unreasonable delay;

See 2, below

(k) to be tried in a language that the accused understands or, if that is not practicable, to have the proceedings interpreted in that language;

See 1, below

(o) of appeal to, or review by, a higher court.

See 3, below

1 Introduction

After having heard the final arguments by the prosecution and the defence in support of their respective cases (see para 6 of Chapter 17 above), the court is required to give judgment. This means that the court must consider and deliver its verdict on the 'merits' of the case, that is, whether the accused should be acquitted or convicted on the charge (s) against him. Indeed, in terms of s 106(4) as read with s 108 of the Act an accused is

entitled to demand that he be acquitted or convicted. See also para 5 of Chapter 14 above.

Judgment must be delivered in open court (see Chapter 15 above) and in a language that an accused understands (s 35(3)*(k)* of the Constitution). Where required, the whole judgment must be interpreted to an accused in a language he understands.

The role of assessors in assisting a judge or magistrate in reaching a verdict on the merits of the case was discussed in Chapter 13 above.

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Where there are two or more counts in a charge or indictment, a court is required to return a verdict in respect of each count and to do so in a single judgment. See *Mabayi* 1966 (3) SA 730 (C); *Mthetwa* 1970 (2) SA 310 (N). An accused who has pleaded not guilty to charges in respect of which the trial court has given no verdict is on appeal or review entitled to an acquittal on all these charges. See *Sithole* 1999 (1) SACR 227 (T) at 299*h*. Different considerations might apply where no verdict was given in respect of a plea of guilty and it is on appeal or review clear that this plea was adequately supported by statements made by the accused. See generally *Fongoqa* 2016 (1) SACR 88 (WCC) at [68].

2 Verdict to be delivered within reasonable time

A court would normally give its judgment immediately where the facts and law are straightforward. This is known as an '*ex tempore* judgment'. The court, however, is also entitled to postpone the case for purposes of considering its verdict, and would normally have to do so where the factual and legal issues so demand. See s 177 of the Criminal Procedure Act. The Supreme Court of Appeal has stated that there is an ethical duty on the court to give judgment promptly and without undue delay, that parties are entitled to judgment as soon as reasonably possible and, furthermore, that improper delays destroy public confidence in the courts. See *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang NNO; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) at 261H. An accused also has a constitutional right to have his trial concluded 'without unreasonable delay'—s 35(3)*(d)* of the Constitution.

A trial is concluded upon acquittal; if convicted, the matter of sentencing—as discussed in the next chapter—must be dealt with in order to bring the trial to conclusion. Reviews and appeals are post-trial procedures and are dealt with below in Chapters 20 and 21, respectively.

An appeal judgment must also be delivered within a reasonable time. In *Myaka* (unreported, GSJ case no A5040/2011, 215/2005, 21 Sept 2012) two of the three judges who heard the appeal delivered their own judgments after the third judge, who was supposed to have written a draft judgment, had failed to do so.

3 Court required to give reasons

In *National Director of Public Prosecutions v Naidoo and Others* 2011 (1) SACR 336 (SCA) Mpati P and Tshiqi JA said (at [18]):

> The importance of furnishing reasons for a judgment is a salutary practice. Judicial officers express the basis for their decisions through reasoned judgments. A statement of reasons gives assurance to the parties and to any other interested member of the public that the court gave due consideration to the matter, thereby ensuring public confidence in the administration of justice.

In terms of s 146 of the Act a judge is required to give reasons for any conclusions reached by him or her in respect any question of law or fact—*Maake* 2011 (1) SACR 263 (SCA) at [24]. A magistrate is also obliged to give reasons for his or her decision on any factual or legal issue—s 93*ter*(3)*(c)* to *(e)* of the Magistrates' Courts Act 32 of 1944; *Maake* (above) at [25]; *Molawa* 2011 (1) SACR 350 (GSJ) at [12]-[14]. In *Mokela* 2012 (1) SACR 431 (SCA) at [12] it was said: 'People need to know that courts do not

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act arbitrarily, but base their decisions on rational grounds.' See also *Strategic Liquor Services v Mvumbi NO* 2010 (2) SA 92 (CC) at [15].

Proper reasons require 'an intelligent analysis of the evidence' and cannot consist of 'a mechanical regurgitation of the evidence'—*Bhengu* 1998 (2) SACR 231 (N) 234*f*-235*a*. Paucity of reasons and the absence of any specific finding as regards the evidence of an accused are 'tantamount to a situation where no reasons for a conviction are given'—*Ngabase* 2011 (1) SACR 456 (ECG) at [4]. See also *Mcoseli* 2012 (2) SACR 82 (ECG). The court must assess the evidence 'holistically'—*Van de Venter* 2011 (1) SACR 238 (SCA) at [8]; *Crossberg* 2008 (2) SACR 317 (SCA) at [157]; *Monyane* 2008 (1) SACR 543 (SCA) at [21]. '[T]he conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence'—per Nugent J in *Van der Meyden* 1999 (1) SACR 447 (W) 450*b*.

The absence of reasons has an adverse effect on the constitutional right of an accused of appeal to, or review by, a higher court—s 35(3)*(o)* of the Constitution; *Calitz* 2003 (1) SACR 116 (SCA); *Molawa* 2011 (1) SACR 350 (GSJ) at [14]-[15]. In the absence of reasons, it becomes difficult for the accused to assess whether an appeal, or review, would have reasonable prospects of success. The trial court's failure to furnish reasons also hampers the task of the appeal or review court. See generally *Molawa* (above) at [17]; *Frazenburg* 2004 (1) SACR 182 (E); *Van der Berg* 2009 (1) SACR 661 (C) at [15]; *Maake* 2011 (1) SACR 263 (SCA) at [20].

On appeal a trial court's findings of fact are—in the absence of a demonstrable and material misdirection by the trial court—presumed to be correct, unless the recorded evidence shows these findings to be clearly wrong (*Hadebe* 1997 (2) SACR 641 (SCA) at 645*e-f*; *Seedat* 2015 (2) SACR 612 (GP) at [23]). A court of appeal would also be able to consider the evidence afresh and make its own factual findings if 'no judgment worth speaking of' was delivered by the trial court. See *Carter* 2014 (1) SACR 517 (NCK) at [6].

4 Competent verdicts (general rules)

4.1 Nature, purpose and statutory basis

It is possible that the evidence might fall short of proving the crime charged, but nevertheless succeed in proving beyond reasonable doubt the commission of some other offence *not* specifically formulated as an alternative charge, in terms of s 83 of the Act, to the charge in the indictment or charge-sheet, as the case may be. This type of situation is governed by the statutory rules pertaining to so-called competent verdicts, that is, the unexpressed or latent or implied charges which only surface once the crime charged is not proved but some other crime, which is normally lesser than or akin to the crime charged, is proved. Where the sole charge against the accused is, for example, murder and the state fails to prove intention to kill (an essential element of murder) but succeeds in proving negligence (an element of culpable homicide), the court is in terms of s 258*(a)* of the Act entitled, and required, to convict the accused of culpable homicide even though the accused had not originally and expressly been charged with culpable homicide. See further para 5.3 below.

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Sections 256-270 of the Act identify the situations and crimes that will give rise to competent verdicts. However, see also para 5.8 below for a discussion of the provisions of s 1(2) of the General Law Amendment Act 1 of 1988.

Competent verdicts are only possible if permitted by statutory provisions. To convict an accused of housebreaking with the intention to steal is not a competent verdict on a charge of robbery because neither s 260 nor s 270 of the Act, nor any other statutory provision, allows housebreaking with the intention to steal as a competent verdict on a charge of robbery (*Nyamza* 2000 (1) SACR 626 (Ck)). If the charge of housebreaking with intent to steal had, however, been included as an express alternative to the charge of robbery, as provided for in s 83 of the Act, such a conviction would have been possible if the main charge were not proved.

One of the objects of competent verdicts is to make it unnecessary to have a range of express alternative charges. See *Jabulani* 1980 (1) SA 331 (N) 332B-C. In *BM* 2014 (2) SACR 23 (SCA) at [4]-[6] it was said that when formulating the charge(s) against an accused, prosecutors must pay proper attention to possible competent verdicts.

If the express charge against the accused is proved, a court may not resort to any competent verdict provided for in statutory provisions (*Mmolawa* 1979 (2) SA 644 (B)). In this instance a conviction on the express charge is required.

The prosecution is not entitled to a competent verdict simply because it has failed to prove the express charge. A competent verdict can only follow where there is proof beyond reasonable doubt of the implied offence (*Mbatha* 1982 (2) SA 145 (N)) and no such proof in respect of the offence charged.

A conviction on a competent verdict must be regarded as an acquittal on the original charge. See *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) at [7]-[9].

4.2 Competent verdicts and the constitutional right to a fair trial

An essential component of an accused's common-law and constitutional right to a fair trial is the right to be informed of the charge(s) with sufficient detail (s 35(3)(*a)* of the Constitution; *Jugazi* 2001 (1) SACR 107 (C); *Fielies* 2006 (1) SACR 302 (C) at [7]). Competent verdicts clearly create a risk of 'trial by ambush' in breach of the right to a fair trial (*Motsomi* 2005 JDR 1080 (T) at [4]). Our courts have therefore over the years developed rules of practice to ensure that the convenience of having competent verdicts does not render a trial unfair (*Chauke* 1998 (1) SACR 354 (V) 356*j*-357*a*; *Masita* 2005 (1) SACR 272 (C); *Kester* 1996 (1) SACR 461 (B)). These rules were set out as follows by Griesel J in *Fielies* (above) at [9]:

(a) The constitutional right to be informed of the charge includes the right to be informed of competent verdicts on the charge.

(b) While it is not essential to refer to competent verdicts in the charge-sheet, it is extremely desirable that an undefended accused be informed timeously of any competent verdicts that might be returned on conviction . . .

(c) In order to give efficacy to this right, it is important that the accused be informed of competent verdicts before pleading.

(d) These principles have particular relevance—but are not limited to the situation—where a statutory provision places an *onus* on the accused.

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(e) Failure to inform an accused of a competent verdict does not *per se* preclude the court from recording such competent verdict. Everything will depend upon the facts of each particular case and the extent to which an accused may or may not be prejudiced in the conduct of his or her defence by such omission. Where there is the likelihood of prejudice to the unrepresented accused, the return of a competent verdict would not be sanctioned.

(f) In the ultimate analysis, the enquiry is simply whether the accused has been given a fair trial.

'Prejudice' as envisaged in para *(e)* above is absent where the court concludes that an accused—had his attention been drawn to the risk of a competent verdict—could not have conducted his defence any differently or would not have had any other defence (*Mwali* 1992 2 SACR 281 (A)).

Prejudice is present where the absence of the warning of the risk of a competent verdict leaves an unrepresented accused 'to flounder' (*Dayimani* 2006 (2) SACR 594 (E) at [15]); or where an accused is only during the trial court's judgment informed of the relevant competent verdict (*Fielies* (above) at [10]); or where a trial court warns an accused of the risk of a competent verdict only after the court has noted the accused's admissions in respect of such a competent verdict (*Hlakwane* 1993 (2) SACR 362 (O)).

In cases where the accused had legal representation, the courts would normally be slow to conclude that the absence of a warning concerning a competent verdict had rendered the trial unfair (*Jasat* 1997 (1) SACR 489 (SCA) 493*h*-494*a*). But issues of fact and law may be such that an unfair trial may result despite legal representation (*Mukwevho* 2010 (1) SACR 349 (GSJ) at 360*a*-*d*).

An accused can plead guilty to an offence which is a competent verdict in respect of the offence charged. See s 106(1)*(a)* of the Act.

5 Competent verdicts (selected examples)

In a work of this nature it is not possible to deal with all the possible competent verdicts on particular charges. What follows is a selection, but should not detract from the fact that both prosecutor and defence lawyer should at all times be alert to possible competent verdicts in respect of cases they are involved in.

5.1 Attempt: s 256 of the Act

In terms of the above section any person charged with an offence may be found guilty of an attempt to commit such offence, or of an attempt to commit any other offence of which he may be convicted on the charge, if such be the facts proved. Thus, if A is charged with murder and murder is not proved, a conviction of attempted murder must follow if such an attempt is proved; and if attempted murder is also not proved, but only an attempted robbery, then a conviction of attempted robbery would be in order because robbery is in terms of s 260 a competent verdict on a charge of murder. See para 5.3 below.

A verdict of attempt is not permitted where the evidence proves the offence charged (*Makhutla* 1969 (2) SA 490 (O) 492H).

An accused charged with an attempt cannot be convicted of the completed crime even if such completion is proved. In such an instance s 256 does not prohibit a conviction on the attempt as charged (*Sikhakane* 1982 (2) SA 289 (N)).

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An accused acquitted upon a charge of having committed an offence can successfully raise the plea of prior acquittal (*autrefois acquit*) if subsequently charged with an attempt to have committed such offence. The reason for this is that at his first trial he was already, on account of the provisions of s 256, in jeopardy in respect of the attempt. See further s 106(1)*(d)* of the Act as well as the discussion of *autrefois acquit* in para 4.4.3 in Chapter 14, above.

5.2 Accessory after the fact: s 257 of the Act

If there is no proof that the accused was a perpetrator or co-perpetrator or accomplice in the crime charged, he may be convicted as an accessory after the fact to the crime charged should there indeed be proof that he acted in such a capacity. See further para 3 in Chapter 16 above, where the difference between a participant and an accessory is discussed.

The sentence imposed on an accessory may not exceed the sentence which may be imposed in respect of the offence with reference to which the accused was convicted as an accessory—s 257.

5.3 Murder and attempted murder: s 258 of the Act

The above section provides for the following possible competent verdicts on a charge of murder or attempted murder:

(a) the offence of culpable homicide;
(b) the offence of assault with intent to do grievous bodily harm;
(c) the offence of robbery;
(d) in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in

contravention of section 113 of the General Law Amendment Act 46 of 1935, with intent to conceal the fact of its birth;

(e) the offence of common assault;

(f) the offence of public violence; or

(g) the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law.

5.4 Robbery: s 260 of the Act

The above section determines the competent verdicts in respect of robbery or attempted robbery. Examples of such possible verdicts are: assault with intent to do grievous bodily harm (s 260*(a)*); or common assault (s 260*(b)*); or theft (s 260*(d)*).

Robbery is the only crime where an accused can be convicted of two other crimes if the single robbery charge is not proved but the two other latent crimes are: theft and common assault as two separate competent verdicts *or* theft and assault with intent to do grievous bodily harm as two separate competent verdicts. This unique provision in s 260 must be understood in the context of the substantive criminal law definition of the crime of robbery, namely that it is really theft of property through the use of violence where there is a causal link between the violence and the taking of the property. See Snyman *Criminal Law* 5 ed (2008) at 517. This means that where there is a single charge of robbery and the evidence fails to establish the causal link between the theft and violence, there may nevertheless be proof of theft and violence—hence the two competent verdicts. See further *Matjeke* 1980 (4) 267

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(B). The cumulative effect of the sentence imposed on each of the two convictions must be borne in mind in deciding upon an appropriate punishment. See *Jabulani* 1980 (1) SA 331 (N).

In *S v Rautenbach* 2014 (1) SACR 1 (GSJ) the accused was charged with, amongst other charges, murder and robbery. In respect of the robbery charge he was only convicted of theft as a competent verdict as provided for in s 260*(d)*: it was only after the murder that the intention to steal from the deceased was formed (at [145]).

5.5 Sexual offences in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007: s 261 of the Act

Competent verdicts in respect of the above statutory offences are regulated extensively by s 261 of the Criminal Procedure Act. See generally *Mnguni* 2014 (2) SACR 595 (GP); *Nkosi* 2014 (2) SACR 525 (GP); *Khala* 2015 JDR 1186 (GP). Where the state fails to prove attempted rape, but the evidence is sufficient to prove a ‘sexual assault’, the latter statutory offence would be a competent verdict in terms of s 261(1)*(c)* of the Act. See *BM* 2014 (2) SACR 23 (SCA) at [6].

5.6 Further examples of crimes covered by competent verdicts: s 259 and ss 262 to 269A of the Act

The Act also provides for competent verdicts in respect of the following crimes: culpable homicide (s 259); trafficking in persons in contravention of s 4 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013; housebreaking with intent to commit an offence (s 262); statutory offence of breaking and entering or of entering premises (s 263); theft (s 264); receiving stolen property knowing it to have been stolen (s 265); assault with intent to do bodily harm (s 266); common assault (s 267); statutory unlawful carnal intercourse (s 268); and certain offences under the Prevention and Combating of Corrupt Activities Act 12 of 2004 (s 269A).

5.7 Offences not specified in ss 256 to 269A of the Act: s 270 of the Act

Section 270 provides that if the evidence on a charge of any offence not referred to in ss 256 to 269A of the Act does not prove the offence charged ‘but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved’.

A court should not resort to s 270 in order to remedy the inept or slovenly work of prosecutors who fail to draft the correct charges (Cowling (2000) *SACJ* 227, 237). In *Busuku* 2006 (1) SACR 96 (E) at [12] it was correctly noted that 'the enquiry, when determining whether to invoke . . . s 270 . . . is whether the essential elements of the alleged competent verdict were included in the original charge'. In *Mitchell* 1992 (1) SACR 17 (A) it was held, for example, that all the essential elements of conspiracy to assault were not included in the original charge of murder and that s 270 could therefore not be invoked. *Amas* 1995 (2) SACR 735 (N) provides another example where s 270 could not be invoked: some essential elements of the alleged competent verdict (contempt of court) were not included in the original charge (the statutory offence of failing to grant other parent access to children).

The elements of the offence of escaping (contravening s 51(1) of the Act) are *essentially* the same as the elements of the offence of escaping as provided for in s 117 *(a)* of the Correctional Services Act 111 of 1998. In this instance s 270 would apply.

5.8 The crime of 'statutory intoxication' as a competent verdict on any charge: s 1(2) of the Criminal Law Amendment Act 1 of 1988

In terms of s 1(1) of the above Act a person who voluntarily consumes alcohol (or uses any other drug) to such an extent that it leads to criminal non-responsibility *and* who—whilst in this condition—commits an act punishable by law of which he would have been convicted but for his self-induced lack of criminal responsibility, is guilty of an offence. Snyman *Criminal Law* 5 ed (2008) at 228 refers to this offence as 'statutory intoxication'. This offence may be put as the only charge, or as an express alternative to the main charge, for example, murder alternatively contravention of s 1(1) of Act 1 of 1988. However, in terms of s 1(2) of Act 1 of 1988, a conviction of statutory intoxication—that is, contravention of s 1(1)—may also be a competent verdict in any prosecution for any offence. It is, like a true competent verdict, an automatic alternative to the main charge (*Mphungatje* 1989 (4) SA 139 (O) 144A). Section 1(2) states:

If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (1) were impaired by the consumption or use of any substance, such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.

Where an accused is found guilty of 'statutory intoxication' as a competent verdict, the court's finding must make reference to the original charge, for example, 'guilty of contravening s 1(1) of Act 1 of 1988 (murder)'. See generally *Oliphant* 1989 (4) SA 169 (O); *Pietersen* 1994 (2) SACR 434 (C). An accused can obviously not be convicted of the original charge *and* contravention of s 1(1) of Act 1 of 1988 (*Griessel* 1993 (1) SACR 178 (O)).

A competent verdict like the one created in s 1(2) of Act 1 of 1988 exists—like other competent verdicts created by ss 256-270 of the Criminal Procedure Act—for the sake of convenience, but may never serve as a procedural trap for the ignorant (Van der Merwe (1990) *Stell LR* 94 at 104). The ultimate test is the constitutional right to a fair trial—a matter that was discussed in para 4.2 above.

6 The court's amendment of its own verdict: s 176 of the Act

The common-law principle is that a court is *functus officio* once it has delivered its judgment. This means that the court itself may not alter or revoke its verdict. See generally *Chauke* 2010 (1) SACR 287 (GSJ). Section 176 of the Act creates a very limited exception to this principle. This section provides as follows: 'When by mistake a wrong judgment is delivered, the court may, before or immediately after it is recorded, amend the judgment.' Section 298 of the Act contains a similar provision in respect of the sentence passed by the court.

Section 176 does not entitle a trial court to amend a verdict given as a result of a misdirection or incorrect procedure (*Brand* 1992 (1) SACR 525 (Nm)).

Section 176 is primarily aimed at the situation where a court intends to pronounce a verdict of guilty, for example, of theft, but inadvertently announces a verdict of guilty of robbery—and then wishes to rectify this mistake.

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There is a common-law rule which permits a court to effect linguistic or other minor changes to its judgment as pronounced, without changing the outcome or substance thereof (*Wells* 1990 (1) SA 816 (A)). Section 176 must be read in conjunction with this common-law approach (*Maifala* 1991 (1) SACR 78 (BA)).

Phase Three:
The Sentence

Chapter 19 The sentence

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Chapter 19
The sentence

SS Terblanche

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The Constitution and this chapter:

Section 9—Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms—. . .

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

. . .

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(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

See 3, below

Section 10—Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

See 9.1, below

Section 11—Life

Everyone has the right to life.

See 9.1, below

Section 12—Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right—

(a) not be deprived of freedom arbitrarily or without just cause;

. . .

(d) not to be tortured in any way;

(e) not to be treated or punished in a cruel, inhuman or degrading way.

See 5.3 and 9.1, below

Section 35—Detained, arrested and accused persons

(2) Everyone who is detained, including every sentenced prisoner, has the right—

. . .

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; . . .

(3) Every accused person has a right to a fair trial, which includes the right—

. . .

(n) to the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; . . .

Compare 5, below

Section 36—Limitation

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

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(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

See 9.1 and 9.2, below

The Child Justice Act 75 of 2008 and this chapter:

Section 61—Family group conference

(1) *(a)* A family group conference is an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together, supported by their families and other appropriate persons and, attended by persons referred to in subsection (3)*(b)*, at which a plan is developed on how the child will redress the effects of the offence.

(b) A family group conference may only take place if both the victim and the child consent.

(2) If a child has been ordered to appear at a family group conference, a probation officer appointed by the magistrate referred to in section 42, an inquiry magistrate or a child justice court must, within 21 days after the order, convene the conference by—

(a) setting the date, time and place of the conference; and

(b) taking steps to ensure that all persons who may attend the conference are timeously notified of the date, time and place of the conference.

(3) *(a)* The family group conference must be facilitated by a family group conference facilitator, who may be a probation officer or a diversion service provider referred to in section 56 (1).

(b) A family group conference may be attended by the following persons:

(i) The child and his or her parent, an appropriate adult or a guardian;

(ii) any person requested by the child;

(iii) the victim of the alleged offence, his or her parent, an appropriate adult or a guardian, where applicable, and any other support person of the victim's choice;

(iv) the probation officer, if he or she is not the family group conference facilitator;

(v) the prosecutor;

(vi) any police official;

(vii) a member of the community in which the child normally resides, as determined by the family group conference facilitator; and

(viii) any person authorised by the family group conference facilitator to attend the conference.

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(4) If a family group conference fails to take place on the date and at the time and place set for the conference, the probation officer must convene another conference, as provided for in this section, within 21 days from the date on which it was to take place.

(5) Participants in a family group conference must follow the procedure agreed on by them and may agree to a plan in respect of the child, in accordance with subsection (6).

(6) A plan referred to in subsection (5)—

(a) may include—

(i) the application of any option contained in section 53(3); or

(ii) any other action appropriate to the child, his or her family and local circumstances, which is consistent with the principles contained in this Act; and

(b) must—

(i) specify the objectives for the child and the period within which they are to be achieved;

(ii) contain details of the services and assistance to be provided to the child and a parent, an appropriate adult or a guardian;
(iii) specify the persons or organisations to provide the required services and assistance;
(iv) state the responsibilities of the child and of the child's parent, an appropriate adult or a guardian;
(v) state personal objectives for the child and for the child's parent, an appropriate adult or a guardian;
(vi) include any other matters relating to the education, employment, recreation and welfare of the child as are relevant; and
(vii) include a mechanism to monitor the plan.

(7) *(a)* The family group conference facilitator must record the details of and reasons for any plan agreed to at the family group conference and must furnish a copy of the record to the child and to the probation officer or person referred to in section 57(1).

(b) In the event of the conference not taking place or the child failing to comply with the plan agreed to at the family group conference, the probation officer or person must notify the magistrate, inquiry magistrate or child justice court in writing of the failure, in which case section 58 applies.

(8) If the participants in a family group conference cannot agree on a plan, the conference must be closed and the probation officer must refer the matter back to the magistrate, inquiry magistrate or child justice court for consideration of another diversion option.

(9) No information furnished by the child at a family group conference may be used in any subsequent criminal proceedings arising from the same facts.

Section 62—Victim-offender mediation

(1) *(a)* Victim-offender mediation means an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together at which a plan is developed on how the child will redress the effects of the offence.

(b) A victim-offender mediation may only take place if both the victim and the child consent.

(2) If a child has been ordered to appear at a victim-offender mediation, section 61 (2), (4), (5), (6), (7), (8) and (9) applies with the changes required by the context.

(3) A probation officer appointed by a magistrate referred to in section 42, an inquiry magistrate or a child justice court must convene the victim-offender mediation.

(4) The victim-offender mediation must be mediated by a probation officer or a diversion service provider referred to in section 56 (1), who or which may regulate the procedure to be followed at the mediation.

Section 68—Child to be sentenced in terms of this Chapter

A child justice court must, after convicting a child, impose a sentence in accordance with this Chapter.

See 10.6.3.2, below

Section 69—Objectives of sentencing and factors to be considered

(1) In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this Act are to—
(a) encourage the child to understand the implications of and be accountable for the harm caused;
(b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;
(c) promote the reintegration of the child into the family and community;
(d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and
(e)

use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.

(2) In order to promote the objectives of sentencing referred to in subsection (1) and to encourage a restorative justice approach, sentences may be used in combination.

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(3) When considering the imposition of a sentence involving compulsory residence in a child and youth care centre in terms of section 76, which provides a programme referred to in section 191(2)*(j)* of the Children's Act, a child justice court must, in addition to the factors referred to in subsection (4) relating to imprisonment, consider the following:

(a) Whether the offence is of such a serious nature that it indicates that the child has a tendency towards harmful activities;

(b) whether the harm caused by the offence indicates that a residential sentence is appropriate;

(c) the extent to which the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm; and

(d) whether the child is in need of a particular service provided at a child and youth care centre.

(4) When considering the imposition of a sentence involving imprisonment in terms of section 77, the child justice court must take the following factors into account:

(a) The seriousness of the offence, with due regard to

(i) the amount of harm done or risked through the offence; and

(ii) the culpability of the child in causing or risking the harm;

(b) the protection of the community;

(c) the severity of the impact of the offence on the victim;

(d) the previous failure of the child to respond to non-residential alternatives, if applicable; and

(e) the desirability of keeping the child out of prison.

See 10.6.3.2, 10.6.3.3 and 10.6.3.4, below

Section 70—Impact of offence on victim

(1) For purposes of this section, a victim impact statement means a sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim which reflects the physical, psychological, social, financial or any other consequences of the offence for the victim.

(2) The prosecutor may, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim, and, where practicable, furnish the child justice court with a victim impact statement provided for in subsection (1).

(3) If the contents of a victim impact statement are not disputed, a victim impact statement is admissible as evidence on its production.

Section 71—Pre-sentence reports

(1) *(a)* A child justice court imposing a sentence must, subject to paragraph *(b)*, request a pre-sentence report prepared by a probation officer prior to the imposition of sentence.

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(b) A child justice court may dispense with a pre-sentence report where a child is convicted of an offence referred to in Schedule 1 or where requiring the report would cause undue delay in the conclusion of the case, to the prejudice of the child, but no child justice court sentencing a child may impose a sentence involving compulsory

residence in a child and youth care centre providing a programme referred to in section 191(2)*(j)* of the Children's Act or imprisonment, unless a pre-sentence report has first been obtained.

(2) The probation officer must complete the report as soon as possible but no later than six weeks following the date on which the report was requested.

(3) Where a probation officer recommends that a child be sentenced to compulsory residence in a child and youth care centre providing a programme referred to in section 191(2)*(j)* of the Children's Act, the recommendation must be supported by current and reliable information, obtained by the probation officer from the person in charge of that centre, regarding the availability or otherwise of accommodation for the child in question.

(4) A child justice court may impose a sentence other than that recommended in the pre-sentence report and must, in that event, enter the reasons for the imposition of a different sentence on the record of the proceedings.

Section 72—Community-based sentences

(1) A community-based sentence is a sentence which allows a child to remain in the community and includes any of the options referred to in section 53, as sentencing options, or any combination thereof and a sentence involving correctional supervision referred to in section 75.

(2) A child justice court that has imposed a community-based sentence in terms of subsection (1) must—

(a) request the probation officer concerned to monitor the child's compliance with the relevant order and to provide the court with progress reports, in the prescribed manner, indicating compliance; and

(b) warn the child that any failure to comply with the sentence will result in him or her being brought back before the child justice court for an inquiry to be held in terms of section 79.

See 10.6.3.8, below

Section 73—Restorative justice sentences

(1) A child justice court that convicts a child of an offence may refer the matter—

(a) to a family group conference in terms of section 61;

(b) for victim-offender mediation in terms of section 62; or

(c) to any other restorative justice process which is in accordance with the definition of restorative justice.

(2) On receipt of the written recommendations from a family group conference, victim-offender mediation or other restorative justice process, the child justice court may impose a sentence by confirming, amending or substituting the recommendations.

(3) If the child justice court does not agree with the terms of the plan made at a family group conference, victim-offender mediation or other restorative justice process, the court may impose any other sentence provided for in this Chapter and enter the reasons for substituting the plan with that sentence on the record of the proceedings.

(4) A child justice court that has imposed a sentence in terms of subsection (2) must—

(a) request the probation officer concerned to monitor the child's compliance with the sentence referred to in subsection (2) and to provide the court with progress reports, in the prescribed manner, indicating compliance; and

(b) warn the child that any failure to comply with the sentence will result in the child being brought back before the child justice court for an inquiry to be held in terms of section 79.

See 10.6.3.6, below

Section 74—Fine or alternatives to fine

(1) A child justice court convicting a child of an offence for which a fine is appropriate must, before imposing a fine—

(a) inquire into the ability of the child or his or her parents, an appropriate adult or a guardian to pay the fine, whether in full or in instalments; and

(b) consider whether the failure to pay the fine may cause the child to be imprisoned.

(2) A child justice court may consider the imposition of any of the following options as an alternative to the payment of a fine:

(a) Symbolic restitution to a specified person, persons, group of persons or community, charity or welfare organisation or institution;

(b) payment of compensation to a specified person, persons, group of persons or community, charity or welfare organisation or institution where the child or his or her family is able to afford this;

(c) an obligation on the child to provide some service or benefit to a specified person, persons, group of persons or community, charity or welfare organisation or institution: Provided that an obligation to provide some service or benefit may only be imposed on a child who is 15 years or older; or

(d) any other option that the child justice court considers to be appropriate in the circumstances.

(3) A child justice court that has imposed a sentence in terms of this section must—

(a) request the probation officer concerned to monitor the compliance with the sentence and to provide the court with progress reports, in the prescribed manner, indicating compliance; and

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(b) warn the child that any failure to comply with the sentence will result in the child being brought back before the child justice court for an inquiry to be held in terms of section 79.

See 10.6.3.6, below

Section 75—Sentences of correctional supervision

A child justice court that convicts a child of an offence may impose a sentence of correctional supervision envisaged in section 276(1)*(h)* of the Criminal Procedure Act.

See 10.6.3.5, below

Section 76—Sentence of compulsory residence in child and youth care centre

(1) A child justice court that convicts a child of an offence may sentence him or her to compulsory residence in a child and youth care centre providing a programme referred to in section 191(2)*(j)* of the Children's Act.

(2) A sentence referred to in subsection (1) may, subject to subsection (3), be imposed for a period not exceeding five years or for a period which may not exceed the date on which the child in question turns 21 years of age, whichever date is the earliest.

(3) *(a)* A child justice court that convicts a child of an offence—

(i) referred to in Schedule 3; and

(ii) which, if committed by an adult, would have justified a term of imprisonment exceeding ten years, may, if substantial and compelling reasons exist, in addition to a sentence in terms of subsection (1), sentence the child to a period of imprisonment which is to be served after completion of the period determined in accordance with subsection (2).

(b) The head of the child and youth care centre to which a child has been sentenced in terms of subsection (1) must, on the child's completion of that sentence, submit a prescribed report to the child justice court which imposed the sentence, containing his or her views on the extent to which the relevant objectives of sentencing referred to in section 69 have been achieved and the possibility of the child's reintegration into society without serving the additional term of imprisonment.

(c) The child justice court, after consideration of the report and any other relevant factors, may, if satisfied that it would be in the interests of justice to do so—

(i) confirm the sentence and period of imprisonment originally imposed, upon which the child must immediately be transferred from the child and youth care centre to the specified prison;

(ii) substitute that sentence with any other sentence that the court considers to be appropriate in the circumstances; or
(iii) order the release of the child, with or without conditions.

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(d) If a sentence has been confirmed in accordance with paragraph *(c)*(i), the period served by the child in a child and youth care centre must be taken into account when consideration is given as to whether or not the child should be released on parole in accordance with Chapter VII of the Correctional Services Act, 1998 (Act 111 of 1998).

(4) *(a)* A child who is sentenced in terms of this section, must be taken in the prescribed manner to the centre specified in the order as soon as possible, but not later than one month after the order was made.

(b) When making an order referred to in subsection (1), the child justice court must—
(i) specify the centre to which the child must be admitted, with due regard to the information obtained by the probation officer referred to in section 71 (3);
(ii) cause the order to be brought to the attention of relevant functionaries in the prescribed manner;
(iii) give directions where the child is to be placed for any period before being admitted to the centre specified in the order, preferably in another child and youth care centre referred to in section 191(2)*(h)* of the Children's Act, but not in a police cell or lock-up; and
(iv) direct a probation officer to monitor the movement of the child to the centre specified in the order, in compliance with the order, and to report to the court in writing once the child has been admitted to the centre.

(c) Where the information referred to in section 71(3) is, for any reason, not available, the presiding officer may request any official of the rank of Director or above at the Department of Social Development dealing with the designation of children to child and youth care centres to furnish that information, in respect of the availability or otherwise of accommodation for the child in question.

(d) Where a presiding officer has sentenced a child in terms of this section, he or she must cause the matter to be retained on the court roll for one month, and must, at the re-appearance of the matter, inquire whether the child has been admitted to the child and youth care centre.

(e) If the child has not been admitted to a child and youth care centre, the presiding officer must hold an inquiry and take appropriate action, which may, after consideration of the evidence recorded, include the imposition of an alternative sentence, unless the child has been sentenced in terms of subsection (3).

(f) If the presiding officer finds that the failure to admit the child is due to the fault of any official, he or she must cause a copy of the finding to this effect to be brought to the attention of the appropriate authority to take the necessary action.

See 10.6.3.3 and 10.6.3.4, below

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Section 77—Sentence of imprisonment

(1) A child justice court—
(a) may not impose a sentence of imprisonment on a child who is under the age of 14 years at the time of being sentenced for the offence; and
(b) when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time.

. . .

(3) A child who is 14 years or older at the time of being sentenced for the offence may only be sentenced to imprisonment, if the child is convicted of an offence referred to in—

(a) Schedule 3;
(b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment;
(c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.

(4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment—

(a) for a period not exceeding 25 years; or
(b) envisaged in section 276(1)*(i)* of the Criminal Procedure Act.

(5) A child justice court imposing a sentence of imprisonment must take into account the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed.

(6) In compliance with the Republic's international obligations, no law, or sentence of imprisonment imposed on a child, including a sentence of imprisonment for life, may, directly or indirectly, deny, restrict or limit the possibility of earlier release of a child sentenced to any term of imprisonment.

See 10.6.3.3, below

Section 78—Postponement or suspension of passing of sentence

(1) The provisions of section 297 of the Criminal Procedure Act apply in relation to the postponement or suspension of passing of sentence by a child justice court in terms of this Act.

(2) In addition to the provisions of section 297 of the Criminal Procedure Act, the following may be considered as conditions:

(a) Fulfilment of or compliance with any option referred to in section 53(3)*(a)* to *(m)*, *(q)* and (7) of this Act; and
(b) a requirement that the child or any other person designated by the child justice court must again appear before that child justice court on a date or dates to be determined by the child justice court for a periodic progress report.

(3) A child justice court that has postponed the passing of sentence in terms of subsection (1) on one or more conditions must request the probation officer concerned to monitor the child's compliance with the conditions imposed and to provide the court with progress reports indicating compliance.

See 10.6.3.9, below

Section 79—Failure to comply with certain sentences

(1) If a probation officer reports to a child justice court that a child has failed to comply with a community-based sentence imposed in terms of section 72, or a restorative justice sentence imposed in terms of section 73, or has failed to pay a fine, restitution or compensation provided for in section 74, the child may, in the prescribed manner, be brought before the child justice court which imposed the original sentence for the holding of an inquiry into the failure of the child to comply.

(2) If, upon the conclusion of the inquiry, it is found that the child has failed to comply with the sentence provided for in subsection (1), the child justice court may confirm, amend or substitute the sentence

See, in general, 10.6, below

1 Introduction

Determining a suitable sentence is one of the most difficult tasks a judicial officer has to face. What makes it particularly difficult is the fact that it involves so many (often contradictory) factors. The judicial officer imposing sentence has to make a value judgment and determine how much weight every fact and factor should be afforded, and these considerations must then be converted into a sentence of some kind and some extent. In this process the personality of the sentencing official plays an important role.

In this chapter we investigate only certain procedural aspects of sentencing and mostly leave the substantive aspects aside. We place specific emphasis on the statutory framework supplied by the Criminal Procedure Act 51 of 1977.

2 Concepts

It is important to make a few remarks about some of the terms that are used in this chapter.

2.1 Sentence

The sentence is any measure applied by a court to the person convicted of a crime and which finalises the case. In some instances specific provision is made for reconsideration of a sentence, but this is the exception. Conditions of suspended sentences are not 'sentences'. A caution, however, does amount to a sentence.

2.2 Punishment

Punishment is used here in the usual sense of the word, namely as something which is unpleasant to experience, except that it is limited to measures imposed by

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a court after conviction. Some sentences do not constitute punishment, such as most suspended sentences and a caution. Some forms of punishment are not sentences, for example where community service is imposed as condition for the suspension of sentence. Most forms of punishment will nevertheless be sentences.

2.3 Sentencing

Sentencing is the imposition of a sentence by the court, on a particular offender.

2.4 Offender / criminal / accused

These terms are used to describe the person who is accused or convicted of having committed the crime. Although a theoretical distinction may be drawn between these words, no such a distinction is drawn for the purposes of this chapter and the terms are used interchangeably.

2.5 Offence / crime

These terms are used to describe the action which caused the offender to be tried and sentenced in court. For present purposes the concepts are used as synonymous.

3 The sentence discretion

A court has wide-ranging powers to impose sentences. In deciding how to exercise this power in a specific case, the court exercises a *discretion*, which involves making a choice from various possibilities. In the case of sentencing these 'possibilities' consist of the various types of sentences, and normally also the extent (or quantity) of the type of sentence decided upon.

This discretion may not be exercised arbitrarily; a court is expected to act within the limits prescribed by the legislature and in accordance with the guidelines laid down by higher courts. The basic requirement set by the Supreme Court of Appeal is that the discretion must be exercised reasonably and judicially—cf *Pieters* 1987 (3) SA 717 (A).

The main advantage of a wide discretion is that the courts can adapt their sentences to provide for the slightest differences between cases. The disadvantage is that, should the same case be heard by two different judicial officers, the sentences they may impose can

be very different. This problem creates a conflict with s 9 of the Constitution, which stresses the equality of all people before the law. Inconsistency was described in *Marx* 1989 (1) SA 222 (A) as something which is generally viewed as unjust. Therefore, inconsistent sentences are not consonant with justice and fairness. The South African Law Commission identified a lack of consistency in sentencing as one of the biggest problems of our sentencing system and proposed development of sentencing guidelines to reduce disparity (*Report: Sentencing (A new sentencing framework): Project 82* (2000)).

For a long time the dominant view was that each case is unique and that an appropriate sentence should be based on the facts and considerations of that case alone; consequently, it is an 'idle exercise' to compare the sentences imposed in different cases (*Fraser* 1987 (2) SA 859 (A)). More recently comparisons with the sentences imposed for similar offences in the past have become common (cf *Xaba* 2005 (1) SACR 435 (SCA)). Previous sentences can be a useful guide of what an appropriate sentence can be; following such guides can be useful to limit unnecessary

disparity in sentences. Despite the common practice, the idea that each case is different is still raised from time to time (cf *S v PB* 2013 (2) SACR 553 (SCA)). Such uniqueness is probably overstated in the 'vast majority of cases the unique facts and features lie in the minutiae that have little or no effect on the eventual sentence' Terblanche *A Guide to Sentencing in South Africa* (2016) 145-146).

4 General principles with regard to sentencing

The general principles of sentencing were summarised in *Rabie* 1975 (4) SA 855 (A) 862G as follows:

> Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.

These three elements (the crime, the offender and the interests of society) are known as the "triad of *Zinn*", after the judgment in *Zinn* 1969 (2) SA 537 (A).

Furthermore, all sentences should take into account the (so-called) main purposes of punishment, namely retribution, deterrence, prevention and rehabilitation. Of these purposes deterrence has for a long time been considered the most important (see eg *B* 1985 (2) SA 120 (A) 124), but in *Nkambule* 1993 (1) SACR 136 (A) 146C it was pointed out that this was an oversimplification, as the position is not static.

The process which should ensure that every sentence fits the criminal as well as the crime and is fair to society is known as personalisation (or individualisation) of punishment. This process is considered to be the main reason for leaving sentencers with such a wide discretion.

5 Penalty clauses

5.1 General

Most statutory offences are enacted with an attendant penalty clause. Imprisonment may normally be imposed for these crimes only if it is specifically provided for, as it almost invariably is. The same goes for a fine. If a penalty clause provides for a fine *or* imprisonment (eg R12 000 or 1 year's imprisonment), the court has a discretion to impose either a fine or imprisonment, but not both. It may not, for instance, impose imprisonment directly *and* as an alternative to a fine. For that possibility to exist, the penalty clause should prescribe a fine or imprisonment, *or both*—cf *Arends* 1988 (4) SA 792 (E) 794I-795B.

5.2 The Adjustment of Fines Act 101 of 1991

All penalty clauses providing for a fine must, however, be read together with the provisions of the Adjustment of Fines Act 101 of 1991. This Act replaces, with some exceptions, all existing penalty clauses. It now requires a calculation to be made of the maximum fine that may be imposed, based on the maximum term of imprisonment

prescribed for a particular offence. The ratio between fine and imprisonment is determined by the standard jurisdiction of the magistrate's court, which at present is R120 000 or three years' imprisonment (ie R40 000 for each 12 months' imprisonment). This ratio applies in particular to penalty clauses which provide for the imposition of a fine without reference to a maximum amount—see Terblanche

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A Guide to Sentencing in South Africa (2016) 36-39. But even a penalty clause allowing a penalty of 'not more than R1 000 or six months' imprisonment' must be read with the Adjustment of Fines Act as providing for 'not more than *R20 000* or six months' imprisonment'.

5.3 Minimum sentences

Statutes that prescribe minimum sentences had been few and far between in South African law for some decades, but the position was changed with the passing of s 51 of the Criminal Law Amendment Act 105 of 1997. (This legislation was amended substantially, at the end of 2007, by the Criminal Law (Sentencing) Amendment 38 of 2007.) Section 51, in essence, provides for the imposition of minimum sentences for a wide range of the more serious crimes. For premeditated murder, and rape where aggravating factors are involved (these factors are specifically set out), life imprisonment is prescribed. Specific minimum terms (from five years' to 25 years' imprisonment) are prescribed for a wide range of other crimes, especially when committed by gangs or crime syndicates, or by law enforcement officers. Only High Courts and regional courts may impose these sentences. The minimum sentences were originally intended to apply for a limited period of two years only, which could be extended from time to time. However, following the amendments made by Act 38 of 2007 they are now in force until expressly scrapped.

If the sentencing court is satisfied that there are 'substantial and compelling circumstances' justifying a lesser sentence than that prescribed in a particular case, it must impose such lesser sentence—s 51(3)*(a)*. In *Malgas* 2001 (1) SACR 469 (SCA) the court decided that this provision should be interpreted to have the following effect: The sentencing court should consider the sentences prescribed in Act 105 of 1997 as the point of departure, which should normally be imposed, and not be departed from lightly. However, if the cumulative effect of all the mitigating factors that a court would traditionally take into account when imposing sentence would justify the court in departing from the prescribed sentence in a particular case, the court should consider doing so. When the imposition of the prescribed sentence would amount to an injustice in that particular case, the court should act to prevent such injustice, and impose a lesser, appropriate sentence. It was not the intention of the legislature to eliminate the courts' discretion in sentencing offenders for the offences earmarked in Act 105 of 1997. These views were endorsed by the Constitutional Court in *Dodo* 2001 (1) SACR 594 (CC).

The constitutionality of some of these provisions has been questioned. The matter was dealt with in *Dodo* 2001 (1) SACR 594 (CC). The court found that it would have been unconstitutional had the legislature attempted to compel any court to impose a sentence that is inconsistent with the Bill of Rights. Section 12(1)*(e)* of the Constitution requires that the extent of any punishment should be proportionate to the seriousness of the offence. The rights contained in that section are breached when the punishment is *grossly* disproportionate to the offence. Since the sentencing courts are allowed to deviate from the prescribed sentences in the presence of substantial and compelling circumstances, such disproportionality can be prevented. In general, therefore, s 51 is not unconstitutional. However, some authorities argue that this position has changed now that the legislation has become permanent and since the unequal application of these powers appears to

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be unavoidable (cf Van Zyl Smit in Woolman et al *Constitutional Law of South Africa* 2ed (2006) 49-14.)

The prescribed minimum sentences are not applicable to an offender who was under the age of 18 years when the offence is committed. Although s 51(6) provided for an age limit of 16, this was declared unconstitutional in *Centre of Child Law v Minister for Justice and Constitutional Development* 2009 (2) SACR 477 (CC). The court's main reason was that the minimum sentences should be used as a starting point, and that a starting point of life imprisonment cannot be in accordance with the constitutional requirement in s 28 that children be incarcerated (if such incarceration is unavoidable) for the briefest possible period.

6 The pre-sentence investigation

6.1 General

As has been mentioned, the discretion to impose a suitable sentence lies with the sentencing officer. However, the sentencing officer cannot do so without sufficient factual information on which to base this decision. Tradition seems to require the State and the accused to supply this information. However, s 274(1) of the Criminal Procedure Act places the court in the centre of this process and empowers the court, before passing sentence, to allow evidence that will assist the court in determining a proper sentence. The term 'evidence' used here is usually not interpreted in the strict sense of the word; neither is the law of evidence strictly observed—cf *Zonele* 1959 (3) SA 319 (A) 330F.

6.2 Previous convictions

What normally happens in practice is that, after conviction, the State will indicate whether the accused has any previous convictions. The Criminal Procedure Act deals with this procedure in ss 271 to 273. If there are previous convictions, they are usually proved simply by handing in the accused's fingerprint record (the so-called SAP69) which, according to s 272, is *prima facie* proof of previous convictions. The court must enquire from the accused whether he or she admits the previous convictions. In case of denial (which rarely happens) the prosecutor may tender evidence to prove the previous convictions. The court will then decide the matter on the evidence—cf *Mchunu* 1974 (1) SA 708 (N).

Section 271A provides that certain previous convictions 'fall away' after a period of 10 years if the offender has not committed a fairly serious crime within that period. The convictions that fall away are those for—

(1) any offence for which the passing of sentence was postponed in terms of s 297(1) *(a)*, or for which the accused was merely cautioned and discharged, and
(2) less serious crimes (for which more than six months' imprisonment without the option of a fine may not be imposed).

According to *Zondi* 1995 (1) SACR 18 (A) such a previous conviction loses its validity and cannot be considered for purposes of sentencing at all. Even when s 271A is not applicable, however, the importance of all previous convictions diminishes with time.

Further provisions affecting the accused's record of previous convictions have been introduced by the Criminal Procedure Amendment Act 65 of 2008. Sections

271B to 271E contain extensive provisions on the expungement (deletion or scrapping) of records of previous convictions. These provisions are so detailed that no summary could be completely accurate. However, in essence they provide for a person with previous convictions to apply in writing for the expungement of some previous convictions from the criminal record. Some requirements apply:

(a) A period of 10 years must have elapsed after the date of conviction for the particular offence.
(b) The application has to be in writing, in accordance with the further requirements set in ss 271B to 271D.

(c) Based on the severity of the imposed sentence the crime should not have been very serious (see below for more detail in this connection).

This concession is available regardless of the crime committed (with one exception that is mentioned below). However, if the offence is really serious the imposed sentence should exclude the case from complying with the requirements. This is the position as expungement is only possible for sentences that would normally be considered alternatives to imprisonment, such as totally suspended sentences, caution and discharge, fines (without alternative imprisonment) of not more than R20 000, and correctional supervision. Sentences of imprisonment, even as little as 4 days' imprisonment, do not qualify for expungement.

Automatic expungement is also provided for in the case of a long list of offences related to former apartheid legislation, or offences based on race in other legislation, or offences that would now be considered unconstitutional—s 271C.

Further provisions on the expungement of previous convictions are contained in s 87 of the Child Justice Act 75 of 2008.

6.3 The accused on sentence

After the previous convictions have been dealt with, the accused is given the opportunity to supply evidence in mitigation of sentence. In less serious cases, mitigating features are frequently described by the accused or the legal representative simply by addressing the court from the bar. It has on occasion been held that the address on sentence should not include facts; facts should first be proven by evidence under oath—cf *Gough* 1980 (3) SA 785 (NC) 786H. However, this approach is not consistently followed. What is clear is that s 274(2) obliges the court to afford the accused an opportunity to address the court on sentence.

After all the evidence on behalf of the accused has been led, the State will normally also be allowed the opportunity to lead evidence and to address the court on sentence.

6.4 The duty to supply information

As mentioned above, tradition seems to require the State and the accused to supply the information necessary for the court to decide on a suitable sentence. This tradition is taken to the extreme in judgments such as *Khambule* 1991 (2) SACR 277 (W) and *Njikaza* 2002 (2) SACR 481 (C), where it is considered a serious irregularity for the court to ask the accused whether he has any previous convictions, if the State does not produce a list of previous convictions. In *S v Nhlapo* 2012 (2) SACR 358 (GSJ) the court held that these judgments were incorrect, but the position remains somewhat flexible.

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It may be accepted that an accused person who is aware of his rights will normally take the opportunity to provide the court with information in mitigation of sentence. However, the State should not stand by passively as the accused gives a one-sided picture to the court—cf *Smith* 1971 (4) SA 419 (T). A criminal trial does not have a conviction as its ultimate aim, but rather a suitable sanction. The prosecutor does not fulfil the role as representative of 'the people' when the accused is convicted, but only once everything has been done to ensure that the accused receives an appropriate sentence.

However, in the final analysis it is the court that has to impose the sentence. It has the discretion; a discretion which cannot be exercised properly unless all the information necessary to make such an important decision is at the disposal of the court. In comparison with the attention given to determining the guilt of the accused, the sentencing process is often neglected, which is why decisions requiring the court not to adopt a passive role in this regard (cf *Dlamini* 1991 (2) SACR 655 (A); *Ndlovu* 2003 (1) SACR 331 (SCA)) must be welcomed.

7 Absence of judicial officer

Criminal proceedings are frequently postponed after conviction, before sentence is passed. This can happen because the State needs more time to obtain a list of the accused's previous convictions or because a pre-sentence report has been requested. Section 275 provides that any judicial officer of the same court may, if the judge or magistrate who has convicted the accused is 'not available', pass sentence after consideration of the evidence. However, the judicial officer must be 'materially absent', owing to reasons such as recusal, transfer, leave, death or serious illness—cf *Lukele* 1978 (4) SA 450 (T).

8 Mitigating and aggravating factors

When considering sentence the court must take mitigating and aggravating factors into consideration. A large number of such factors have already been accepted by our courts (see eg Hiemstra *Suid-Afrikaanse Strafproses* (1987) 590-604), including factors such as premeditation, abuse of trust, or the presence of remorse, whether the offender is married or employed, etc. Only two of these are briefly considered here.

8.1 Youth as a mitigating factor

As a general principle, young offenders are sentenced more leniently than adults (*DPP, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) para [12] (youth has always been a mitigating factor)). The reason for this approach is that they cannot be expected to act with the same measure of responsibility as adults, that they lack the necessary experience and insight and are therefore more prone to commit thoughtless acts. These considerations were emphasised in *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC) at [26]-[28]:

> The sharp distinction between children and adult offenders is not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. [Children are] . . . more needful of protection, less resourceful . . . less mature, more vulnerable to influence and pressure from others . . . more capable of rehabilitation . . . .

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Although this judgment specifically addressed the position of child offenders, a child does not suddenly become an adult when the age of 18 is reached, and the relevant considerations remain of importance depending on the individual characteristics of the offender.

The special considerations surrounding the sentencing of child offenders are further discussed in para 10.6 below.

8.2 Previous convictions as an aggravating factor

A person who is convicted time and again of similar offences will progressively be punished more severely. This is because the offender, by continuing to commit offences, displays a disregard for the law and because it is believed that the heavier a penalty is, the more likely it is to deter the offender from committing more crime. In the past very heavy penalties were sometimes imposed for minor offences, based solely on the number of previous convictions for similar offences.

However, a number of decisions stressed that the *seriousness of the particular crime* should be the more important factor, and that the previous convictions should not be over-emphasised—cf *Barnabas* 1991 (1) SACR 467 (A).

9 The unconstitutionality of the death penalty

9.1 General remarks

One of the earliest decisions of the Constitutional Court dealt with sentencing. More particularly, in *Makwanyane* 1995 (2) SACR 1 (CC), the court found the death penalty to be unconstitutional. It is important to understand the court's reasoning for this decision. Apart from discussing the death penalty, the judgment also contains a wealth of material on other matters related to sentencing, such as the interpretation of the Constitution, the

understanding of rights such as the right to dignity, and the right not to be subjected to cruel or inhuman treatment.

In the discussion that follows particular attention is given to the main judgment by Chaskalson P.

9.2 Introduction

In essence, the decision revolves around the interpretation of s 9 ('every person shall have the right to life'), s 10 ('every person shall have the right to respect for and protection of his or her dignity') and s 8(1) ('every person shall have the right to equality before the law and to equal protection of the law') of the interim Constitution (the corresponding provisions in the 1996 Constitution are ss 11, 10 and 9(1)). The court found that any punishment should meet the requirements of these provisions (at [11]). These requirements should, in turn, be used to give meaning to s 11(2) of the interim Constitution, which prohibited 'cruel, inhuman and degrading treatment or punishment' (s 12(1)*(d)* and *(e)* of the 1996 Constitution). The crucial question was whether the death penalty was a cruel, inhuman and degrading punishment within the meaning of this provision—at [26].

The main arguments for and against the death penalty are summarised as follows (at [27]):

The principal arguments advanced by counsel for the accused in support of their contention that the imposition of the death penalty for murder is a 'cruel, inhuman or degrading punishment' were that the death sentence is an affront to human

dignity, is inconsistent with the unqualified right to life entrenched in the Constitution, cannot be corrected in case of error or enforced in a manner that is not arbitrary, and that it negates the essential content of the right to life and the other rights that flow from it. The Attorney-General argued that the death penalty is recognised as a legitimate form of punishment in many parts of the world, it is a deterrent to violent crime, it meets society's need for adequate retribution for heinous offences, and it is regarded by South African society as an acceptable form of punishment. He asserted that it is, therefore, not cruel, inhuman or degrading within the meaning of s 11(2) of the [interim] Constitution.

9.3 Arbitrariness in the imposition of the death penalty

Section 277 of the Criminal Procedure Act (it has subsequently been repealed by the Criminal Law Amendment Act 105 of 1997) provided for the imposition of the death penalty for extremely serious crimes. Before it could be imposed, however, the sentencing court had to find death to be the only proper sentence for the particular crime, with due regard to the presence or absence of mitigating and/or aggravating factors—cf *Masina* 1990 (4) SA 709 (A). While thousands of people were charged with murder every year, less than 1 per cent of them were sentenced to death.

Most accused persons facing the death penalty are unable to pay for an effective defence, and they are more likely to be sentenced to death than those with the means to do so. The inference is unavoidable:

> It cannot be gainsaid that poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die (paras [49]-[51] of *Makwanyane*).

All the inconsistencies inherent in any judicial system, such as good and bad prosecutors, severe and lenient judges, judges who favour the death penalty and those who favour its abolition, and other imperfections, meant that error could not be excluded (at [54]). In ordinary criminal cases such a system has to be accepted as a matter of necessity, but with the death penalty the error is not reversible, which reduces this acceptability.

9.4 The death penalty in foreign law

The court in *Makwanyane* also considered the extent to which the death penalty was still in force internationally. It is clear that the death penalty is not prohibited by public

international law (at [36]), but it has been abolished (for murder) in almost half the countries of the world, including countries such as Namibia, Mozambique and Angola. In most of the countries where it is retained, it is hardly ever used. In the United States of America, the death penalty itself has not been held to be unconstitutional—*Gregg v Georgia* 428 US 153 (1976). It is specifically mentioned in the Fifth Amendment to the American Constitution, even though the Eighth Amendment prohibits cruel and unusual punishment. However, if the death penalty statute in a particular state did not allow for sufficient discretion in the imposition of the sentence, or where too wide a discretion was allowed, such statute would be struck down by the Supreme Court (at [42]).

9.5 Public opinion

As the Attorney-General (now the DPP) had argued that the meaning of the phrase 'cruel, inhuman and degrading' should be interpreted in accordance with the

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attitudes of South African society, the court had to consider the importance of public opinion in reaching its decision (at [88]):

> Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution.

9.6 Cruel, inhuman and degrading punishment

In terms of the Constitution, the death penalty would be unconstitutional if it is found either to be cruel, inhuman *or* degrading. Ultimately, the court in *Makwanyane* concluded (at [95]):

> The carrying out of the death sentence destroys life, which is protected without reservation under s 9 of our Constitution, it annihilates human dignity which is protected under s 10, elements of arbitrariness are present in its enforcement and it is irremediable.

As a result the court found the death penalty to be cruel, inhuman *and* degrading punishment.

9.7 The limitation clause

The next question the court had to answer was whether imposing death as punishment could, despite being cruel, inhuman and degrading punishment, be justified for murder, in terms of s 33 of the interim Constitution. Such a finding would not be reached easily (at [111]):

> Respect for life and dignity, which are at the heart of s 11(2), are values of the highest order under our Constitution. The carrying out of the death penalty would destroy these and all other rights that the convicted person has, and a clear and convincing case must be made out to justify such action.

The main arguments in favour of justification were that the death penalty deters better than other forms of punishment, that it ensures the protection of prison warders and inmates, and that it meets the needs for retribution (at [112]).

With respect to deterrence the court observed (at [122]):

> The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness.

There was (and is) no proof that the death penalty was a greater deterrent to violent crime than life imprisonment (at [127]), and the court could not find that the deterrent effect of the death penalty was sufficient to justify the infringement of basic rights in the fashion in which it infringed those rights.

As far as prevention is concerned, the court held that it can be achieved through means other than the death sentence. There were not enough prison murders to justify the existence of the death penalty for the few cases in which it was imposed (at [128]).

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Lastly, retribution, in the sense of the 'natural indignation' of the community, can also be expressed by means other than the death penalty, such as a long term of imprisonment (at [129]).

9.8 Conclusion

In order to reach a conclusion, all these different considerations had to be balanced with one another (at [135]):

> In the balancing process, deterrence, prevention and retribution must be weighed against the alternative punishments available to the state, and the factors which taken together make capital punishment cruel, inhuman and degrading: the destruction of life, the annihilation of dignity, the elements of arbitrariness, inequality and the possibility of error in the enforcement of the penalty.

It is important to remember that criminals do not forfeit most of their rights in terms of the Constitution. Whether they lose any of these rights depends on whether it is justifiable in terms of s 33 of the interim Constitution (at [143])—or, currently, s 36.

The court's main findings are summed up in the following terms (at [144]):

> The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.

The death penalty is, therefore, unconstitutional.

10 The forms of punishment that may be imposed

10.1 Introduction

Section 276 lists the sentences that may generally be passed. These basically consist of the following:

(1) imprisonment (in various forms and for various terms);
(2) committal to a treatment centre;
(3) a fine; and
(4) correctional supervision.

Courts are also provided with various related powers in s 297, which provides for—

(1) the suspension of a sentence on various conditions;
(2) the conditional or unconditional postponement of the imposition of a sentence; and
(3) a caution and discharge.

Each of these sentences and measures is discussed below in greater detail. It should be noted that the sentences provided for in the Criminal Procedure Act do not apply to child offenders who have been tried and convicted in a child justice court in terms of the Child Justice Act 75 of 2008. A different set of sentences is provided in the Child Justice Act (see para 10.6 below).

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10.2 Imprisonment

10.2.1 General

One of the first decisions a court makes when sentencing the offender is whether to remove him from society or to punish him within the community. The latter kinds of sentences are often described as 'alternatives to imprisonment', as such sentences are frequently seen as some kind of leniency. The decision to remove the offender from the community remains one of the most difficult sentencing decisions to be made. The

decision to imprison a person results in the particularly drastic outcome of taking away a person's liberty, and our law provides disappointingly little guidance in the making of this decision. A careful search through the law reports will reveal only that the seriousness of the particular crime is a very important, but also very inexact factor. Any aggravating factor, such as a previous conviction or the brutality of the crime, may be used as a reason for imposing imprisonment. Conversely, the presence of mitigating factors may dictate a decision not to imprison. Generally, only two mitigating factors could be seen as regularly affecting this question. Firstly, juveniles are not readily imprisoned (see the discussion in para 8.1 above and *Willemse* 1988 (3) SA 836 (A)). Secondly, first offenders are also not readily imprisoned. It is generally felt that they should be given another opportunity to show that they can live a life without crime—cf *Kelly* 1993 (2) SACR 492 (A) 493*j*. That does not mean that a first offender who has committed a serious crime cannot be imprisoned and it does in fact often happen—cf *Victor* 1970 (1) SA 427 (A).

10.2.2 The various forms of imprisonment

The Criminal Procedure Act makes provision for several 'forms' of imprisonment. The 'forms' are really descriptions of different terms of imprisonment, rather than completely separate kinds of punishment. Whether any of these forms may be imposed in a particular instance depends on the statutory provisions which regulate the imposition thereof, and on the statutory provisions applicable to the particular crime. The various forms are discussed briefly in the following paragraphs.

10.2.2.1 Ordinary imprisonment for a term determined by the court

This is the most common form of imprisonment. All criminal courts have the power to impose a term of imprisonment for most crimes, limited only by their general jurisdiction, and/or by the penalty clause for the particular crime. In the case of *common-law crimes*, only the general jurisdiction applies—regional courts are limited to 15 years' imprisonment and district magistrates' courts to 3 years—s 92 of the Magistrates' Courts Act 32 of 1944. (The minimum sentences legislation is not taken into account for the current discussion.) Subject to the shortest term of imprisonment (see below), High Courts may impose any term of imprisonment. In the case of *statutory crimes* the general jurisdiction is also applicable, but always subject to the penalty clause contained in the statute. Quite a number of these provisions specifically empower lower courts to impose terms exceeding the general jurisdiction, for example s 64(1) of the Drugs and Drug Trafficking Act 140 of 1992, allowing sentences of up to 25 years' imprisonment for some offences. Why district courts are entrusted with such high powers only in the case of certain offences is anyone's guess—cf *Jeminez* 2002 (2) SACR 190 (W) 193*b*.

Sometimes, but normally only in the case of serious statutory crimes, the prescribed punishment refers to imprisonment only, or otherwise requires the imposition of imprisonment (eg s 17*(e)* of the Drugs and Drug Trafficking Act 140 of 1992, for dealing in illegal drugs). In these instances imprisonment has to be imposed, and only the term of imprisonment is in the discretion of the court. However, due to exceptions created by ss 276(3), 296 and 297 of the Criminal Procedure Act, it is really only a fine that may not be imposed in such cases.

In terms of s 284 no court may impose a sentence of less than four days' imprisonment, unless the sentence is that the offender be detained until the rising of the court. It was decided in *Msimango* 1972 (3) SA 145 (N) that a court 'rises' as soon as it has disposed of a case and the offender is therefore entitled to his release before the next case is called. To call this 'imprisonment' is clearly a fiction.

Within this framework a court that has decided to impose imprisonment is expected to determine the most appropriate term of imprisonment, based on the general principles of sentencing. This implies that the more serious the offence, or the more dangerous the

criminal, the longer the period of imprisonment will be, and *vice versa*—cf *Holder* 1979 (2) SA 70 (A). The term of imprisonment must always be stipulated by the court.

In the past longer terms than 25 years' imprisonment were rarely imposed—cf *M* 1993 (1) SACR 126 (A) 134. However, after the abolition of the death penalty this position changed dramatically, and sentences of up to 40 years are quite readily imposed for very serious crime. Some courts overdid it, however, by imposing sentences that are obviously longer than the offender could reasonably be expected to live. This practice appears to be ongoing, prompting the court in *Bull; Chavulla* 2001 (2) SACR 681 (SCA) at [22] to repeat its warning against the imposition of excessively long sentences in order to circumvent the release of prisoners on parole. Another repetition of this warning was required in *Nkosi* 2003 (1) SACR 91 (SCA) at [9], where the Supreme Court of Appeal stated:

> Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed [a sentence longer than the life expectancy of the prisoner] the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released after serving half the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by s 12(1)*(e)* of the Constitution . . .

Most prisoners are eventually released, but courts are not supposed to take the normal prison release policy into account when determining an appropriate prison term (cf *S* 1987 (2) SA 307 (A); *Bull; Chavulla* 2001 (2) SACR 681 (SCA) at [22]). The release regime is described in Chapter VII of the Correctional Services Act 111 of 1998. Most of the provisions affecting release have repeatedly been amended since 1998, resulting in a lot of litigation about the precise state of the law, especially with respect to when prisoners can expect parole to be considered (see *Van Vuren v Minister of Correctional Services* 2012 (1) SACR 103 (CC) in connection with life prisoners).

Prisoners with sentences of more than two years' imprisonment may only be considered for release on parole after having served half their sentences; parole is possible in case of shorter sentences after a quarter has been served. Once placed under parole, the offender will still be under various conditions until the total period of the original sentence has lapsed.

Sentences of imprisonment may normally be imposed in conjunction with other

forms of punishment such as fines and correctional supervision. A term of imprisonment may also normally be partly or fully suspended in terms of s 297 of the Criminal Procedure Act (see para 11 below).

Section 276B of the Criminal Procedure Act, which came into operation in 2004, empowers the sentencing courts to determine a 'non-parole period'. This is a period that the court may fix, as part of the sentence, and during which the offender may not be placed on parole by the Department of Correctional Services. Only sentences of two years imprisonment or longer (per charge) qualify for this determination, and the non-parole period is limited to two thirds of the sentence. Courts may not determine non-parole periods as a matter of course, and it should only be done under exceptional circumstances—cf *Stander* 2012 (1) SACR 537 (SCA); *Williams, Papier* 2006 (2) SACR 101 (C) at [15].

10.2.2.2 Imprisonment for life

Life imprisonment was expressly inserted into s 276 of the Criminal Procedure Act by the Criminal Law Amendment Act 107 of 1990, although it was available to the High Courts before that as well. At present, it can only be imposed by the High Courts (although regional courts are also empowered to impose it in terms of the minimum sentences legislation—cf 5.3 above).

Since the abolition of the death penalty, life imprisonment is the most severe and onerous sentence that our courts can impose. It is considered appropriate in those cases

where the criminal should be removed from society for up to the rest of his natural life—cf *Bull; Chavulla* 2001 (2) SACR 681 (SCA) at [21].

Life imprisonment is an indeterminate sentence, because when it is imposed, it is unknown for how long the offender will be imprisoned. Some possibility for release exists, nevertheless. In terms of s 78(1) of the Correctional Services Act 111 of 1998 the Minister of Correctional Services may release the prisoner on parole, on recommendation from the Correctional Service and Parole Board. The current position is that such a prisoner may not, however, be placed on parole before having served at least 25 years in prison, or on reaching the age of 65 (if at least 15 years have already been served)—s 73 (6). It is the possibility of parole that saves sentences of life imprisonment from being unconstitutional.

10.2.2.3 Declaration as dangerous criminal

Section 286A provides for the declaration of a person as a dangerous criminal. Such sentences are indeterminate, except that the court has to determine a date when the offender has to reappear before the court for a re-evaluation of the sentence. Only regional and High Courts may impose such a sentence. The duration of the initial imprisonment of the offender may not exceed the court's general jurisdiction—s 287B(1) *(b)*.

The sentence may only be imposed if the court 'is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him . . .'—s 286A(1).

In *T* 1997 (1) SACR 496 (SCA) the court referred to a number of considerations for the imposition of this sentence:

This . . . punishment [is] ideally suited to a case . . . where the crime itself is not so serious as to warrant a sentence of life imprisonment, where the convicted person represents a danger to the physical and mental well-being of other persons

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sufficiently serious to warrant his detention for an indefinite period and where there is a possibility that his condition may improve to such an extent that that would no longer be the case.

In prison the Case Management Committee dealing with the dangerous criminal's case must submit a report on him to the Correctional Supervision and Parole Board—s 75(1) *(b)* of the Correctional Services Act 111 of 1998. This report should deal with, inter alia, the conduct of the prisoner, his adaptation, training, mental state and the possibility of a relapse into crime—s 42(2). The Board then recommends to the court how the matter should be dealt with. When the prisoner reappears in court, the court has to reconsider the original sentence, taking into account the Board's report, but also any other evidence which may be adduced at the hearing—*Moetjie* 2009 (1) SACR 95 (T). The court then has to decide whether to order the continued incarceration, or the release of the offender. The release of the prisoner may be conditional, and the sentence may also be converted into correctional supervision at this stage.

In *Bull; Chavulla* 2001 (2) SACR 681 (SCA) the court found that this sentence is not unconstitutional, since there is nothing in s 286A or 286B compelling a court to act in contravention of the Constitution. The sentencing court can ensure that the sentence is imposed in conformity with the Bill of Rights.

10.2.2.4 Declaration as a habitual criminal

Within the rather specific statutory framework of s 286 of the Criminal Procedure Act, a superior or regional court may declare an offender to be a habitual criminal if the court is satisfied that—

(1) the person *habitually* commits offences, and
(2) the community should be *protected* against him.

Both requirements must be met. The second requirement prevents a person who repeatedly commits petty offences from being declared a habitual criminal; cf *Makoula* 1978 (4) SA 763 (SWA). The statutory framework furthermore removes this form of imprisonment from a court's discretion if—

(1) the offender is under the age of 18 years, and if
(2) the court is of the opinion that the offender deserves imprisonment for a period exceeding 15 years.

Although not a statutory requirement, it is a rule of practice not to declare an accused to be a habitual criminal unless he has previously been warned that such a sentence might be imposed on a further conviction—*Mache* 1980 (3) SA 224 (T). Despite this rule, the courts may impose such a sentence even where no warning has been given. However, a court will be particularly careful before imposing it in such a case—cf *Shabalala* 1984 (2) SA 234 (N).

A person who has been declared a habitual criminal is kept in a prison for at least seven years—s 73(6)*(c)* of Act 111 of 1998. He may thereafter be considered for parole if the Correctional Supervision and Parole Board finds that, for some reason (such as that there is a reasonable probability that the prisoner will abstain from committing crime in future), it is desirable that the prisoner be placed on parole. Such a prisoner may not be detained for more than 15 years—see also *Niemand* 2001 (2) SACR 654 (CC).

10.2.2.5 Periodical imprisonment

Periodical imprisonment is a form of imprisonment requiring prisoners to be imprisoned for short periods only (between 24 and 48 hours at a time). After every period of incarceration they are released to continue their normal existence. Because they are usually imprisoned over weekends it has also become known as 'weekend imprisonment', but they can be imprisoned at any time, also during the week. This intermittent character is an important aspect of periodical imprisonment—the prisoner may not be held for long periods at a time in order to complete the total sentence rapidly.

Periodical imprisonment is provided for in s 285(1) of the Criminal Procedure Act. It may be imposed on conviction of any offence other than an offence for which a minimum punishment is prescribed. It is also imposed 'in lieu of any other punishment', which means that periodical imprisonment cannot be combined with another sentence—*Smith* 2000 (1) SACR 388 (O). Unlike ordinary imprisonment, periodical imprisonment is imposed for a period expressed in hours—its duration may not exceed 2 000 hours, but may also not be less than 100 hours.

When periodical imprisonment was introduced in our law in 1959 (by Act 16 of 1959), it was highly praised as a severe form of punishment which nevertheless does not disrupt the family life of the prisoner. Courts were prompted to impose it as often as possible—cf *Botha* 1970 (4) SA 407 (T). In practice, it is only imposed occasionally. Periodical imprisonment remains a particularly good option for the offence of failure to pay maintenance—*Visser* 2004 (1) SACR 393 (SCA).

10.2.2.6 Section 276(1)(i) imprisonment

If an offender has been imprisoned in terms of s 276(1)*(i)* of the Criminal Procedure Act, the Commissioner of Correctional Services is empowered to release that prisoner, during the course of his sentence, on correctional supervision (see 10.4 below). The sentencing court basically provides the Commissioner with this discretion by making clear in some way that the imprisonment is imposed in terms of this provision. The court must be satisfied that imprisonment for a maximum term of five years is appropriate for the offender's crime, before it can exercise this option (s 276A(2)*(a)*). This limit provides an indication of the seriousness of the crimes for which the legislature considered this sentence to be suitable—*Blank* 1995 (1) SACR 62 (A). As a result, if more than five years' imprisonment is required to suitably punish the offender, this option is not available—*Randell* 1995 (1) SACR 404 (O). The maximum term of this form of

imprisonment is also restricted to five years (s 276A(2)*(b)*). In theory this does not mean, however, that more than five years may not be imposed if the accused is convicted of more than one crime—*Gouws* 1995 (1) SACR 342 (T).

This form of imprisonment is most appropriate in a rather narrow band of serious crimes, where correctional supervision is not sufficient punishment but imprisonment of more than five years is not needed. This was confirmed in *Scheepers* 2006 (1) SACR 72 (SCA), where the sentence was considered a mitigated form of imprisonment. It is useful when the sentencer considers imprisonment to be essential, but the nature of the offence does not require a long term of imprisonment. The sentence was extensively covered in in the news media when Oscar Pistorius was originally sentenced to such imprisonment.

What happens after sentencing is that the prisoner should be evaluated immediately

as he starts his prison term. The Correctional Supervision and Parole Board has to decide on the advisability of releasing the prisoner on correctional supervision. The prisoner has to serve at least one-sixth of the total sentence, before he can be considered for release (s 73(7) of Act 111 of 1998—this is subject to various other provisions if the person is also sentenced to other forms of imprisonment). From the moment of release the offender is treated as any other person under correctional supervision. Previously, if the probationer did not comply with the conditions of his correctional supervision, he could be arrested and imprisoned to complete the rest of his prison sentence—s 84B of Act 8 of 1959. The position under the current Correctional Services Act 111 of 1998 is not entirely clear, since the above-mentioned option is not expressly mentioned in the relevant section (s 70) of the current Act. It provides for the recalcitrant probationer to be instructed by the Commissioner to appear before the court, or the Correctional Supervision and Parole Board, or for the probationer to be arrested under warrant and to be brought before the court.

10.2.3 Further provisions on imprisonment

Some statutes may still provide for brief maximum periods of imprisonment, eg one month's imprisonment. In order to bring about uniformity with regard to maximum penalties for minor statutory offences, s 281*(b)* of the Criminal Procedure Act provides that any reference in a statute to a maximum period of imprisonment of less than three months must be construed as a reference to a period of three months.

A court may sometimes ante-date a sentence of imprisonment, following an appeal or review of the original sentence. There are several requirements: the offender must have served a part of the first sentence; this sentence (of imprisonment) must have been set aside on appeal or review; a date must be specified and this date may not be earlier than the date on which the first sentence was imposed—s 282.

10.2.4 Reduction of sentence

Once an offender has been sentenced by a court and the questions of review or appeal have been finalised, the matter is out of the hands of the courts. The court is then considered *'functus officio'*. Any modification of the sentence is limited to administrative action by the Department of Correctional Services, in terms of its powers as prescribed by the Correctional Services Act 111 of 1998. Various office-bearers may authorise the release of prisoners who have served various portions of their sentences. Executive interference with prison sentences has been severely criticised for a long time (cf *Madizela* 1992 (1) SACR 125 (N)), but one has to accept that, within reasonable limits, it is part of the reality (and the law) within which the sentencing official has to exercise his or her discretion.

10.2.5 The value of imprisonment

Courts are constantly urged to impose imprisonment more readily, and for longer periods. The idea that, if one were just to lock away enough criminals, the crime problem will be something of the past, is very prevalent in the media and in private conversations.

The fact is that imprisonment is by no means as successful in curbing crime as one would instinctively feel. Its main value is that it enables the court to remove a

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person constituting a danger to society from the community. However, this is always a temporary measure, as almost all prisoners have to be released at some point. Imprisonment is mainly characterised by its disadvantages. These include the following:

(1) It is very expensive. Prisons cost millions of rands to erect and maintain. The inmates have to be provided with an internationally acceptable standard of living. A whole state department with a huge budget has to be financed (R19.9 billion for the 2015/2016 financial year), while the next of kin of the prisoners often have to be supported financially by the state or other welfare organisations.

(2) Many of the people with whom the offender is incarcerated are hardened criminals. The prospects of rehabilitation in such an environment are slim. Although psychological and welfare services are available to prisoners, these are limited and their rehabilitative value is basically unproven. This is the position in prisons with a good prisoner to services ratio, but South African prisons are hopelessly overcrowded.

(3) The entire prison environment with its discipline and subcultures is singularly unhelpful for preparing any prisoner to live in a free society.

10.3 Fine

10.3.1 General

The fine is the sentence most commonly imposed in South African courts. It is a simple form of punishment and very commonly used for less serious offences. It consists of ordering the offender to pay an amount of money to the State as punishment for his crime.

10.3.2 When are fines imposed?

As is the case with imprisonment, courts generally enjoy a wide discretion to impose fines as punishment. If a particular statute does not mention a fine in its penalty clauses, it may not be imposed at all. Most penalty clauses, however, provide for the imposition of fines.

If a court may impose a fine, three factors are generally decisive for the decision to impose a fine or not. *First*, the crime should not be so serious that imprisonment is called for, and *secondly*, the offender must have some financial means (or have access thereto) with which a fine can be paid—cf *Frans* 1924 TPD 419. With no means at his disposal, a fine will usually simply result in the offender's imprisonment. A *third factor* comes into play when crimes are committed for financial gain. In such cases a fine may be imposed which would indicate to the offender that crime does not pay—cf *Van Rooyen* 1994 (2) SACR 823 (A).

10.3.3 The amount of the fine

The amount of the fine imposed is, depending on any relevant statutory provisions, normally left to the discretion of the court. The magistrates' and regional courts are limited in this respect by the scope of their ordinary or specifically increased jurisdiction. The ordinary jurisdiction currently stands at R120 000 for district courts and R600 000 for regional courts—s 92(1)*(b)* of Act 32 of 1944 read with GN R 63 of 30 January 2013.

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In assessing the *quantum* (amount) of the fine, the court should normally be guided by the accused's means. It goes without saying that where a court has decided to impose a fine with the intention of keeping the accused out of prison, it would serve no purpose to impose a fine completely beyond his means—cf *Ncobo* 1988 (3) SA 954 (N). On the other hand, it has frequently been held that the indigence of the accused does not warrant so

moderate a fine that it does not reflect the gravity of the offence in question—cf *Bhembe* 1993 (1) SACR 164 (T). This approach, although widely applied, may in future have to be reconsidered. The fine punishes every man differently according to his financial ability. The same fine will punish the poor much more heavily than the middle class, who in turn will be more severely affected than the rich. The question is, therefore: from the point of view of which of these classes of people must the fine seem to reflect the gravity of the offence? The answer should be simply that the court must determine how heavily the fine should punish the offender, and then determine the amount that will punish that particular offender as heavily as he deserves. This principle has long been accepted by countries employing the day-fine system (such as Germany). The one exception is crimes committed for illegal gain, in which case the real financial ability of the accused is usually unknown and the seriousness of the crime substantial, which should then be reflected by the amount of the fine—*Ntakatsane* 1990 (2) SACR 382 (NC).

In *Bersin* 1970 (1) SA 729 (R) the court held that the amount of the fine may be slightly increased to make provision for a wealthy offender. No direct recent and local authority is available on this point, but it may be accepted that the level of the fine may be set appreciably higher for such an offender, who would otherwise go almost scot-free.

The appropriate course of action if the offender simply does not have the means to pay a fine is another vexed question. Various decisions have made various suggestions, which range from the view that it is an anomaly that has to be accepted (cf *Lekgoale* 1983 (2) SA 175 (B)) to the view that another form of punishment should then be imposed—cf *Ncobo* 1988 (3) SA 954 (N). The latter method has not found general acceptance. Also, in the seminal judgment on the topic, *Van Rooyen* 1994 (2) SACR 823 (A) 827F, the court decided that it cannot be stated categorically that a fine which is above the financial resources of the offender may never be imposed. With the addition of correctional supervision to the list of available sentences this problem should be partly relieved, simply because additional forms of punishment are available.

10.3.4 Determining the means of the offender

The court has to make purposeful inquiries to determine the means of the accused—cf *Sithole* 1979 (2) SA 67 (A). If necessary, it will require the accused to sell or pledge his assets in order to obtain the necessary funds for the fine—*De Beer* 1977 (2) SA 161 (O). The means of the offender consists of cash, savings, monthly income and other possessions, but income and available cash are often regarded as the main criteria.

In the past it was frequently held that, because it is the accused who is to be punished, only his ability to pay a fine must be considered and not that of his family and friends. Recently, however, there is a tendency to allow for assistance to

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be taken into consideration—cf *Nxumalo* 1992 (2) SACR 268 (O) 271G; *Bhembe* 1993 (1) SACR 164 (T) 168A.

10.3.5 Recovering the fine

If the accused can pay the fine immediately, the recovery of the fine does not, of course, present any problem. Various measures are, however, employed to recover the fine once it has been imposed:

10.3.5.1 Imprisonment in default of payment

Although it is not required, almost all fines are imposed with an alternative period of imprisonment already added to the sentence. This has become generally known as alternative imprisonment and its imposition is authorised by s 287(1), which applies even if the penalty clause does not specifically mention imprisonment. The total period of imprisonment imposed by any court, however, may never exceed the limits of that court's jurisdiction. If the court, for example, imposes a period of direct imprisonment (whether suspended or not) in addition to a fine, as well as alternative imprisonment, the

total period of imprisonment may not exceed the maximum period that may be imposed by the court—cf *Moyage* 1958 (3) SA 400 (A).

The ratio between the fine and alternative imprisonment should always be 'reasonable' (cf *Tsatsinyana* 1986 (2) SA 504 (T)), although the exact meaning of this reasonableness is far from clear.

As will be explained in para 12 below, a court may order that two or more terms of imprisonment should run concurrently. All sentences of fines must, however, be cumulative. In *Sitebe* 1934 AD 56, it was held that since fines cannot be ordered to run concurrently, two sentences of imprisonment in default of payment of such fines can also not be ordered to run concurrently, but it has since been held that it is competent to order two or more terms of alternative imprisonment to run together—*Lalsing* 1990 (1) SACR 443 (N); *Mngadi* 1991 (1) SACR 313 (T).

What normally happens in practice is that, if the offender cannot pay his fine immediately, he is detained to undergo the alternative imprisonment, unless payment of the fine is deferred.

10.3.5.2 Deferment of payment of the fine

The court may, in terms of s 297(5), defer payment of the fine, or order its payment in instalments, but not for longer than five years after the imposition of the sentence. In cases such as *Molala* 1988 (2) SA 97 (T) and *Maluleke* 2002 (1) SACR 260 (T) courts were urged to use this discretion to accommodate people without the funds to pay the fine immediately. In this way such people are afforded the opportunity to stay out of prison.

10.3.5.3 Further relief after the start of the prison term

When an offender has started serving the alternative imprisonment, the court may at any stage before the termination of the imprisonment order the release of the person convicted on condition that he pay the rest of the fine as determined by the court—s 297 (6)*(a)*.

In terms of s 287(4) the Commissioner may release a prisoner undergoing alternative imprisonment on correctional supervision at any time, unless the court

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specifically withdraws this power, and unless the alternative imprisonment exceeds five years. Alternatively, the Commissioner may refer the prisoner back to the court for reconsideration of the sentence.

10.3.5.4 Other methods of recovery

Sections 287(2), 288 and 289 provide further methods through which fines may be recovered, including attachment and sale of movable (and even immovable) property, deductions from salary, etc. These measures are hardly ever utilised (see Du Toit et al 28-26D to 28-28).

10.3.6 To whom does the fine go?

Except in cases where statutory authority exists for such an order, a court is not entitled to direct that any portion of the fine should go to the complainant in the case or to an informer or anybody else. The fine must go to the State. Compensation to the victim is discussed below in para 11.1.

10.4 Correctional supervision

10.4.1 General

In 1991, by way of Act 122 of 1991, the legislature introduced a new form of sentence into our law of sentencing, namely correctional supervision. The name is rather descriptive of what it entails, namely the supervision of the offender with the view of

correcting the wrongdoer and the wrongdoing. The enthusiasm with which it has been received by some judges is clear from the following dictum in *Omar* 1993 (2) SACR 5 (C):

> [Correctional supervision is] . . . an excellent acceptable alternative, having regard to the present-day emphasis on the rehabilitation and reformation of offenders, to direct imprisonment.

10.4.2 The nature of correctional supervision

Correctional supervision is described rather blandly in s 1 of the Criminal Procedure Act as a 'community-based' form of punishment. This means that it is punishment which is executed within the community—where the offender would normally work and live. The term 'correctional supervision' is a collective term for describing the various conditions which may be included in such punishment—see *R* 1993 (1) SACR 209 (A) 220H. Correctional supervision is also defined in the Correctional Services Act 111 of 1998 as a 'form of community corrections contemplated in Chapter VI' of the Act.

The standard measures of correctional supervision would normally include house arrest, monitoring and community service. These three measures form the main penal components of the punishment and should, according to *Omar* 1993 (2) SACR 5 (C), normally form part of the sentence, unless there are exceptional circumstances for not including any of them. Various other conditions aimed at the education and rehabilitation of the offender and at correcting the wrongdoing, such as compensation of the victim, supervision by a probation officer and the presentation of various life skill courses, may also form part of the sentence—s 52 of Act 111 of 1998. The content of the main penal measures requires some illumination:

(1) House arrest can be equated to confinement at home—it requires of the probationer to stay at home. Exceptions would normally be made to allow the probationer at least to go to work, to do some shopping and to attend religious gatherings.
(2) Community service is service rendered in the interest of the community without receiving any remuneration. It may consist of the cleaning of parks or pavements, or working in a hospital or any public institution. For the purposes of correctional supervision, 16 hours' community service would typically be required every month.
(3) Monitoring simply entails that some state official will check whether the probationer actually complies with the condition of the sentence. Any step which is mainly aimed at this end would amount to monitoring.

The Correctional Services Act included restorative justice for the first time. Section 52(1)*(g)* refers specifically to 'mediation between victim and offender' and 'family group conferencing'. These activities are well-known aspects of restorative justice. According to Skelton *The Influence of the Theory and Practice of Restorative Justice in South Africa* (2005) 137, mediation—

> brings together the victim and the offender for a dialogue that is facilitated by a neutral person. The parties will talk about how the incident has affected them and come to an agreement about restitution, which will generally be reduced to a written plan.

A family group conference has been defined as a 'gathering of people convened by a probation officer or social worker as condition of a community penalty in order to obtain a restorative response to the offender and the offence'—*South African Law Commission Report (Sentencing: A new sentencing framework)* (2000) cl 1.

10.4.3 The various forms of correctional supervision

A sentencing court has various options in imposing correctional supervision:
(1) It can be imposed as a sentence by itself, just as a fine or imprisonment can be imposed—s 276(1)*(h)* of the Criminal Procedure Act. This may not be done without a report by a probation or correctional officer and it may not exceed three years—s 276A(1). This would be the standard form of correctional supervision.
(2) It can be imposed as a condition to a suspended sentence or to postponement of sentencing (see below para 11.5). This option would normally only be used if the

court finds that a particular need for the individual deterrence of the accused exists—Terblanche (1992) 5 *SACJ* 254. All the other requirements of postponed or suspended sentences also apply here, including the fact that the period of postponement or suspension is limited in duration to five years.

(3) Imprisonment may be linked to correctional supervision in the sense discussed in para 10.2.2.6 above.

(4) When the Commissioner of Correctional Services is of the opinion that a *prisoner* is a suitable candidate for correctional supervision (cf *Leeb* 1993 (1) SACR 315 (T)), he may apply to the court which initially imposed the imprisonment, to reconsider that sentence and, amongst other sentences, to consider imposing correctional supervision in lieu of the remaining term of imprisonment—s 276A(3).

10.4.4 The penal value of correctional supervision

One of the many important points raised in *R* above by Kriegler AJA is that correctional supervision is not a 'soft option'. Because of its various components, which include restraints on the freedom of the offender, it has a high penal content. This has the effect that punishment for serious crimes need not be confined to imprisonment any more—cf also *Kotze* 1994 (2) SACR 214 (O). Its penal effect can be lessened by reducing the strictness of the conditions, and the opposite may be achieved by increasing this strictness, for instance by increasing the duration of community service which should be performed and by reducing the time which the probationer is allowed outside his house every week.

Because of its high penal content, correctional supervision will normally not be imposed if a fine or suspended sentence or other lighter form of sentence is sufficient punishment for the crime. For the same reason it is not surprising that it has already been imposed for crimes which are normally regarded as very serious, such as murder (*Potgieter* 1994 (1) SACR 61 (A); *Larsen* 1994 (2) SACR 149 (A)); sexual molesting of children (*R* above); major theft (*Sibuyi* 1993 (1) SACR 235 (A)); and drunken driving (*Croukamp* 1993 (1) SACR 439 (T)).

A word of warning was, however, sounded in *Ingram* 1995 (1) SACR 1 (A) 9F:

> As correctional supervision under s 276(1)*(h)* can . . . only be imposed for a period not exceeding three years, it is not a sentence that readily lends itself to the very serious category of crimes (which would normally call for higher sentences) and should therefore not be too lightly imposed in such cases.

This was followed by a distinct move away from correctional supervision, and the Supreme Court of Appeal often refused to impose it even for crimes which would in the past not have been considered to be too serious. It was regularly emphasised that correctional supervision should be imposed with care, so that its 'coinage is not debased'—cf *Maritz* 1996 (1) SACR 405 (A) 418C. Now and then a judgment is reported indicating that the pendulum might be swinging back slowly again, especially in view of the current severe overcrowding of the prisons—cf *Dougherty* 2003 (2) SACR 36 (W); *Vuma* 2003 (2) SACR 597 (W). The court in *M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) took a particularly positive view of correctional supervision.

10.4.5 Factors influencing the imposition of correctional supervision

Correctional supervision may be imposed for any offence, including any statutory offence, apart from the offences mentioned in the minimum sentences legislation—s 276(3) of the Criminal Procedure Act; *Van Dyk* 2005 (1) SACR 35 (SCA). The previous position, as determined in *Strydom* 1994 (2) SACR 456 (W), that correctional supervision cannot be imposed if the penalty clause of a statutory offence provides for imprisonment only, no longer applies.

Once it has been established that the particular crime is not too serious to be punished by correctional supervision (see above para 10.4.4), it is not so much the nature of the crime as the kind of person who has committed it which will determine whether correctional supervision should be imposed (see Krugel and Terblanche *Praktiese*

Vonnisoplegging (1990) 1007)). In *Omar* 1993 (2) SACR 5 (C) it was found that the kind of offender for whom correctional supervision may be suitable may—

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> . . . vary from the first offender with no inborn criminal tendencies who has strayed into criminal activities, to the offender with criminal leanings who may have offended on more than one occasion but by reason of his employment, domestic and other circumstances is likely to . . . be a suitable candidate for correctional supervision.

Kriegler AJA decided in *R* 1993 (1) SACR 209 (A) 221*h* that the legislature distinguishes between two kinds of offenders, namely those who should be removed from the community through imprisonment, and those who deserve punishment but need not be removed from the community. This is an important consideration when correctional supervision is considered.

Another factor which has been stressed by our courts is the rehabilitative value of correctional supervision. Whereas it undoubtedly has a greater potential for achieving the rehabilitation of the offender than, for example, imprisonment has, one's expectations in this regard should not be too high (cf Terblanche *A Guide to Sentencing in South Africa* (2016) 320-321. Otherwise one might well find that when former probationers begin to reappear in the courts with sentences of correctional supervision on their list of previous convictions, sentencing courts will stop imposing this sentence, convinced that correctional supervision 'does not work'.

When a court has decided to impose correctional supervision, it must determine the composition of the sentence. The conditions of the sentence may not be left to the discretion of the Department of Correctional Services. The court should consequently prescribe which of the conditions that may be included in a sentence of correctional supervision (see para 10.4.2 above) should apply in a specific case—*Ndaba* 1993 (1) SACR 637 (A).

Correctional supervision may also be imposed in conjunction with any other form of punishment.

10.4.6 The execution of correctional supervision

Correctional supervision is executed by the personnel of the Department of Correctional Services in accordance with the provisions of Chapter VI of the Correctional Services Act 111 of 1998.

Section 276A(4) of the Criminal Procedure Act makes provision for the situation where the probationer proves not to be a suitable candidate for correctional supervision. In such a case the Commissioner (or someone delegated by the Commissioner—*Sebiya* 1994 (1) SACR 129 (O)) or a probation officer should provide the court with a motivated recommendation why the probationer is not suitable to be subject to correctional supervision. If the court finds the probationer to be unfit, it may impose any other proper sentence, limited only to its jurisdictional limits.

10.5 Committal to a treatment centre

In terms of s 296 of the Criminal Procedure Act an offender may be committed to a treatment centre in addition to or instead of any other sentence. The treatment centres are established and governed in terms of the Prevention of and Treatment for Substance Abuse Act 70 of 2008, which came into operation on 31 March 2013. Section 36 of this Act contains a provision similar to s 296 of the Criminal Procedure Act, and it provides that the accused has to be someone referred to in s 33(1). This would be a person who, for example, is dependent on alcohol in consequence whereof his own or his family's welfare is harmed. Section 33(1)*(c)* expressly includes a person who commits crime in order to support his or her drug dependency.

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In investigating whether the accused is such a person, the court must obtain a probation officer's report. Detention in a treatment centre is for an indefinite period, but if the offender is not released within 12 months the Superintendent of the centre is required to report the matter to the Director-General of Social Development.

It should be noted that s 296 refers to the Prevention and Treatment of Drug Dependency Act 20 of 1992, which no longer exists. However, as explained in Terblanche *A Guide to Sentencing in South Africa* (2016) 387-388, this does not affect the existence or nature of this sentence.

10.6 Juvenile offenders

10.6.1 Introduction

The SA Law Commission completed its investigation into a completely separate juvenile justice system in 2000. Its *Report: Juvenile Justice* contains recommendations in terms of which all child offenders (persons under the age of 18 when they commit the offence) will have to be dealt with. These recommendations have to a large extent been accepted and contained in the Child Justice Act 75 of 2008 (in this part referred to as 'the Act'), which came into operation on 1 April 2010.

10.6.2 General sentencing principles

Even under the common law, it was accepted that young offenders should not be punished as harshly as adult offenders—cf *Mohlobane* 1969 (1) SA 561 (A).

Today, especially in the case of children (ie people under 18 years old), this has become a constitutional issue. Children are afforded various rights in s 28 of the Constitution. In particular, they should not be detained except 'as a measure of last resort', and then for the shortest possible time. The child's best interests are always of paramount importance—cf, in general, *Nkosi* 2002 (1) SACR 135 (W).

10.6.3 Sentences introduced by the Act

10.6.3.1 Introduction

Diversion from the criminal process is a central feature of the new system. This means that the child offender is not prosecuted in the criminal court, but is subjected to any number of conditions of diversion. These conditions are aimed at emphasising restorative justice and other community-based measures. If these conditions are successfully complied with, the matter is considered finalised. The child offender will also not have a criminal record.

Sentencing takes place only when the prosecution determines that a criminal trial is required for some appropriate reason (these reasons are not of current importance). The trial and sentencing take place in a child justice court.

The Act contains extensive provisions on the sentencing of children. It includes both general principles and specific provisions on specific sentences. For example, there is a wealth of detail on the crimes for which imprisonment and residence in a child care centre may be imposed. The sentences of imprisonment, fines and correctional supervision, as well as measures such as suspension of sentence and the postponement of sentencing, are retained for child offenders. However, specific guidelines and principles are set for just about every kind of sentence. Several new

possibilities are created and they are often provided for under some collective term, such as community-based sentences, restorative justice sentences and compulsory residence in a care centre. Space does not permit of a discussion of all the details.

10.6.3.2 General principles

Section 68 requires a child justice court to impose sentence in accordance with Chapter 10 of the Act. In addition, s 69 contains principles that have to be complied with in the

process of establishing an appropriate sentence. For example, the objectives of the Act must be kept in mind. Sentencing of child offenders has the following objectives:

(a) encouraging the child to understand the implications of the crime and to accept responsibility for the harm;

(b) finding a balance, within the facts of the specific case, between the interests of the child and society and the seriousness of the crime;

(c) promoting the reintegration of the child into the family and community and ensuring that the child receives the required guidance and supervision to this end;

(d) avoiding imprisonment as far as possible.

10.6.3.3 Imprisonment

Section 77 contains a number of unique provisions applying to child offenders. For example, imprisonment cannot be imposed on an offender under the age of 14 years (at the time of sentencing—s 77(1)*(a)*); in some instances a child may only be imprisoned if he has a criminal record and there are substantial and compelling circumstances requiring the imposition of imprisonment (s 77(3)). A child may also not be sentenced to more than 25 years' imprisonment (s 77(4)).

In addition to the limitations in s 77, s 69(4) contains a number of guidelines that have to be followed in determining whether imprisonment should be imposed. For example, the court has to attend very specifically to the seriousness of the crime, the protection of society, and the impact of the crime on the victim. For the first time in South African legislation, the seriousness of the crime is directly linked to the harm caused or risked by the offence, and the offender's blameworthiness for such harm (this is in line with the Law Commission's recommendations on sentencing in general—cf para 3 above).

Section 76(3) contains an interesting new provision allowing for imprisonment to follow compulsory residence in a care centre. Before such a child may be transferred to a prison, the head of the care centre has to report to the court on the child's progress during residence in the centre. The court may then reconsider the original sentence.

10.6.3.4 Compulsory residence in a care centre

Among other things, s 76 provides that such residence is limited in duration to five years, or to the date when the child offender reaches the age of 21 years. The centre involved is a 'child and youth care centre' as defined in the Children's Act 38 of 2005. The court must specify the centre in which the child is to reside, in accordance with the recommendations in the probation officer's report. It can be assumed that these centres will largely replace the discredited reformatories of the past.

Additional considerations that have to be taken into account in imposing this sentence are set out in s 69(3). These include that if the seriousness of the offence should indicate that the child has a tendency towards harmful conduct, it has to be established whether the offence caused *such* harm that a residential sentence is appropriate and that the child has a need for the kind of services offered at the centre.

10.6.3.5 Correctional supervision

In terms of s 75 any child may be sentenced to correctional supervision.

10.6.3.6 Fines

Section 74(1) authorises a child justice court to impose a fine, but it emphasises that this should only take place following a proper investigation into the means of the offender, parent or guardian to pay the fine. The court should ensure that the child is not imprisoned simply for being unable to afford the fine. Subsection (2) provides for a number of alternatives to the fine, such as payment of an amount of money as a form of symbolic restitution, or delivering a service instead of a fine. These alternatives are aimed at achieving the general principle that the child offender should assume responsibility for the committed crime.

10.6.3.7 Restorative justice

As mentioned above, the Act emphasises diversion of child offenders. In this process the principles of restorative justice are of particular importance. Specific provision is made in s 73 for measures related to restorative justice to be imposed as sentences. Specific reference is made to family group conferences and victim-offender mediation, in which case the processes prescribed for diversion have to be followed. Any procedure that would fit in with the definition of 'restorative justice' could also be imposed as a sentence by the court.

10.6.3.8 Community-based sentence

According to s 72 a community-based sentence is a sentence which allows a child to remain in the community. Any of the diversion options provided for in s 53 of the Act, and any combination thereof, could be included with such a sentence, including correctional supervision. A probation officer should be appointed to oversee compliance with such a sentence—s 72(2)*(a)*.

10.6.3.9 Suspension of sentence and postponement of sentencing

In terms of s 78 of the Child Justice Act the provisions of s 297 of the Criminal Procedure Act basically apply in the case of child offenders as well. A number of conditions that are not available in the case of adult offenders are also provided for.

10.7 Caution and discharge

Subject to the same exceptions as are discussed below in para 11.2, a court may discharge any offender with a mere caution—s 297(1)*(c)* of the Criminal Procedure Act. This is the lightest sentence which the law permits—cf *Magidson* 1984 (3) SA

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825 (T). Although the discharge has the effect of an acquittal, the conviction is still recorded and counts as a previous conviction.

11 Suspended and postponed sentences

11.1 General

Sentences are frequently *suspended*, which means they are imposed in full but, subject to certain conditions, not executed. A sentence that is wholly suspended is not executed unless the conditions for its suspension have been broken by the offender. Sentences can also be partly suspended. In such cases the unsuspended part is executed, but the suspended part not, unless the conditions are breached.

Courts are generally also empowered to *postpone* the imposition of sentence. This may be done conditionally or without any conditions. In such a case the offender is released without a sentence, but may be ordered to appear before the court at some later date.

The whole statutory framework for these forms of punishment is contained in s 297 of the Criminal Procedure Act, which is criticised by Hiemstra 754 for the mass of words the reader has to wade through before getting to the main purpose of the particular provision.

11.2 Exclusionary provisions

Any court may, according to s 297, postpone sentencing or suspend any sentence, for any offence *except* an offence for which a minimum penalty is prescribed (see, with respect to minimum sentences, para 5.3 above). In these cases the sentences may only be partly suspended—s 297(4).

11.3 Postponement of passing of sentence

The court may postpone the passing of sentence for a period not exceeding five years and release the offender unconditionally, or on one or more conditions (which are discussed in para 11.5 below). The offender may then be ordered to appear before the

court if called upon before the expiry of the relevant period. If the offender is not called to appear before the court, or if the court finds that the conditions have been met, no sentence is imposed and for record purposes the result of the trial is a caution.

11.4 Suspension of sentence

All imposed sentences may be suspended, although it is mostly done with imprisonment and fines. The suspension of most other forms of sentence will rarely make much sense.

Suspended sentences have two main functions:

(1) to serve as alternative to imprisonment in situations where the offender cannot afford a fine and where other forms of punishment are improper, mainly because the offence was not particularly serious; and

(2) to serve as individual deterrent to the offender as it hangs like a sword over his head—cf *Allart* 1984 (2) SA 731 (T).

The maximum term for which a sentence may be suspended is five years. In the Free State exceptional circumstances are required before the maximum of five

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years is employed (cf *Nabote* 1978 (1) SA 648 (O)), but this is not required in the other divisions—cf *Cobothi* 1978 (2) SA 749 (N); *Van Rensburg* 1978 (4) SA 481 (T). The Free State point of view gives the impression that it is unreasonable to expect of people not to commit crime, a view that cannot be supported.

Where part of a sentence of imprisonment has been suspended, the period of suspension runs from the date on which the person is released from prison after serving the unsuspended portion, and not from the date of imposition of the sentence—*Ex parte Minister of Justice: In re Duze* 1945 AD 112. The result is that the prisoner is not under threat of the suspended portion of the sentence, a situation which has on occasion been criticised—*Mbombo* 1984 (1) SA 390 (D).

A suspended sentence is inextricably linked to its conditions of suspension. Without conditions it would not be a legally enforceable form of sentencing.

11.5 The conditions

When considering the conditions of suspension it is useful to distinguish between *negative* and *positive* conditions (even though our courts do not use this distinction, but see Hiemstra 754). *Negative* conditions are the most common conditions and require of the offender not to repeat the crimes specified. *Positive* conditions require positive action by the offender in order to fulfil the conditions of suspension. When positive conditions are imposed, they are usually combined with a negative condition.

Any condition of suspension has to conform to three basic requirements:

(1) It must be *related to the committed offence*. This relationship must be clear—cf *Tshaki* 1985 (3) SA 373 (O). This requirement is aimed mainly at negative conditions, so that a sentence for assault is, for example, only suspended on condition that similar offences are not repeated. It may not always be possible to link a positive condition to the kind of offence, as would be the case if community service were imposed for a theft.

(2) It must be stated *clearly and unambiguously*, so that the offender will know exactly what is expected of him—cf *Xhaba* 1971 (1) SA 232 (T). It is undoubtedly more clear to specify the crimes which an accused should not repeat rather than to use phrases such as ‘crimes of which force is an element’ or ‘crimes of which dishonesty is an element’—cf *Mjware* 1990 (1) SACR 388 (N) and *Goeieman* 1992 (1) SACR 296 (NC).

(3) The conditions must be *reasonable*—cf *Gaika* 1971 (1) SA 231 (C). They should not be worded in such a way that a petty offence may trigger a severe suspended sentence. In several reported cases the accused was convicted of dealing in dagga and sentenced to a (partly) suspended term of imprisonment on condition that (inter alia) the accused was not found guilty of the possession of dagga. One can

hardly argue that these two offences are not sufficiently related, but possession of a minute amount of dagga would normally breach the conditions upon which the (usually) severe sentence for dealing in dagga was suspended. For this reason it has become customary to include an extra condition for the latter offence, such as 'for which imprisonment, without the option of a fine, of more than four months is imposed'—cf *Adams* 1986 (3) SA 733 (C); *Herold* 1992 (2) SACR 195 (W).

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Examples of positive conditions include compensation, community service, correctional supervision, submission to instruction or treatment, the attendance of courses or treatment at specified centres, etc.

Community service consists of any service rendered without remuneration which is to the benefit of the community—s 297(1)*(a)*(i)*(cc)*. It is in actual fact a different form of punishment which is imposed under the guise of a condition of suspension. It is a form of punishment with many advantages (cf *Mogora* 1990 (2) SACR 9 (T) 17*c-f*): it is not restricted to less serious offences, but can be imposed for serious offences where appropriate—cf *Van Vuuren* 1992 (1) SACR 127 (A). However, community service is not normally appropriate for recidivists or offenders who are suffering from some form of personality disturbance—*Abrahams* 1990 (1) SACR 172 (C).

Compensation may also be brought about by suspending an imposed sentence on condition that the victim is compensated. This approach was promoted in *Charlie* 1976 (2) SA 596 (A) and *Edward* 1978 (1) SA 317 (NC).

11.6 Breaching the conditions

Elaborate provision has been made for the procedure to be followed if any condition is breached. When a court has to consider whether a suspended sentence should be put into operation, the *audi alteram partem* rule is applied and the offender must be given the opportunity to lead evidence and to make representations—cf *Zondi* 1974 (3) SA 391 (N). If it is found that the offender did not comply with his conditions, the court may put the suspended sentence into operation, or may suspend it further on appropriate conditions. This decision is not subject to appeal, but as it amounts to an exercise of a discretion, it has to be done in a judicial manner, and is subject to review—*Callaghan v Klackers NO* 1975 (2) SA 258 (E).

12 Sentences for more than one crime

Offenders are often, during the same trial, convicted of more than one crime and the question is whether this fact should influence sentencing at all. The trial court retains its full sentencing jurisdiction for every separate crime the accused has been convicted of. For example, an offender who has been convicted of theft, assault and arson may be sentenced to a maximum of three years' imprisonment on every count by a district court. In such cases, however, it easily happens that, despite the individual sentences being suitable, the total punishment becomes unduly severe. The court then has to reduce what is called the *cumulative effect* of the various sentences in some way.

The preferred method is to order the whole or part of the sentences to run concurrently (or 'at the same time'). In terms of s 280(2) of the Criminal Procedure Act all sentences of imprisonment are executed in the order in which they were imposed and the next sentence commences after the completion of the previous one, unless the court orders that they are to run concurrently. Only sentences of *imprisonment* (*Mngadi* 1991 (1) SACR 313 (T)) or correctional supervision (s 280(3) of the Criminal Procedure Act) may be ordered to run concurrently.

There are two further methods of restricting the cumulative effect of multiple sentences. *First*, every sentence may be reduced so that the total sentence is not excessive. A variation to this method is to suspend a portion or portions of the

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various sentences—cf *Coales* 1995 (1) SACR 33 (A). An objection against these approaches is that the sentences for the individual crimes may seem inadequate when viewed in isolation. *Secondly*, some or all of the counts can be taken together for purposes of sentencing. The Criminal Procedure Act does not specifically provide for this method, but it is part of our practice and is often used—see Hiemstra 719. The main problem with this method is that difficulties may develop on review or appeal if some of the convictions are set aside, or some misdirection took place during sentencing—cf *Young* 1977 (1) SA 602 (A); *Keulder* 1994 (1) SACR 91 (A). It is also not desirable to take convictions in respect of divergent counts together for the purpose of sentence—cf *S* 1981 (3) SA 377 (A). A court which takes different counts together must also ensure that the eventual sentence is a competent one for every crime that the offender has been convicted of—cf *Hayman* 1988 (1) SA 831 (NC).

13 Compensation and restitution

13.1 Compensation

The Criminal Procedure Act makes provision for compensation to the victims of crime in various ways. One of these procedures is contained in s 300. It provides that any convicted person who has caused damage to or loss of property of another person through his crime may, in certain circumstances, be ordered to compensate the victim. Such an order then has the effect of a civil judgment. For this purpose the court should shed its criminal approach and function completely as a civil court. The amount of compensation which may be ordered in the High Court is unlimited, but in the case of the regional and magistrates' courts it is presently limited to amounts of R1 000 000 and R300 000 respectively. These amounts are determined by the Minister of Justice by way of notices in the *Government Gazette*.

A court may act in terms of s 300 only when requested to do so by the injured party (cf *Dhlamini* 1967 (4) SA 679 (N) 679G) or the prosecutor acting on the instructions of the injured person (there must be proof of this authorisation—cf *Vanmali* 1975 (1) SA 17 (N)). What follows thereafter is a separate enquiry into the amount of damages, which is civil in nature. The court should explain to the parties (including the victim—cf *Makhae* 1974 (1) SA 578 (O)) what is taking place and must afford them the opportunity to lead evidence and to present argument. The usual calculation of the amount of damages applies as in civil claims. Evidence already led at the criminal trial is also taken into consideration—cf *Maelane* 1978 (3) SA 528 (T).

The compensation order may be given only in respect of direct loss or damage—cf *Mokwaka* 1969 (2) SA 484 (O). In *Du Plessis* 1969 (1) SA 72 (N), the court intimated that motor collision cases would be inappropriate for an award in terms of s 300 where this would necessitate a lengthy enquiry into contributory negligence. An order to pay compensation is also clearly inappropriate where the accused is sent to prison for a substantial period of time and he has no assets—*Baloyi* 1981 (2) SA 227 (T).

A person in whose favour an award has been made may, within 60 days, renounce the award and, where applicable, make a repayment. If such renunciation is not done, the accused may not later be held liable in civil proceedings in respect of the injury for which the award was made—s 300(5).

Since an order for compensation in terms of s 300 has the effect of a civil

judgment, a sentence of imprisonment in default of payment cannot be imposed in the alternative—cf *Msiza* 1979 (4) SA 473 (T).

13.2 Restitution

Section 301 provides that the court may order, at the request of a *bona fide* buyer, that he (the buyer) be compensated out of money taken from the convicted thief when the latter was arrested, provided of course that the buyer returns the goods to the owner thereof.

Phase Four:
Post-Verdict and Post-Sentence Remedies

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Chapter 20
Review

JP Swanepoel

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The Constitution and this chapter:

Section 8—Application of rights

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

See 1.2, below

Section 9—Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

Section 35—Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right—

. . .

(o) of appeal to, or review by, a higher court.

. . .

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

See 1.1 and 5.5.2, below

Section 36—Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

See 1.2, below

Section 38—Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant

appropriate relief, including a declaration of rights. The persons who may approach a court are—

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

See 1.2, below

Section 172—Powers of courts in constitutional matters

(1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including—
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) *(a)* The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

See 1.2 and 5.5, below

Section 173—Inherent power

The Constitutional Court, Supreme Court of Appeal and High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

See 1.1 and 5.4, below

The Child Justice Act 75 of 2008 and this chapter:

Section 85—Automatic review in certain cases

(1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child has been sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191(2)*(j)* of the Children's Act, the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of—
(a) the duration of the sentence;

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(b) the period the judicial officer who sentenced the child in question has held the substantive rank of magistrate or regional magistrate;
(c) whether the child in question was represented by a legal representative; or
(d) whether the child in question appeared before a district court or a regional court sitting as a child justice court.

(2) The provisions of subsection (1) do not apply if an appeal has been noted in terms of section 84.

See 3.1.2.1 and 3.1.2.2, below

Section 86—Release on bail pending review or appeal

Whenever the release of a child on bail is considered, pending—
(a) the review of a sentence as provided for in section 307 of the Criminal Procedure Act; or
(b) the appeal against a sentence as provided for in sections 309(4) and 316 of the Criminal Procedure Act,

the provisions of section 25 of this Act, dealing with the release of children on bail, apply.

1 Introduction

1.1 The right to review and review in general

1.1.1 Review: A constitutional right

Section 25(3)*(h)* of the repealed interim Constitution of the Republic of South Africa, Act 200 of 1993, entrenched every accused person's right to a fair trial, which included the right to have recourse, by way of appeal or review, to a higher court than the court of first instance. Section 35(3)*(o)* of the final Constitution of the Republic of South Africa, 1996 (the 'Constitution'), confirms this right. It guarantees, as a component of every accused person's right to a fair trial, the right of review or appeal by a court of higher instance. The omission from s 35(3)*(o)* of the Constitution of the words 'to have recourse', which had appeared in s 25(3)*(h)* of the interim Constitution, brought no dramatic changes. It did, however, clarify that it is not the right of *recourse* that must be guaranteed and protected, but rather the right to a reappraisal of the criminal proceedings by means of review or appeal (*Shinga v The State and Another (Society of Advocates (Pietermaritzburg Bar) Intervening as Amicus Curiae: O'Connell* 2007 (2) SACR 28 (CC)).

In *Ntuli* 1996 (1) SACR 94 (CC), the Constitutional Court, in striking down the provision which required prisoners to obtain a judge's certificate before they could be brought to court to argue a review or an appeal in court, held that the constitutional right of having the opportunity to have recourse by way of an appeal or review envisages, as a minimum, '*the opportunity for an adequate reappraisal of every case and an informed decision on it*' (at [17]). The court found that the inherent danger that worthy appeals and reviews were stifled by this process, and never attracted the judicial attention they deserved, exposed the process of having to obtain a certificate as offending against the right to equal protection and benefit of the law. (See also *Minister of Justice v Ntuli* 1996 (1) SA 1207 (CC)).

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At first blush, it did not seem as though the provisions of the interim and the final Constitutions have added to or extended the ambit of the rights which accused enjoyed under the previous constitutional and legal dispensation, when those rights were not entrenched in a Bill of Rights. It is, however, submitted that the entrenchment of the right to review or appeal to a court of higher instance has strengthened the power of the courts to enforce standards of fairness, due process of law and other interrelated rights

(see 'Procedural Rights' in Van Wyk et al (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 413). In *Ntuli* 1996 (1) SA 1207 (CC) the Constitutional Court per Didcott J held that the concept of fairness is no longer restricted by the rules set by legal standards which were applicable before the Constitution came into force. Previously, fairness to the accused meant that the accused was *'. . . not entitled to a trial which is fair when tested against abstract notions of fairness and justice'* (per Nicholas AJA in *Rudman; Mthwana* 1992 (1) SA 343 (A) at 387). The main enquiry had been whether a failure of justice had resulted. This had been resolved by applying two alternative tests, namely—

- whether a court would inevitably have convicted, had there been no irregularity, and if so, then there was no failure of justice vitiating the trial; or
- whether the irregularity was such a gross departure from established rules of procedure that it could not be said that the accused had been properly tried. In such a case a failure of justice resulted *per se* (see *Mtyuda* 1995 (5) BCLR 646 (E) and Chapter 21, para 3.9).
- Section 25(3) of the interim Constitution and s 35(3) of the final Constitution clarified and enlarged this restricted understanding of the *concept of fairness* and broadened the enquiry: fairness no longer entails enquiring whether there was a failure of justice in that sense, but whether the trial was fair. The result is that criminal proceedings must not only be conducted in compliance with previous standards or requirements, but must also conform to these broad notions of substantive fairness and justice. The emphasis is now on whether there was a fair trial, but the trial must also be conducted according to acceptable standards. In *Zuma* 1995 (2) SA 642 (CC) at 651J–652A the Constitutional Court held that the right to a fair trial conferred by the Constitution '. . . embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force'. Pursuant to this a court may set aside proceedings where the court did not inform the accused at the end of the trial that he had a right to appeal or review—*Kumkani* 2013 (2) SACR 360 (WCC).

1.1.2 When will review proceedings be more appropriate than appeal proceedings?

An accused person who is dissatisfied with the outcome of his or her criminal trial on fact or law in a lower court (ie, a district or regional court) may bring the matter before a division of the High Court (having jurisdiction) either by way of an appeal or a review. In general, an accused seeking redress from a decision or order made by a court of first instance, in challenging the correctness of his conviction and/or sentence, should appeal against such conviction and/or sentence. However, where an irregularity in the criminal proceedings against the accused person is involved, such a person should seek relief by way of review. In *Mwambazi* 1991 (2) SACR 149 (Nm) the court explained when a specific procedure, appeal or review, would be apposite.

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1.1.3 Categories of review procedures

There are various types of review procedure, but three distinct categories were pointed out in *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111. The first category deals with ordinary reviews of statutory origin, other than those under the Constitution, by means of which the proceedings of a lower court are brought before a division of the High Court as a court of a higher instance for an examination of irregularities or illegalities in the proceedings in the court *a quo*. These are the kind of irregularities contemplated by s 22 of the Superior Courts Act 10 of 2013 and various provisions (see below) of the Criminal Procedure Act 51 of 1977. In terms of s 21(1)*(a)-(b)* of the Superior Courts Act, a division of the High Court having review and appeal jurisdiction may exercise powers of review with regard to lower court proceedings in respect of specified irregularities that happened before or during such proceedings.

Section 22(1) of the Act regulates the grounds on which a review procedure may be instituted against inferior courts' decisions. These are—

(1) absence of jurisdiction of the court;
(2) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
(3) gross irregularity in the proceedings; and/or
(4) the admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence.

The court hearing a review under this section is confined to the relevant provisions of the Act and may not go beyond this. The procedure under the Superior Courts Act, contrary to that provided for by the Criminal Procedure Act, is strictly formal and also expensive to exercise. An irregularity in the proceedings of a lower court that does not appear from the record of the proceedings may be brought under review supported by an affidavit setting out the grounds, facts and circumstances on which the applicant relies.

The Criminal Procedure Act provides for various procedures by which the High Court may review criminal proceedings in lower courts, and establishes by whom such a review procedure may be instituted. The following review procedures are provided for under this Act:

(1) automatic review in terms of s 302;
(2) extraordinary review in terms of s 304(4);
(3) review of proceedings before sentencing in terms of s 304A;
(4) setting down of a case for argument in terms of s 306.

The *second category* of judicial review is of common-law origin and includes the High Court's common-law inherent jurisdiction to review, which power is acknowledged in s 173 of the Constitution. See *Hira v Booysen* 1992 (4) SA 86 (A) on common-law review powers. These courts are endowed with an inherent jurisdiction to review the proceedings of lower courts, administrative authorities or tribunals and to set aside or to correct errors in the proceedings if it appears to be in the interest of justice, or to test the validity of proceedings of such institutions in order to prevent injustices or miscarriages of justice. In *Kirsch* 2014 (2) SACR 419 (WCC) the court exercised its inherent jurisdiction by virtue of s 173 of the Constitution in the recusal of the presiding officer whose friendship with a state witness came to

light after evidence had been led. The court set aside the proceedings. However, the courts' inherent power must be exercised sparingly and may not be used to correct mistakes made by any one of the parties, and certainly not in order to rectify a failure of the prosecution to lead important evidence (*Ntswayi* 1991 (2) SACR 397 (C)). (See *Siwela* 1981 (2) SA 56 (T) and see also the discussion in Chapter 21 below.)

The Supreme Court of Appeal has no common-law jurisdiction to ordinarily review the proceedings of any High Court. This means that, unless an aggrieved party brings a matter before the Supreme Court of Appeal by way of appeal, that court has no jurisdiction. In criminal cases the Supreme Court of Appeal has no power to review any proceedings of High Courts which are not brought before it by way of an appeal or an appeal by virtue of a special entry of an irregularity or illegality in the procedure, or an appeal by means of the reservation of a question of law.

The *third category* of constitutional judicial review has been referred to as that category which comprises reviews provided for by *other legislation*. The jurisdiction to review conferred upon a court or a judge thereof through such legislation is a power of review which, according to the view expressed by Innes CJ in *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111 at 116, is 'far wider than the powers which it possesses under either of the review procedures [ie the categories above] to which I have alluded'. Consequently, the notion of judicial review in this category is wide enough to embrace reviews pertaining to constitutional infringements. Obviously, with regard to the third category, the grounds for such a

review will differ from the others. With the commencement of the interim Constitution on 27 April 1994 and the final Constitution of 1996 on 4 February 1997, a power of judicial review was conferred upon the superior courts, which power fits under the umbrella of this third category mentioned by Innes CJ, although that court presumably did not have constitutional legislation or constitutional judicial review in mind. In *Magano v District Magistrate, Johannesburg (2)* 1994 (2) SACR 307 (W) Van Blerk AJ held that judicial review by a High Court of a decision of a lower court which is alleged to be an infringement of a fundamental human right is of a wide-ranging nature and of the type where the court could enter upon and decide the matter *de novo*.

1.2 Judicial review in terms of the Constitution

1.2.1 The origin, nature and extent of judicial review

The concept of judicial review within a constitutional legal system was first introduced by Judge John Marshall in the well-known American case of *Marbury v Madison* 5 US (1 Cranch) 137 (1803), where the learned judge established the judicial power to set aside a statute or provision thereof as unconstitutional. With the introduction of the interim Constitution, South Africa was set on a democratic constitutional course which has been confirmed by the final 1996 Constitution. In the same manner as the interim Constitution, the final Constitution ranks the Constitution and the rule of law as the supreme authority and law of the country, and all other laws and conduct are subject to the Constitution. Any law (whether a statute of Parliament or a rule of the common or customary law) or conduct inconsistent with the provisions of the Constitution will be invalid to the extent of the inconsistency (ss 2, 8(1) and 172(1) of the Constitution). The Constitution binds

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all persons, as well as legislative, executive and judicial organs of the state on all levels of government (s 8(1) and (2) read with s 239 of the Constitution). (The interim Constitution did not apply horizontally *inter partes*. It appears from reading s 2 and s 8 (2) that horizontal application is now provided for. On the vertical and horizontal application of the Constitution, see *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) and Woolman and Davis 'The Last Laugh: *Du Plessis v De Klerk*, classical liberation, creole liberalism and the application of fundamental rights under the interim and the final Constitutions' 1996 *SAJHR* 361.) By declaring the Constitution the supreme law of the country, we departed decisively from the Westminster tradition based on the sovereignty of Parliament.

The Constitution is 'sovereign'. The supremacy of the Constitution implies, in broad terms, that when any norm or rule of statute or common law is in conflict with the Constitution, that law or rule ceases to be valid law and lacks binding force. However, such law does not lapse automatically but will continue to exist until such time as it is declared unconstitutional by a court with constitutional jurisdiction (constitutional judicial review) powers (see item 2 of the transitional arrangements in Schedule 6 to the Constitution).

As the cornerstone of democracy in South Africa, the Constitution guarantees the fundamental human rights entrenched in the Bill of Rights in Chapter 2 thereof and requires the state to respect, protect, promote and fulfil the rights as set out in the Bill of Rights, although these rights may be limited (s 7 of the Constitution).

Contrary to the provisions of the interim Constitution, which denied constitutional jurisdiction to the Supreme Court of Appeal (formerly the Appellate Division), the final Constitution acknowledges the Supreme Court of Appeal as a separate constitutional entity, empowered with jurisdiction to decide the constitutional validity of any conduct or any law to the extent of the inconsistency of the law or conduct. The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa are now charged with ensuring that the democratic ideals and the values of the new constitutional order in South Africa are enforced, and that the fundamental human rights set out in Chapter 2 of

the Constitution are protected by the exercise of their judicial review powers. The power of judicial review has been said to be a necessary part of a democratic system in order to protect individual rights against powers that may ignore, undermine, harm, or infringe, basic guarantees. (See D Davis, M Chaskalson, J de Waal 'Democracy and Constitutionalism: the Role of Constitutional Interpretation' in Van Wyk et al (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 1 et seq for a discussion.) In *Hansen v The Regional Magistrate, Cape Town* 1999 (2) SACR 430 (C) it was held that s 173 of the Constitution had broadened the inherent jurisdiction of the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa, which promotes the interests of justice within the context of the values of the Constitution. These courts also have the power to review actions by the government and the conduct of persons, and to review the constitutional validity of legislation by Parliament, a power denied all courts during the previous dispensation, which was based on the sovereignty of Parliament. However, if a decision of unconstitutionality relates to an Act of Parliament or a provincial Act, the order of constitutional invalidity made by any competent court must be confirmed by the Constitutional Court (s 172(2)*(a)* of the Constitution). Note that lower

courts are excluded from ruling on the constitutionality of any legislation—s 170 of the Constitution.

Judicial review might be defined as the authority of a court with jurisdiction to examine executive conduct or a legislative Act and to invalidate that conduct or Act if it is contrary to constitutional principles. In *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at [49] (applied in *National Director of Public Prosecutions v Freedom under the Law* 2014 (2) SACR 107 (SCA) at [28]), the court held that there is an alternative to where judicial review finds no application, and that is the doctrine of legality. The doctrine of legality, the essence of the rule of law, includes review on grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute:

> The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.

Public power cannot be exercised arbitrarily and the exercising of such power must be rationally related to the purpose for which the power was given. This is the rationality test—see *Affordable Medicines Trust v Minister of Health and* 2006 (3) SA 247 (CC) at [75] and *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC). See also Chapter 22.

1.2.2 Limitation of constitutional rights and the approach thereto

No right, whether entrenched or not, is absolute. The rights of others and the needs of society may restrict these rights. Section 7(3) of the Constitution explicitly recognises this by providing that the rights in the Bill of Rights are subject to the limitations contained or referred to in s 36 or elsewhere in the Constitution. It is the task of the courts to establish the meaning, content and extent of the said rights within the ambit of the limitation clause.

Section 36(1) prescribes the criteria determining any limitation of fundamental rights. When an infringement, denial or breach of, or threat to, an entrenched right or freedom is alleged, a two-stage approach in determining its constitutional validity has to be followed. The first stage of the inquiry is to determine whether the right or freedom has been infringed or violated. This will lead to an investigation into the nature and scope of the particular right, bearing in mind that the court will have to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom', as is required by s 39(1) of the Constitution. If the answer to the first question is in the affirmative, then the second stage is to decide to what extent such infringement or

violation is reasonable and justified in terms of the limitation provisions in s 36. The onus to prove the limitation, on a balance of probabilities, rests on the party alleging that the applicant's right is limited. This is the approach adopted in *Qozeleni v Minister of Law and Order* 1994 (2) SACR 340 (E) and approved by the Constitutional Court in *Makwanyane* 1995 (3) SA 391 (CC); *Zuma* 1995 (1) SACR 568 (CC); *Mbatha; Prinsloo* 1996 (2) SA 464 (CC).

The justification for a limitation of a fundamental right must be established by the party relying thereon and it is not for the party challenging it to show that it was unjustifiable (see *Zuma* 1995 (1) SACR 568 (CC)). The party alleging a limitation of the right in question will argue that the contested conduct or law is nevertheless acceptable because it can be justified as law of general application and that

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the basis of the limitation is reasonable and justifiable. The final determination will then hinge on the limitation clause and not on the provision which entrenched the right. Section 36(1) provides the mechanisms and guidelines, for the courts having jurisdiction, to decide the constitutionality of a specific issue. Section 36 has to be applied in all instances concerning the infringement of a fundamental right or freedom. Note that s 35 of the Constitution, dealing with arrested, detained and accused persons, sets out important additional limitation grounds. Some of the rights it creates are not absolute but conditional, for example, the provision of legal representation at state expense 'if substantial injustice would otherwise result' (s 35(2)*(c)* and (3)*(g)*); release from detention 'if the interests of justice permit' (s 35(1)*(f)*); and the exclusion of improperly obtained evidence 'if it would render the trial unfair' (s 35(5)).

If a right which is entrenched in the Bill of Rights is limited, it may only be limited by law of general application, provided that—

(1) such limitation is reasonable, and
(2) such limitation is justifiable in an open and democratic society based on human dignity, equality and freedom, and
(3) all relevant factors are taken into consideration, including—
    (a) the nature of the right;
    (b) the importance of the purpose of the limitation;
    (c) the nature and extent of the limitation;
    (d) the relation between the limitation and its purpose; and
    (e) less restrictive means to achieve the purpose.

The above is not an exhaustive list, but the criteria are the key factors that have to be considered in an overall assessment as to whether or not the contested limitation is reasonable and justifiable—*Manamela* 2000 (1) SACR 414 (CC). In addition, the factors mentioned in s 36(1)*(a)*-*(e)* must be considered in any appraisal of the reasonableness and justifiability of the limitation. (See also Chapter 21.)

1.2.3 Locus standi and remedies in constitutional matters

1.2.3.1 The meaning of a constitutional matter and related issues

A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution—s 167(7). Issues connected with decisions on constitutional matters can be decided by the Constitutional Court. Applications for leave to appeal to the Constitutional Court that turn on issues which are concerned with a constitutional matter will receive the attention of the Constitutional Court if the court is satisfied that it is in the interests of justice—*Basson* 2004 (1) SACR 285 (CC). A constitutional issue is not raised where the applicant is dissatisfied with the trial court's factual findings—*Marais* 2010 (2) SACR 606 (CC). In *Friedman (2)* 1996 (1) SACR 196 (W) the court stated that a court retains the discretion to refuse to entertain a constitutional challenge before the accused pleads. Such discretion is only to be exercised in exceptional cases, after taking certain factors into consideration. The factors to be taken into account are (1) the prospects of success of the constitutional challenge; (2)

the possible length of delay of the trial; and (3) the possible prejudice to the accused, if the constitutional challenge is not decided immediately.

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1.2.3.2 Who has locus standi, what relief is sought and when—

Section 38 of the Constitution provides that when an infringement of or a threat to any right entrenched in the Bill of Rights is alleged, any person mentioned below will be entitled to apply to a competent court for appropriate relief, which may include a declaration of rights. (See para 8 below for a discussion of a declaration of rights.) The relief available to an applicant includes an order of constitutional invalidity of a law; the suspension of such order for a period to allow for the rectification of the constitutional defect in a law; the adjournment of constitutional proceedings pending a decision of the Constitutional Court; the exclusion of unconstitutionally obtained evidence; a temporary interdict or other temporary relief. (In *Ferreira v Levin NO* 1995 (2) SA 813 (W) the court held that an application for temporary relief will only be granted if the applicant can show that the issue of the validity of the Act is urgent and serious.) When there is an infringement of or threat to a constitutionally entrenched right, the appropriate relief must be found in our common law and the statutes on a case by case basis. The court may develop the common law to the extent that legislation does not give effect to a fundamental right and, if necessary, develop rules of the common law to limit the right, provided that the limitation is in accordance with s 36—see ss 8(3) and 39(2) of the Constitution.

(a) In terms of s 172 of the Constitution, competent courts (on constitutional matters) are—

the Constitutional Court as a court of a final instance;

the Supreme Court of Appeal;

the High Court of South Africa including all its divisions.

These courts may be approached for relief by any of the persons mentioned in below when an infringement of, or threat to, any right entrenched in Chapter 2 is alleged, namely—

(1) a person acting in his or her own interest;
(2) an association acting in the interests of its members;
(3) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
(4) a person acting as a member of, or in the interest of, a group or class of persons;
(5) a person acting in the public interest. (See Chapter 21 para 1.2.5.1.)

(b) Any person or organ of state with a sufficient interest may apply by motion procedure or appeal directly to the Constitutional Court to confirm or vary an order of constitutional invalidity of an Act of Parliament or a provincial Act made by a competent court (s 172(2)*(d)* of the Constitution). Juristic persons are entitled to the rights contained in the Bill of Rights where, and to the extent that, the nature of the rights permits it. Therefore, as a 'person', a juristic person is entitled to seek relief in terms of the Constitution (cf s 8(4) of the Constitution).

In *Magano v District Magistrate, Johannesburg (2)* 1994 (2) SACR 307 (W) the court considered the question whether application of s 7(4)*(a)* of the interim Constitution (s 38 of the final Constitution) should be restricted to recognised grounds of review enumerated in s 22(1) of the Superior Courts Act (then s 24 of Act 59 of 1959, now repealed, see above) and whether such grounds are of a wide-ranging nature. The

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court held that s 7(4)*(a)* did not determine the nature of, or the grounds for, relief, but the circumstances when such relief may be sought, namely, when a person's constitutional rights were disregarded or infringed. If s 7(4) were to be limited to those

situations pertinent to the grounds enumerated in s 22, it would seriously hamper the courts' judicial powers to review proceedings in lower courts. Consequently the provisions of s 38 are not restricted to the grounds mentioned in s 22(1), but should be interpreted widely in order to allow relief whenever there is an infringement of a person's fundamental rights. Standing provisions are broadly and expansively framed as an indication of the constitutional protection of constitutional rights but do not allow abstract non-specific challenges on the constitutionality of legislation—*Savoy v National Director of Public Prosecutions* 2014 (1) SACR 545 (CC) at [12] and [13].

1.2.4 Access to competent courts relating to constitutional matters

Access to courts competent to hear constitutional matters may be gained in the following ways:

(a) *To the Constitutional Court*—

(1) by means of an appeal from a court of a status higher than a lower court (s 170 and 172(2)*(d)* of the Constitution);

(2) by means of a referral by a division of the High Court or by the Supreme Court of Appeal (s 172(2)*(b)* and *(c)* of the Constitution and s 15(1)*(a)* of the Superior Courts Act); or

(3) by means of direct access on application or on appeal from any person/organ with sufficient interest to do so (s 167(6)*(a)* and *(b)* of the Constitution and s 15(1)*(b)* of Act 10 of 2013).

(b) *To the High Court*—

Access to the High Court for the purposes of deciding a constitutional issue is obtained by means of review powers or on appeal or on an application for relief (s 169 of the Constitution).

(c) *To the Supreme Court of Appeal*—

The Supreme Court of Appeal may only be approached by means of an appeal, unless an issue was specifically referred to this court by legislation.

Leave to appeal is generally a prerequisite before an appeal may be heard.

(On the standing of lower courts with regard to constitutional issues, see Chapter 21 para 1.2.3.2.)

2 The difference between appeal and review procedures

Although there is a difference between appeal and review procedures, both are inherently aimed at setting aside a conviction or a sentence. Correct procedure should, however, be used. As mentioned above, an appeal is the correct way to challenge a conviction or sentence or both. An appeal is concerned with the substantive correctness of the decision based on the facts or merits of the case on the record and the law relevant to such facts. Should a party feel aggrieved about an irregularity involved in arriving at the conviction, the best procedure is to seek redress by way of review. A review is concerned with the validity of the proceedings. According to *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581, an irregularity in the proceedings—

does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.

Not only irregularities that arise from high-handedness, but also a *bona fide* mistake denying the accused a fair trial, will amount to an irregularity in the proceedings. If a party wishes to attack the proceedings on one or more grounds of review and also the correctness of the magistrate's findings on the facts or the law—or both—he may appeal *and* apply for review—*Ellis* (above). Judicial review relating to constitutional issues is brought by means of an appeal or review depending on the *forum* (lower court or division of the High Court) in which the constitutional matter has arisen. The purpose of judicial

review will obviously cause the approach to and grounds of the review to be different from those applying to appeal.

The differences between appeal and review procedure when constitutional issues are *not* exclusively involved are basically the following:

(1) An appeal may be brought against the findings of a lower court on any point of law and/or fact. A review in terms of the Superior Courts Act, on the other hand, can be brought only on the ground of specific procedural irregularities (see below, under 'Grounds for review').

(2) In an appeal the parties are confined to what appears on the record, but in a review it is permissible to prove any of the grounds for review (including alleged irregularities that do not appear on the face of the record) by affidavit so as to show that the judge had an interest in the cause or that he acted maliciously or corruptly.

In *Mwambazi* 1991 (2) SACR 149 (Nm) the court illustrated the difference as follows:

> It must be stressed that in an appeal an appellant is confined to the four corners of the record but in review proceedings the aggrieved party traverses matters not appearing on the record. *Schwartz v Goldschmid* 1914 TPD 122. Consequently, if there is a patent omission from the record, as for instance the magistrate's failure to inform an accused of his right to representation, and the accused comes by way of appeal, such failure to inform him does not mean the High Court will interfere unless it also appears from the record that the appellant did not know of his right. On the other hand, if the accused came by way of review he could fill this gap in his affidavit.

(3) Furthermore, a review is not generally permissible on a finding of fact unless that finding is so unreasonable that it constitutes an irregularity. While any question of law or fact, or any gross irregularity appearing on the face or the record, may be raised by means of an appeal, the accused who brings the matter before the court by way of review is confined to the specific grounds for review. On review he will not be allowed to argue that the presiding officer went wrong on a point of law, unless the error affected one of the grounds for review (eg, where the magistrate incorrectly decides that the law conferred jurisdiction upon him which he actually does not have). The applicant may not argue on review that the magistrate's decision is wrong on the facts—although a total absence of any evidence to justify the magistrate's finding, is such a gross irregularity as to afford a ground for review—see *Hlatswayo* 1947 (4) SA 755 (O).

(4) While an appeal must be brought within a certain time, there is no such limit in the case of a review. However, a court of review will not condone the bringing of the matter under review after an unreasonable period has elapsed since conviction. In the case of a long delay, the court will exercise its discretion to hear the review only if a satisfactory explanation for the delay is given—*Zwane v Magistrate, Maphumulo* 1980 (3) SA 976 (N). Note however that an application for leave to appeal to the Supreme Court of Appeal is not time-bound but may in exceptional circumstances be allowed—s 17(2)*(f)* of the Superior Courts Act.

(5) Appeal is tantamount to a retrial on the record, while in the case of a review, facts can be brought to the notice of the court by means of an affidavit in order to prove the irregularity, and the enquiry is then whether the proceedings have been in accordance with justice and/or whether the accused has been prejudiced by the irregularities in the proceedings (however, see above para 1.1 and Chapter 21 para 3.9).

(6) A court has no inherent appellate jurisdiction and its powers on appeal are statutorily limited. It is therefore not possible to invoke the court's appellate powers by any means other than those set out in the relevant statutory provisions. Only the superior courts enjoy inherent review jurisdiction. The court's inherent review jurisdiction is overriding and may be invoked irrespective of the relief procedure instituted. When considering an appeal or a statutory review, the court may resort to its inherent review jurisdiction.

(7) An appeal is lodged by way of an application for leave to appeal, whereas a review is sought by way of a notice of motion whereby the respondents are called upon to show cause why the decision or proceedings should not be reviewed and corrected or set aside.

3 Review in terms of the Criminal Procedure Act

3.1 Automatic review

3.1.1 General

The law of criminal procedure provides that certain sentences of magistrates' courts must be reviewed by a 'provincial' or 'local' division of the High Court in the ordinary course of events, without the accused requesting it. Review of sentences as a matter of course is known in practice as 'automatic review'—the term that is favoured here. Automatic review is of South African origin and is a praiseworthy development because it ensures that the High Court constantly controls the administration of justice in magistrates' courts (see 1962 *SALJ* 267 *et seq*). The process of automatic review is based on two fundamental principles: judicial experience and the extent of the sentence. The premise is that the less judicial experience the presiding officer has, the more restricted his or her proficiency and skill will be, and the greater the danger of incorrect conduct and sentences. In district courts, experience in sentencing above a certain limit is restricted by the limited extent of cases adjudicated in such courts—*Mokubung; Lesibo* 1983 (2) SA 710 (O). Consequently, no provision is made in the Act for the automatic review of sentences imposed by the High Court, or of decisions and sentences imposed by regional courts. (A sentence of a fine or imprisonment imposed by a regional court in terms of s 108(1) of Act 32 of 1944 for contempt of court is an exception to the above rule—see s 108(2) of the Magistrates' Courts Act 32 of 1944 and cf *Nxane* 1975 (4) SA 433 (O).)

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Although the automatic review procedure is termed 'review', the reviewing judge is not limited to the investigation of irregularities but may pay attention to all aspects that are subject to appeal. However, in an automatic review, the judge is confined to the record of the proceedings. A court on review has only to certify that the proceedings were in accordance with justice, and not necessarily in accordance with law. Hence a court on automatic review could confirm an incompetent sentence, where the circumstances of the case did not warrant the setting aside thereof as a court on review has only to certify that the proceedings were in accordance with justice, and not necessarily in accordance with law—*Cedars* 2010 (1) SACR 75 (GNP). In this case the court followed *R v Harmer* 1906 TS 50 at 52, where Innes CJ held that a court on review only has to certify that the proceedings are in accordance with real and substantial justice, not necessarily in accordance with strict law even though a rule of criminal procedure may not have been observed. Automatic review proceedings do not bar the accused from appealing the court's decision or order before or after the court has certified the proceedings.

3.1.2 District courts' sentences subject to automatic review

In general, but subject to the provisions of ss 81, 83 and 85 of the Child Justice Act 75 of 2008, which provide for legal representation for child offenders and sentences of detention, a sentence is not subject to automatic review if the accused was assisted by a legal adviser—s 302(3). Where the accused was assisted during the trial, but not at the time of sentence, either because the legal adviser had withdrawn or because the accused had withdrawn the legal adviser's mandate, the proceedings are nevertheless subject to automatic review—*Mboyany* 1978 (2) SA 927 (T). It is submitted that where there is doubt or where the legal adviser at any stage during the trial is absent for such a period that his absence could have made a difference to the outcome of the trial, automatic review would be the proper course.

The following sentences imposed on offenders are subject to automatic review:
(1)

Sentences of imprisonment (including detention in a child and youth care centre providing a residential programme outside prison or in a family environment as contemplated and provided for in s 191(2)*(j)* of the Children's Act 38 of 2005) for a period exceeding *three months* if imposed by a judicial officer who has not held the substantive rank of a magistrate or higher for seven years, or for a period exceeding *six months*, if imposed by a judicial officer who has held the substantive rank of a magistrate or higher for seven years or longer, are subject to automatic review—s 302(1)*(a)*(i).The term 'has held the substantive rank' in the section is wide enough to include a magistrate's previous term of office—*Botha* 1978 (4) SA 543 (T). (In *Heskwa* 1992 (2) SACR 95 (C) the desirability of the practice propounded by *Botha* (above) was questioned and the court suggested an amendment of s 302, providing that the seven-year period should have been served during the immediately preceding ten years.) However, the judicial officer should actually have served as magistrate for the required period and the fact that he has been regarded as a magistrate for the required period is irrelevant for the purposes of s 302(1)*(a)*(i)—*Heskwa* (above).

Direct imprisonment and any suspended imprisonment, if imposed, must be added up to determine the reviewability of the sentence. In the same manner a suspended period of imprisonment is subject to automatic review if it exceeds

the prescribed period. Likewise, if a suspended sentence of imprisonment does not exceed the prescribed limit, the sentence is not subject to automatic review—*M* 1990 (2) SACR 217 (T).

(2) A sentence of a fine that exceeds the amount determined by the Minister from time to time by notice in the *Government Gazette* for the respective judicial officers referred to in subsection 302(1)*(a)*(i) above is subject to automatic review—s 302 (1)*(a)*(ii). From 30 January 2013 (*GG* 36111) a sentence that in the case of a fine exceeds the amount of R6 000, if imposed by a judicial officer who has not held the substantive rank of a magistrate or higher for seven years, or which exceeds the amount of R12 000, if imposed by a judicial officer who has held the substantive rank of a magistrate or higher for seven years or longer, is subject to automatic review—s 302(1)*(a)*(ii).

For the purpose of automatic review, it is irrelevant whether a fine is coupled with an alternative sentence of imprisonment, whether suspended or not, and whether the fine is paid or not—*Melani* 1991 (2) SACR 611 (NC); *Afrikaners* 1992 (2) SACR 408 (C). All sentences of fines above the prescribed limit and imposed by magistrates of district courts render the proceedings automatically reviewable and it is irrelevant whether the fine is paid or not.

In order to compute sentences that are appropriate for automatic review, each sentence on each separate count must be considered a separate sentence. The fact that the aggregate of the sentences imposed in respect of more than one count in the same proceedings or criminal trial exceeds the prescribed periods or amounts does not render those sentences, if below the statutory prescribed limits, subject to automatic review—s 302(2).

An automatic review does not affect an accused's right of appeal against such a sentence, whether before or after confirmation thereof by the judge or court reviewing it. If an accused has appealed against a conviction or sentence and has not abandoned the appeal, the automatic review of the sentence is suspended and shall cease to apply concerning such accused when judgment is given—s 302(1)*(b)*.

3.1.2.1 Automatic review applicable in respect of children in terms of the Child Justice Act 75 of 2008

Children convicted in terms of the Child Justice Act or any other provision have their sentences automatically reviewed as provided in terms of s 302 of the Criminal Procedure

Act, unless the child has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in s 191(2)*(j)* of the Children's Act—s 85 of the Child Justice Act. In such a case the sentence will be automatically reviewed, irrespective of the term of imprisonment imposed or the period for which the presiding officer has held the substantive rank of magistrate. Contrary to the procedure in terms of s 302, in such a case it is also of no significance whether the child was represented during the proceedings or not, or whether the trial was conducted in a district or regional court—*LM* 2013 (1) SACR 188 (WCC); *S v FM* 2013 (1) SACR 57 (GNP). Consequently, when a child is legally represented and sentenced by any lower court to imprisonment not wholly suspended or compulsory detention in a child and youth care centre, the sentence will be automatically reviewed, while in respect of other sentences, where the child

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enjoyed the services of a legal representative, automatic review will be excluded in terms of s 85 of the Child Justice Act.

Such automatic review will be suspended when an appeal is noted in terms of s 84 of the Child Justice Act. Release of the child on bail will be possible, pending review or appeal.

3.1.2.2 When automatic review is not applicable

Not all orders of a lower court are automatically reviewable. The following are examples of those not reviewable:

(1) When a person is convicted and it appears that the convicted person has not complied with a condition of suspension imposed as part of a sentence of a previous conviction, the putting into effect of such suspended sentences is an administrative decision and is not a 'sentence'. The High Courts may review it only by virtue of its common-law power of review upon notice of motion—*Van Staden* 1975 (2) PH H103 (T); *Zwane* 1996 (2) SACR 281 (T).

(2) An order made under s 77(6)*(a)* of the Criminal Procedure Act that an accused is not capable of understanding the proceedings to make a proper defence (and detention of an accused in a psychiatric hospital or a prison or detention in an institution pending the signification of the decision of a judge in chambers) is not subject to automatic review but may be appealed against on condition that the accused did not raise his mental illness as a defence against any criminal responsibility on his part (see s 77(8) and *Blaauw* 1980 (1) SA 536 (C); *Van Wyk (1)* 2000 (1) SACR 79 (T)).

(3) The proceedings in an inquest conducted before a magistrate in terms of the Inquests Act 58 of 1959, in order to investigate the cause of death of a deceased person, are not criminal proceedings and accordingly not reviewable in terms of the Criminal Procedure Act—*In re Mjoli* 1994 (1) SACR 336 (T).

(4) No judgment given or order by a regional court is automatically reviewable except (as envisaged by s 85 of the Child Justice Act) in the case of a child who has been sentenced in the regional court to imprisonment which sentence was not wholly suspended, or sentenced to compulsory residence in a child and youth facility. The automatic review is suspended when an appeal is noted.

(5) Criminal proceedings diverted into a maintenance investigation are not automatically reviewable—*Mahlanga* [1997] 2 All SA 50 (T), and see also *Van Loggerenberg* 2002 (2) SACR 61 (T) on the tied hands of a High Court to review the default of the Minister to appoint maintenance investigators.

3.1.3 Procedure on review

After a sentence has been passed that is subject to review, the clerk of the court must transmit the record to the registrar of the 'provincial' or 'local' division having jurisdiction, not later than one week after the determination of the case. There should be no delay in

transmitting the record as any delay can seriously prejudice an accused—*Raphatle* 1995 (2) SACR 452 (T). Unreasonable delays in submitting the record reflect on the accused's right to a fair and speedy trial and might be in itself sufficiently material to exclude confirmation of the court of review that the proceedings of the trial court were in accordance with justice—*Joors* 2004 (1) SACR 494 (C). The magistrate may append such remarks as she considers desirable to the

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record. The accused is entitled, within three days after conviction, to supply any written statement or argument in support of his case to the clerk of the court to be transmitted to the registrar with the record—s 303, and see also *Brunette* 1979 (2) SA 430 (T). As soon as possible, the registrar must submit all these papers to a judge in chambers for his or her consideration—s 303. A delay of six months in submitting the record to the judge defeats the purpose of the review process—*VC* 2013 (2) SASV 146 (KZP). A judge who receives the documents in chambers must certify on the record that the proceedings are in order if, in his opinion, the proceedings were in accordance with justice. ('Proceedings' comprises both conviction and sentence and a court of review is accordingly empowered to review both conviction and sentence even though the case is referred for rectification of the sentence only—*Rothman* 1990 (1) SACR 170 (O).)

If the judge is uncertain whether the legal rules were complied with during the magistrate's court proceedings, he requests a statement from the magistrate who presided at the trial setting forth his reasons for convicting the accused and for the sentence imposed. Usually the director of public prosecutions will also be approached for his comments—cf s 304(1). When a query is or queries are directed to a magistrate by a reviewing judge, it is expected of the latter to respond in a responsible, complete and courteous manner—*Mogetwane* 2000 (2) SACR 407 (O). Magistrates must respond within a reasonable time. In *Hlungwane* 2000 (2) SACR 422 (T); 2001 (1) SACR 136 (T) the magistrate and the director of public prosecutions were chided and criticised for taking five months and three weeks, respectively, to respond to or to comment on the judge's queries and request. Accused who have no counsel are entitled to a speedy review and the court warned that a failure by the authorities to ensure that such right is properly respected may amount to a wrongful act against an accused that could lead to a claim for damages against the authorities if the accused was incorrectly convicted and/or sentenced. On the other hand, magistrates ought not to regard a query directed by a judge as an unnecessary irritation, to be disposed of as quickly as possible. When a judge directs a query, it means that he or she is *prima facie* not satisfied that justice was done. The magistrate can, by furnishing proper reasons, contribute to the removal of the judge's initial doubt, and to the confirmation of the conviction and/or sentence—*Joale* 1998 (1) SACR 293 (O). If the judge has no further doubts, he or she signs the certificate. However, if the judge is still in doubt or is uncertain or it appears from the outset to the judge that the proceedings were not according to justice, two judges (sitting as a court of review) must consider the proceedings and deliver judgment—cf s 304(2)*(a)*. Where the review of the proceedings is a matter of urgency, the court of review considers the proceedings without obtaining a statement from the magistrate. This would be the case where the judge is of the opinion that the proceedings were clearly not in accordance with justice and that delaying the review procedure would be to the accused's prejudice.

The test that a court of review applies in automatic review procedure is whether justice has been done. If it has, the sentence will be confirmed even though there were technical irregularities—*Addabba; Ngeme; Van Wyk* 1992 (2) SACR 325 (T). The confirmation of proceedings on review requires a finding only that the proceedings were in accordance with justice although not necessarily in accordance with law—for example, the proceedings might be confirmed on review although a rule of criminal procedure was disregarded—*Ndlovu* 1998 (1) SACR 599 (W). However, the

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proceedings must be in accordance with real and substantial justice in so far as the interests of the convicted person are concerned—*Zwane* 2004 (2) SACR 291 (N).

If the court of review desires to have any question of law or fact in the case argued, it may direct it to be argued by the director of public prosecutions and by such counsel as the court may appoint for the accused. The queries by the reviewing judge, the magistrate's reply and all other communication must be included in the case record—*Ntshingila* 1980 (3) SA 883 (N).

3.1.3.1 Lost record

It may sometimes happen that the record of a case is mislaid or becomes mechanically defective. In such an event, the court of review may order that the clerk of the court submit the best secondary evidence obtainable as to the nature of the original evidence and proceedings (*Van Sitters* 1962 (4) SA 296 (C)), or that the case be sent back to the court to hear evidence in order to reconstruct the record—*Domo* 1969 (1) SA 104 (N), or, where it is impossible to reconstruct the record, the proceedings may be set aside—*Modsenyane* 2014 (2) SACR 453 (GP). This also applies to an appeal. In *Biyana* 1997 (1) SACR 332 (T), the court held that in order to reconstruct a lost record, the recall of witnesses who gave evidence during the trial would be irregular, but for a different viewpoint regarding the recalling of witnesses in order to reconstruct the record, see *Chokoe* 2014 (2) SACR 612 (GP). However, the clerk of the court may obtain affidavits from such witnesses, as well as from other persons concerned with the trial. But if no record exists and the record cannot be reconstructed, the conviction and sentence must be set aside. The matter may not be referred back to the trial court for a *de novo* trial—*Fredericks* 1992 (1) SACR 561 (C).

3.1.4 Automatic review and the right to appeal

The provisions relating to automatic review are suspended in respect of an accused (i) who has noted an appeal and has been granted leave to appeal against a conviction and/or sentence; or (ii) who has an automatic right of appeal and has not abandoned such appeal (s 302(1)*(b)*). If the accused person were to abandon his or her appeal, the sentence will be reviewed. Once judgment has been given on appeal, no automatic review can take place—s 302(1)*(b)*. If the proceedings have already been certified by a judge in terms of s 304(1), when the notice of appeal by the accused reaches the registrar, the certificate will be withdrawn to allow an accused to prosecute his or her appeal—cf *Disler* 1933 CPD 405. There is no inconsistency in criminal proceedings being set aside on appeal after they have been confirmed on review, since the test applied on review is different from the criteria applied on appeal.

A judge is at liberty to withdraw his certificate if he discovers afterwards that he made a mistake or if admissible fresh evidence is discovered after the proceedings have been confirmed—*Madlelana* 1936 EDL 140. In *Makebe* 1967 (1) SA 464 (N), it was held that if, after a judge has confirmed a conviction and sentence on automatic review, it appears that justice demands that the sentence be altered, it is competent for the review court to deal with the matter, even if the reviewing judge is no longer able to withdraw the certificate because he is no longer a judge. (Here the magistrate failed to impose a compensatory fine besides a term of imprisonment.) See also *Katu* 2001 (1) SACR 528 (E), where the court, in the interests of justice, set aside a sentence that proved to be impractical although it had been confirmed on review.

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3.2 Extraordinary review

Where it has been brought to the notice of a division of the High Court having jurisdiction, or any judge thereof, that the criminal proceedings in which the sentence was imposed *were not in accordance with justice*, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been submitted to such court or judge according to the procedure on automatic review—s 304(4). The presiding magistrate must specifically state that the proceedings were not in accordance

with justice and may not abuse these proceedings to obtain the record at state expense to supply the defense with a free copy and magistrates should be aware that courts are not to be misused for cheap appeals in the guise of reviews in terms of s 304(4) of the Criminal Procedure Act—*Singh* 2013 (2) SACR 372 (KZD); *De Wee* 2006 (1) SACR 210 (NC).These provisions will apply where the criminal proceedings are not subject to automatic review, either because they do not qualify in terms of the provisions of s 302 or the sentences have been imposed in a regional court—cf *Eli* 1978 (1) SA 451 (E). The provisions of this subsection enable the director of public prosecutions, a magistrate, or the accused to bring irregularities in the proceedings or pressing legal questions under review by bringing it to the notice of a judge in chambers for him to act according to s 303 or s 304—cf *Hlope* 1962 (2) SA 607 (T). However, a matter that has been finally disposed of on appeal may not be brought on review in terms of s 304(4)—*Mtombeni* 1946 TPD 401.

The question to be considered by the High Court when a matter comes before it on review in terms of s 304(4) is whether there are any irregularities or considerations of equity and fair dealing that compel the court to intervene to prevent a probable failure of justice. Evidence to this effect should be placed before the court—*Cedras* 1992 (2) SACR 530 (C); *De Wee* 2006 (1) SACR 210 (NPD). Care must be taken to prevent s 304(4) being used as a cheap form of appeal—*Matsane* 1978 (3) SA 821 (T); *Ferreira* 1978 (4) SA 30 (T).

No time limit is set by s 304(4) and cases have been reviewed even after a lapse of four years since conviction—cf *Fouché* 1953 (3) SA 201 (C). In *Callaghan v Klackers* 1975 (2) SA 258 (E) the High Court requested, *mero motu*, the record of a magistrate's decision that had been delivered 18 months earlier for the purposes of review.

3.3 Review of proceedings before sentence

If a magistrate or regional magistrate, after conviction but before sentencing, is of the opinion that the proceedings in which a conviction has been brought in are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, such magistrate or regional magistrate shall, without sentencing the accused, submit the record and the reasons for his opinion for review by a judge in chambers—s 304A. This applies irrespective of whether the conviction has been entered by himself or someone else—cf *Abrahams* 1991 (1) SACR 633 (O); *Hlongwane* 1990 (1) SACR 310 (NC). The court must form its opinion on supporting evidence but not on an unsworn statement—*Ngcobo* 2010 (1) SACR 403 (KZP). The judge shall have the same powers as if the matter had been placed before him in terms of s 303. In the interim the case is postponed, pending the outcome of the review proceedings.

Section 304A should not be applied so sparingly as to be a dead letter. It must,

however, be applied only rarely where the continuation of the case would constitute a failure of justice, and real and substantial prejudice would be caused to the accused—*Makhubele* 1987 (2) SA 541 (T). If *a conviction* has not been entered, or the judicial official is without a doubt of the opinion that the proceedings are in accordance with justice, the provisions of s 304A are not available—*Burns* 1988 (3) SA 366 (C); *Ngema* 2005 (2) SACR 236 (NPD). In proper and rare cases the High Court could, by virtue of its inherent powers to restrain irregularities in lower courts, grant relief by way of review, interdict or *mandamus* against the decision of the magistrate in unterminated proceedings in a lower court. The possibility that grave injustice or failure of justice would result must be likely before the High Court would exercise its inherent power—*Van Niekerk v Van Rensburg* 1976 (2) SA 471 (T). Where the accused had been convicted but before he was sentenced, the record of the proceedings was lost, the magistrate was no longer available and the accused disappeared. Eleven years later, the accused was arrested and brought to court, and the matter was sent for review before sentencing of the accused in order for the matter to start *de novo*. Section 304A would not be applicable if no finding of whether the matter was not in accordance with justice could be

made due to the lost record. However, the court intervened on the basis of an unfair trial and resultant serious injustice ensuing should the matter start afresh, due to no fault of the accused—*Masiya* 2013 (2) SACR 363 (GNP). The court will not exercise its inherent review jurisdiction where its decision will be of academic interest only.

The introduction of s 304A brought to an end a series of conflicting decisions that dealt with the problem whether a magistrate who has doubts as to the correctness of a conviction should first impose a sentence although he knows that it would be set aside on review.

3.4 Set down of case for argument

After an accused has been convicted, he may in terms of s 306 bring the magistrate's court proceedings under review by way of setting down for argument his case before a 'provincial' or 'local' division with jurisdiction. This type of review is restricted to those cases that are, in any event, automatically reviewable. However, it creates an alternative review procedure for those accused who are not content with the procedure provided for in s 303, namely the submission of a written statement or argument. However, the accused may not have his case set down after he has submitted a written statement or argument for consideration—*Simelane* 1958 (2) SA 302 (N). In *Simelane* it was decided that the procedure set down in s 306 may only be used in the case of an alleged irregularity. The accused is naturally free to bring the matter under review on any of the grounds mentioned in s 24 of the Superior Courts Act. The procedure created in s 306 is, however, much simpler than the procedure in terms of that Act.

In terms of s 306(1) the accused enrols the case before the record of the proceedings has been transmitted to the 'provincial' or 'local' division for automatic review. Whenever a case is set down for consideration, the accused must notify the director of public prosecutions in writing of the date on and court before which the matter is set down for argument. Such notification must be given more than seven days before the argument and the accused must also state the grounds upon which the setting aside or the alteration of the sentence is to be sought.

4 Review in terms of the Superior Courts Act, 2013

4.1 Review at the instance of the accused

4.1.1 General

Apart from the indirect manner by which a review may be brought to the High Court in terms of ss 304(4), 305 and 306 of the Criminal Procedure Act, this Act does not provide for a review of lower court proceedings at the instance of the accused. The power of the High Court to review lower courts' proceedings is regulated by s 21(1)*(b)* of the Superior Courts Act, 2013. The authority to review is vested in the divisions of the High Court and local seats with review jurisdiction such as the Gauteng High Court, Johannesburg—s 19 (2). The power to review lower courts' proceedings is, however, limited by statute to the grounds set out in s 22 of the said Act (see below). These grounds deal exclusively with irregularities of the method of proceedings and the procedure to be followed is formally embodied in rule 53 of the Uniform Rules of Court. (These rules, called the High Court Uniform Rules (HC Rules for short), regulate the conduct of the proceedings of the divisions of the High Court and are called the 'Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa', published in Government Notice R 966 of 9 October 2009 in *Government Gazette* 32622. Uniform Rule 53 has been amended by notice R 317 of 17 April 2015, allowing the right to a full copy of the record of proceedings.)

4.1.2 Grounds for review

The grounds in terms of s 22(1) of the Superior Courts Act upon which the proceedings in any lower court may be brought under review before a division of a High Court having jurisdiction are:

(1) absence of jurisdiction on the part of the court, for example where the offence is one that cannot be tried by the court, or where the court imposed a punishment beyond its jurisdiction, or where the offence was committed outside the court's territorial area of jurisdiction; or where the sentence imposed by the court, although competent, proved to be unworkable (*Mahlangu* 2000 (2) SACR 210 (T));
(2) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer. This ground deals with irregularities which are founded on a lack of good faith, ulterior motive or corruption on the part of the magistrate;
(3) gross irregularity in the proceedings. (In *Van Heerden* 2002 (1) SACR 409 (T) the review court assumed review powers under s 22 in a partly heard matter before a magistrate in order to set aside a subsequent partly heard trial before another magistrate on the same charge involving the same accused and same set of facts. This matter was referred to the review court in terms of s 304A although it did not apply to the situation. The failure of the magistrate to inform the undefended accused facing a sentence of imprisonment for life that he was entitled to legal counsel amounts to a gross irregularity vitiating the entire trial—*S v GR* 2015 (2) SACR 79 (SCA).)
(4) the admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence.

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4.1.3 Procedure

A matter should be brought under review within a reasonable time, which will depend in each case on the relevant circumstances. The onus of establishing an unreasonable delay is on the party alleging it. The court has a discretion to either condone the delay or refuse to entertain the application for review.

As a rule, review will not be granted in unterminated proceedings. It may, however, be granted where the interests of justice demand it and the High Court avails itself of its inherent powers to correct the proceedings in a lower court at any stage thereof to prevent an injustice—*Lubisi* 1980 (1) SA 187 (T); *Malakwana* 1975 (3) SA 94 (O); *Shezi* 1984 (2) SA 577 (N). An accused may seek either a review or an interdict or mandamus against the magistrate's decision in order to compel the magistrate to adopt the legal procedure.

The procedure to be followed for bringing criminal matters under review is by way of notice of motion directed and delivered to the presiding officer and to all parties affected. The procedure is embodied in Rule 6 and Rule 53 of the HC Rules. Rule 53 must also be followed in cases where the High Court's inherent power of review is sought. The applicant (accused or other party requesting a review) calls upon such persons—

(1) to show cause why the lower court's decision or proceedings should not be reviewed, corrected or set aside, and calling on the magistrate, presiding officer
(2) to despatch, within 15 days after receipt of the notice of motion, to the registrar of the High Court, the record of such proceedings sought to be corrected or set aside, with such reasons as he is by law required or wants to give, and to notify the applicant that he has done so. The Registrar must make the record available to the applicant.

The notice of motion indicates the decision or proceedings sought to be reviewed and must be supported by an affidavit setting out the facts on which the applicant relies. Within ten days the applicant may amend or vary the terms of the notice of motion by means of a fresh notice of motion with supporting affidavits. The respondent may oppose the granting of the order prayed in the notice of motion within 15 days—Rule 53(5).

4.2 Review at the instance of the prosecution

Although there is no express provision in the Superior Courts Act or the Criminal Procedure Act regarding review at the instance of the prosecution, there is nothing in the said Acts or the Supreme Court Rules that confines a prayer for review to the accused to the exclusion of the prosecution. The divisions of the High Court with jurisdiction may review an alleged procedural irregularity at the instance of the prosecution. See for example *Attorney-General v Magistrate, Regional Division, Natal* 1967 (4) SA 680 (N), where the director of public prosecutions successfully brought an application for review of proceedings of a regional court which had improperly converted a case into yet another preparatory examination although a preparatory examination had already been held and the matter had been forwarded by the director of public prosecutions for trial to the said court. See also *Monchanyana* 1968 (1) SA 56 (O). Although these cases are not clear on the specific manner of review procedure, these reviews probably fall within the type contemplated by s 21 on any of the grounds referred to in s 22(1) of Act 10 of 2013. However, s 304(4)

provides an easier mechanism for the prosecution to notify a division of the High Court of irregular proceedings and to seek relief from the court.

5 Functions and powers of a court of review

5.1 General

Upon automatic review, the function of the court is solely to decide whether the proceedings were in accord with the demands of justice. The evidence is not considered as carefully as upon appeal and the same weight is not attached to technical points—cf *Butler* 1947 (2) SA 935 (C). This is equally applicable to all other kinds of review, since a review is concerned only with the question whether the proceedings were in accordance with the demands of justice—*Hlatswayo* 1947 (4) SA 755 (O). The interests of the convicted person and those of the State are considered—*Zulu* 1967 (4) SA 499 (T). Here, however, the court refused to exercise its discretion in favour of the State to correct an error that the magistrate had made when imposing the sentence, so that a more severe punishment would have to be imposed. In the circumstances, the court held that justice towards the convicted person outweighed justice to the State. See further 1975 *Annual Survey* 484-5.

The question whether the proceedings were according to justice must, in general, be decided according to the circumstances that prevailed when the proceedings took place. It is only in exceptional circumstances that the court will take cognisance of circumstances that occurred after the completion of the proceedings and alter the sentence on this account—*Sithole* 1988 (4) SA 177 (T); *Marx* 1989 (1) SA 222 (A). A decision is right or wrong according to the facts in existence at the time it is given, not according to new circumstances subsequently coming into existence—*Verster* 1952 (2) SA 231 (A).

The functions and powers of a court on review, as set out below, are applicable irrespective of the type or manner of review which is brought before the review court. The absence of specific provisions in the Superior Courts Act regarding that court's powers and functions suggests that the provisions of s 304(2)*(b)* and *(c)* apply equally to reviews brought under the Superior Courts Act 10 of 2013.

5.2 Powers of the High Court in terms of s 304

The powers of the court of review in terms of s 304(2)*(b)* and *(c)* and 304(3) are as follows:

(1) The court may confirm, alter or quash the conviction. In *Isaacs* 1970 (4) SA 397 (NC) at 399 the court observed *(obiter)* that where the sentence of a magistrate's court is confirmed upon review, this fact signifies only that there were no grounds for the High Court to interfere with that sentence. It is not to be regarded as a

sentence that the High Court would necessarily have imposed in the first place, nor does that such a confirmed sentence establish any criterion or norm.

(2) The court may confirm, reduce, alter or set aside the sentence or any order of the magistrate's court. Accordingly, the court of review has the power to correct a penalty imposed or the conditions of suspension of the sentence. In doing so, the court cannot render either the penalty or the conditions of suspension more onerous where that sentence or order was a competent one—*Morris* 1992 (2)

SACR 365 (C). A court of review has no jurisdiction to increase a sentence—*Haasbroek* 1969 (1) SA 356 (O). Sentences may be increased on appeal only. If the sentence imposed by the magistrate's court is legally wrong, the appropriate and legal sentence must be substituted for it, even though it could result in a heavier sentence than the sentence previously imposed by the magistrate—Hiemstra 807. Evidently the sentence so imposed may not be beyond the lower court's punitive jurisdiction—cf *Freedman* 1921 AD 603. The court of review may impose the proper sentence but would normally refer the matter back to the lower court for the imposition of a suitable sentence in the presence of the accused—*Zulu* 1967 (4) SA 499 (T). Where there is a possibility of the review court substituting for one conviction another more serious one, with the effect that a heavier sentence than that imposed in the lower court might have to be imposed, the accused, in all fairness, ought to be given prior notice of the court's intention and counsel ought to be appointed to represent the accused—*Zulu* (above) at 500; *Viljoen* 1989 (3) SA 965 (T).

(3) If the accused was convicted on one of two or more alternative counts, the court may, when quashing the conviction, convict on an alternative count.

(4) The court may set aside or correct the proceedings, or generally give such judgment or impose such sentence or make such order, as the magistrate could or should have given, imposed or made. This provision provides the court of review with the jurisdiction to substitute a conviction for a more serious offence and to impose a suitable sentence—cf *E* 1953 (3) SA 314 (A); *Mokoena* 1984 (1) SA 267 (O); *E* 1979 (3) SA 973 (A) 977D; *Morgan* 1993 (2) SACR 134 (A); Hiemstra 807. Also in terms of this power, the court may amend the charge sheet to a conviction on another charge according to the provisions of s 86 only if the proposed amended charge corresponds to the original charge and if the accused is not prejudiced by the amendment. The practical aspects in deciding whether prejudice will result, such as legal cost and the trauma involved in a retrial, must also be kept in mind—*Mahlangu* 1997 (1) SACR 338 (T).

(5) The court may remit the case to the magistrate's court with instructions to deal with any matter in such manner as the court may think fit.

(6) The court may make such order affecting the suspension of the execution of any sentence or admitting the person convicted to bail or, generally, make such order affecting any matter or thing connected with such person, including proceedings, as the court deems fit in order to promote the ends of justice.

(7) *Further evidence:* A court of review may hear any evidence and for that purpose summon any person to appear and to give evidence or to produce any document or other article—s 304(2)*(b)*. When further evidence is allowed, a trial cannot be completed and it is in the interests of justice that finality is reached in criminal cases. Therefore, further evidence would not readily be allowed except on good cause. The fresh evidence must be of such value as to shed new light on facts that existed at the trial in the court *a quo*—*Verster* 1952 (2) SA 231 (A). When applications for further evidence, by either the accused or the prosecution, are to be entertained, there are two requisites that the court has to consider: First, that the applicant should produce reasonably sufficient reasons why such evidence was not led at the trial and, secondly, that the evidence sought to be adduced should be of material interest in the case—*De Beer* 1949 (3) SA 740 (A); *Zackey* 1945 AD 505. The court will receive further evidence

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where such evidence is clearly relevant and the credibility and reliability of the further evidence are not disputed by the other party—*Noemdoe* 1993 (1) SACR 264 (C). Generally the magistrate would be directed to take such further evidence. Such a course is more convenient for the parties—cf *Brunette* 1979 (2) SA 430 (T). The circumstances of the case would dictate the decision of the court of review, and the conviction and sentence may be set aside and referred for further evidence (*Schutte* 1926 TPD 172) or the conviction may be left standing and the magistrate directed to report to the court upon the fresh evidence, which is then considered with the evidence already on record—*Barlow* 1924 CPD 202. An example of a case in which the leading of further evidence was allowed is *Bernhardt* 1967 (3) SA 174 (T), where an undefended juvenile alleged that he was forced to enter a guilty plea and the court accepted, as a possibility, that the allegation was *prima facie* true.

(8) If the court desires to have a question of law or fact arising in any case argued, it may direct such question to be argued by the director of public prosecutions and by such counsel as the court may appoint—s 304(3).

5.3 Powers of the High Court in terms of s 312

Apart from the powers of the court in terms of s 304(2), a conviction and sentence may be set aside on review (or on appeal) on the ground that any provision of s 112(1)*(b)* or (2) or s 113 was not complied with—s 312. The case must be remitted to the court where the sentence was imposed and such court directed either to question the accused according to s 112(1)*(b)* or (2) or to correct the plea when it is clear that the trial court should have had doubts as envisaged by s 113—cf *Addabba; Ngeme; Van Wyk* 1992 (2) SACR 325 (T).

5.4 The High Court's inherent review jurisdiction

Although the courts are slow to interfere in unterminated criminal proceedings, the High Court's inherent power to restrain illegalities in lower courts could be exercised in exceptional cases—cf *Pitso v Additional Magistrate, Krugersdorp* 1976 (4) SA 553 (T) and *Lubisi* 1980 (1) SA 187 (T). Generally speaking, the court will confine the exercise of its powers to rare cases where grave injustice may otherwise result or where justice may not be attained by other means—*Sapat v The Director: Directorate for Organised Crime and Public Safety* 1999 (2) SACR 435 (C). In *Tshabalala* 2002 (1) SACR 605 (WLD) the review court used its inherent power in order to set aside an acquittal on a charge of theft in a magistrate's court, the magistrate having erred in applying the *de minimis* rule in a case of theft of items to the value of R59,66.

5.5 Powers of judicial review and exclusion of evidence

5.5.1 General

In *Hansen v The Regional Magistrate, Cape Town* 1999 (2) SACR 430 (C) it was held that s 173 of the Constitution had broadened the inherent jurisdiction of the Constitutional Court, the Supreme Court of Appeal and the High Court, to promote the interests of justice within the context of the values of the Constitution. A court is therefore permitted in exceptional circumstances, and notwithstanding that the accused has exhausted all his or her procedural remedies, to grant relief.

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5.5.2 Exclusion of unconstitutionally obtained evidence

The Constitution demands a fair trial for any accused person and presiding officials are tasked with ensuring that trials are conducted fairly. Fairness is an issue which has to be decided upon the facts of each case, and the presiding official is the person best placed to take that decision—*Ferreira v Levin; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC). Ultimately, if evidence is obtained in a manner that violates any right in the Bill of Rights, it must be excluded if the admission of that evidence would render the trial unfair or

otherwise be detrimental to the administration of justice—s 35(5) of the Constitution; *Pillay and Others* 2004 (2) SACR 419 (SCA). The court of review may, by virtue of its judicial powers of review, exclude such evidence if the presiding official has exercised his discretion in allowing the evidence in an irregular manner which affected the fairness of the trial. In *Key v Attorney-General, Cape of Good Hope Provincial Division* 1996 (4) SA 187 (CC), Kriegler J summarised the powers of exclusion in the following manner:

At times, fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness requires that evidence, albeit obtained unconstitutionally, nevertheless be admitted.

Compare also para 1.2, above, on judicial review.

The exclusion of evidence improperly obtained is within the power of all courts and not only within the jurisdiction of courts of review or appeal.

6 Execution of the sentence pending review

The execution of any sentence brought under review is not suspended pending the review, unless the magistrate (who imposed the sentence) grants bail or the convicted person is released on a warning to surrender himself for sentence at a later stage—ss 307 and 308A. The manner of review does not affect this provision at all.

7 Retrial where conviction is set aside

Whenever conviction and sentence of a lower court are set aside on review on the ground—

(1) that the court that convicted the accused was not competent to do so; or
(2) that the charge sheet on which the accused was convicted was invalid or defective in any respect; or
(3) that there has been any technical irregularity or defect in the procedure,

proceedings in respect of the same offence to which the conviction and sentence related may be instituted *de novo*. The new trial could be either on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not been previously arraigned, tried and convicted. Such proceedings must then be instituted before some judicial officer other than the one who recorded the conviction and passed the sentence set aside on appeal or review—s 313, read also with s 324 (see also chapter 21 para 3.9).

Although proceedings are not lightly set aside because of irregularities of a formal nature, some irregularities are of such a serious nature that the courts will consider that the proceedings have not been in accordance with justice and fairness, and will set aside the conviction. Where the irregularity is clearly a matter of substance and not a matter of form only and constitutes such a gross departure

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from established rules of procedure that the accused has not been properly tried, it is *per se* a failure of justice—*Raphatle* 1995 (2) SACR 452 (T). In this case, the failure of the court to explain to the accused his rights or to record the full detail of such explanation, once given, was held to be a failure of justice. In *Mabuza* 1991 (1) SACR 636 (O) 638*e* it was held that public policy is an important consideration in the question of whether a presiding officer in his conduct as judicial officer committed an irregularity and whether the accused was thereby prejudiced to such an extent that a failure of justice occurred. If there was such a failure of justice, considerations of justice and also of public policy will require that the proceedings be set aside. In this case the regional court magistrate questioned the accused in a fashion that was described by the High Court as severe cross-examination and inquisitorial in nature.

Other instances of irregular proceedings that were considered not to be in accordance with justice include where the magistrate was clearly biased and indicated that he was satisfied that the accused was guilty before the State had even closed its case (*Berkowitz*

v Pretoria Municipality 1925 TPD 113). Where a prosecutor in a trial later assumed the role of magistrate and sentenced the accused, a gross irregularity would clearly result (*Louw* 1981 (4) SA 939 (E)).

In *Kok* 2005 (2) SACR 240 (NC), on the multiplicity of the irregularities perpetrated by the magistrate, the court remarked that the case serves as an excellent case study for aspirant magistrates on 'how not to conduct a criminal trial'.

The provisions of s 313 must be read in conjunction with the principles involved in *autrefois acquit* and *autrefois convict*—see *Masiya* 2013 (2) SACR 363 (GNP).

8 Declaratory order

As mentioned above, criminal proceedings should not, except in a case of grave injustice, be interrupted to take an illegal or irregular ruling of the magistrate on review. Legal rights or obligations can, however, be decided by means of a declaratory order. Section 21(1)*(c)* of the Superior Courts Act provides that any division of the High Court has the power in its discretion and at the instance of any interested party to inquire into and decide any existing, future or contingent right or obligation, despite the fact that such person cannot claim relief consequential upon the determination. Such interested parties could also be the accused or the prosecuting authority. Section 21(1)*(c)* of the Superior Courts Act provides a statutory basis for the granting of declaratory orders without removing the common-law jurisdiction of courts to do so—*National Director of Public Prosecutions and Another v Mohamed* 2003 (1) SACR 561 (CC).

It is a discretionary remedy. A declaratory order can also be granted although there is no *existing* dispute between the parties concerned, but the dispute must still be alive—*JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC). The courts will not deal with or pronounce upon abstract, hypothetical or academic points of law in proceedings for a declaratory order. The applicant must show that he has a tangible, real and justifiable interest in the determination of his rights and obligations.

Where an appeal or a review might not cover the rights or obligations in question on which clarity is required, a declaratory order may be requested—*Ex parte Attorney-General, Bophuthatswana* 1980 (3) SA 292 (B).

In *Attorney-General of Natal v Johnstone* 1946 AD 256, the court discussed the

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propriety of relief by means of a declaratory order. It is highly questionable whether relief by way of a declaratory order is appropriate in relation to a matter in which criminal proceedings have been instituted—*Sita v Olivier* 1967 (2) SA 442 (A). Where detailed and complex statutory provisions that could be interpreted in different ways are in question, and there is a resultant risk of repeated criminal proceedings against the applicant, the court may grant a declaratory order even though the applicant's rights or obligations were in issue at a concluded criminal trial—*Johnstone* (above).

The Constitution makes provision in s 172(1)*(a)* for its own special form of declaratory order, but allows no room for a declaratory order as envisaged by the common law or s 21 of the Superior Courts Act. Consequently, such declaratory orders are not designed for use when the constitutional invalidity of a statutory provision is being considered—*National Director of Public Prosecutions and Another v Mohamed and Others* 2003 (1) SACR 561 (CC).

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Chapter 21
Appeal

JP Swanepoel

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The Constitution and this chapter:

Section 34—Access to Courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

See 1.2, below.

Section 35—Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right—

. . .

(o) of appeal to, or review by, a higher court.

. . .

See 1.2.1, below

Section 36—Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

See 1.2.2, below

Section 38—Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

See 1.2.5, below

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Section 170—Other courts

All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

See 1.2.3.2, below

Section 171—Court procedures

All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

See 1.2.3.1, below

Section 167(3) and 167(5) Constitutional Court

(3) The Constitutional Court —

(a) is the highest court of the Republic; and
(b) may decide
(i) constitutional matters; and
(ii)

any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

(c) makes the final decision whether a matter is within its jurisdiction.

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.

See 1.2.5, below

Section 172—Powers of courts in constitutional matters—

(1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) *(a)* The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

See 1.2.4 and 1.2.5, below

Section 173—Inherent Power

The Constitutional Court, Supreme Court of Appeal and High Court of South Africa have inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

See 1.2.3.2 and 3.9, below

The Child Justice Act 75 of 2008 and this chapter:

Section 84—Appeals

(1) An appeal by a child against a conviction, sentence or order as provided for in this Act must be noted and dealt with in terms of the provisions of Chapters 30 and 31 of the Criminal Procedure Act: Provided that if that child was, at the time of the commission of the alleged offence—

(a) under the age of 16 years; or

(b) 16 years or older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended,

he or she may note the appeal without having to apply for leave in terms of section 309B of that Act in the case of an appeal from a lower court and in terms of section 316 of that Act in the case of an appeal from a High Court: Provided further that the provisions of

section 302(1)*(b)* of that Act apply in respect of a child who duly notes an appeal against a conviction, sentence or order as provided for in section 302(1)*(a)* of that Act.

(2) A child referred to in subsection (1) must be informed by the presiding officer of his or her rights in respect of appeal and legal representation and of the correct procedures to give effect to these rights.

See 2.2.1, 2.3 and 3.2, below

Section 86—Release on bail pending review or appeal

Whenever the release of a child on bail is considered, pending—

(a) the review of a sentence as provided for in section 307 of the Criminal Procedure Act; or

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(b) the appeal against a sentence as provided for in sections 309(4) and 316 of the Criminal Procedure Act,

the provisions of section 25 of this Act, dealing with the release of children on bail, apply.

See 2.3, below

1 General

1.1 Historical background

In Roman-Dutch law, the general rule was that neither the prosecution nor a convicted person could appeal in criminal cases. This rule was regarded as so self-evident that when William of Orange referred an application for leave to appeal to the Supreme Court of Holland, the reply was that practically throughout the Christian world, the rule was that convicted persons could not appeal. If appeals were allowed, the reply naively continued, convicted criminals would only be enabled to commit further crimes while their appeals were pending! See *Grundlingh* 1955 (2) SA 269 (A). The harshness of this rule was somewhat alleviated by statute both in the Netherlands and at the Cape. In both countries, until after the second British occupation, the right to appeal in criminal cases was far more restricted than the right to appeal in civil cases. During the period 1652 to 1806, the *Raad van Justitie* was the court of appeal for lower courts. At the payment of an amount of 25 rixdollars (£1 7s 6d), the accused were allowed a right of a rehearing (*re-auditie*), which rehearing was based on the record of the trial. Fresh evidence could not be adduced at the rehearing. No *re-auditie* was allowed where the accused had confessed or where the sentence did not exceed a prescribed minimum. In addition to a rehearing, appeals lay from the College of Landdrost and Heemraden, to the Circuit Court (or the Court of Justice), to the High Court of Appeals as the highest court. The decision of the latter was final, but the governor retained the right to pardon an unsuccessful appellant. During the period 1910 to 1955, a further appeal was available to the Privy Council, with the leave of the Privy Council only. (Cf J Dugard *South African Criminal Law and Procedure Volume 1V Introduction to Criminal Procedure* (1970) 18ff.)

Until 1879 no appeal was allowed in criminal cases tried in superior courts, but afterwards appeals were allowed with leave and only to the extent provided for. A special entry was allowed to be made if the proceedings were irregular, as well as the reservation of any question of law for decision by the appeal court. Leave to appeal against findings on the facts was not allowed.

Although no right of appeal initially existed, it was generally accepted later that any person who felt aggrieved by his or her conviction or sentence in a lower court had a right of appeal to a superior court, provided that the appeal was noted and prosecuted in accordance with the rules of the court (Van Zyl *The Theory of Judicial Practice* (1923) 539ff.) Today the right of appeal against decisions of lower courts and the High Court of

South Africa is governed by statute and the Constitution (cf *Grundlingh* (above); *Sefatsa v Attorney-General, Transvaal* 1989 (1) SA 821 (A)).

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1.2 Right of appeal

1.2.1 General

After the decision in *Minister of Justice v Ntuli* 1997 (2) SACR 19 (CC), all convicted persons (irrespective of whether such a person was legally represented or not or imprisoned or not) had an unlimited or absolute right of appeal to a court of a higher instance against a decision or order of a lower court. In *Ntuli* 1996 (1) SACR 94 (CC), s 309(4)*(a)* of the Criminal Procedure Act 51 of 1977, which prohibited any convicted person who was undergoing imprisonment from prosecuting in person any appeal relating to such conviction unless a judge had certified that there were reasonable grounds for an appeal (the so-called 'judges' certificate'), was declared invalid by the Constitutional Court on account of its inconsistency with the 1993 Constitution. This was confirmed in *Minister of Justice v Ntuli* (above). However, the position was drastically changed when the Criminal Procedure Amendment Act 76 of 1997 came into operation on 28 May 1999, amending the former unlimited right of appeal in favour of a limited right of appeal. The amendment intended to bring the procedure regarding appeals from lower courts' decisions into line with those noted against decisions handed down by any division of the High Court of South Africa, sitting either as a court of first instance or as a court of appeal. There had never been a general right of appeal from higher courts, and leave to appeal had been a prerequisite at all times. According to the Department of Justice the reasons for the amendment to the Act were that the unlimited right to appeal caused a backlog in hearing appeals by the already overburdened High Court and that it placed too heavy a burden on state funds, which factors would eventually cause infringements of constitutional rights and the weakening of the judicial system.

Section 25(3)*(h)* provided that included in the right to a fair trial was the right 'to have recourse by way of appeal or review to a higher court than the court of first instance'. (Section 35(3) of the 1996 Constitution entrenches a general right to a fair trial and s 35(3)*(o)* guarantees a specific right to appeal to, or to have a matter reviewed by, a higher court. It provides that every accused person has a right to a fair trial, which includes the right 'of appeal to, or review by, a higher court'.) There is no substantial difference between s 35(3)*(o)* of the Constitution and s 25(3)*(h)* of the interim Constitution, even though the wording differs. The first question that arose after the interim Constitution, Act 200 of 1993, came into effect was whether, in view of the provisions of s 25(3)*(h)*, an accused acquired an absolute right of appeal. Secondly, the question was investigated whether the accused's right to appeal could be limited by conditions that—

(1) the accused has to be granted leave as a prerequisite for appealing from a superior court to the Supreme Court of Appeal or to a full court of any division of the High Court of South Africa (as provided in ss 315(2)*(a)* and 316(1) of the Criminal Procedure Act); and

(2) in order to succeed with such an application for leave to appeal, the accused has to convince the court hearing the application that he has a reasonable prospect of success on appeal or that there is some other compelling reason why the appeal should be heard—s 17(1)*(a)* of the Superior Courts Act, 2013 (see also para 3.4 below).

After a number of opposing decisions (see *Nocuse* 1995 (1) SACR 510 (Tk), *Van Schoor* 1995 (2) SACR 515 (E), *Strowitzki* 1995 (1) SACR 414 (NmH)), the constitutional

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questions came to a head in *Rens* 1996 (1) SACR 105 (CC) at [18]-[25]. The Constitutional Court held that ss 25(3)*(h)* and 102(11) of the interim Constitution should be construed in such a way as to harmonise them and that the leave to appeal

procedures must be consistent with the broad criterion of fairness set by s 25(3) of the interim Constitution. The court held that the procedure prescribed by s 316(1), for appeals from a superior court, does not offend against the provisions of s 25(3)*(h)*, although it requires the trial judge to pronounce on the prospects of success on appeal against his own judgment. The court found that the trial court is not required to say that its own judgment is wrong, but simply to decide whether another court may reasonably come to a different conclusion. The underlying purpose of these limiting requirements is to protect the appeal courts against the burden of dealing with appeals in which there are no prospects of success (at [7] and [20] of the judgment). The court also found that the procedure prescribed by s 316(1) is fair because it allows the accused a dual opportunity of recourse to a higher court: either with the leave of the trial court or with leave granted by the Supreme Court of Appeal upon a petition submitted to the President of that court. In *Twala* 1999 (2) SACR 622 (CC) the Constitutional Court had the opportunity to decide on the constitutionality of s 316 read with s 315(4) of the Act, in the light of the provisions of the final Constitution. The court held that these sections are consistent with the provisions of s 35(3)*(o)* of the final Constitution and that the requirement of leave to appeal is constitutional.

In *Steyn* 2001 (1) SACR 25 (CC) the constitutionality of the requirement of leave to appeal from a lower court, as embodied in ss 309B and 309C of the Criminal Procedure Act, inserted by Act 76 of 1997, was considered and held to be an infringement of an accused's right to a fair trial, which includes a right to an appeal, and his or her right to dignity. Accordingly, the court found these provisions to be unconstitutional and invalid. The court reasoned that when an application for leave to appeal was refused by a magistrate, the reappraisal of the case on a petition by judges of the High Court of South Africa was done on limited information supplied by the lower court and did not allow for an informed decision. The significant differences in the functioning and resources of lower courts and superior courts, according to *Steyn*, allowed for a greater risk of error in lower courts' procedure and judgments, and the threshold of what accorded with fairness could not appropriately be oriented at a level similar to the procedure for appeals from superior courts. In order for the legislature to amend the Act, the Constitutional Court suspended the invalidity order relating to ss 309B and 309C of the Criminal Procedure Act for a six-month period. The failure of the Department for Justice to cure the constitutional defect timeously caused the order to become effective on 28 May 2001. In accordance with the doctrine of objective constitutional invalidity that determines the moment of invalidity (as set out in *Ferreira v Levin NO and Others; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at [26]-[29]), the provisions of the Act were rendered invalid from the day from which such provisions of the Act had been declared invalid. The declaration of invalidity was not made retroactive—*Ndlovu v Director of Public Prosecutions KwaZulu Natal* 2003 (1) SACR 216 (N). All appeals launched but not completed by 28 May 2001 were then governed by the previous position as it had been before ss 309(1) and (2) of the Act were amended, when no leave to appeal was required—*Danster; Nqido* 2002 (2) SACR 178 (C).

However, in 2003 the unlimited right of appeal from a lower court to a higher court was again restricted when s 309 was amended and ss 309B and 309C were reintroduced into the Criminal Procedure Act, albeit with certain amendments. The amendments also brought about that certain juvenile offenders now enjoy an unlimited right of appeal in respect of appeals from the lower courts to superior courts. Convicted persons (other than juvenile offenders, who are specifically provided for in s 84 of the Child Justice Act 75 of 2008) now have to apply for leave to appeal from the courts that tried their cases originally (see paras 2 and 3 below for the provisions regarding the juvenile offenders and their right to appeal). In *Shinga v The State (Society of Advocates (Pietermaritzburg Bar) Intervening as Amicus Curiae): S v O'Connell* 2007 (2) SACR 28 (CC), the court held that the leave to appeal requirement in terms of ss 309B and 309C is consistent with s 35(3)*(o)* of the Constitution and also a desirable procedure as it prevents unmeritorious

appeals. However, in *Shinga* the court struck down certain provisions that were introduced by the amendment as being in part or completely unconstitutional and invalid.

1.2.2 Limitation of constitutional rights

An unlimited right of appeal has been the subject of dispute in a number of cases adjudicated under the new constitutional dispensation. As discussed in Chapter 20, it is trite law that no right is absolute and restrictions are set by the rights of others and by the legitimate needs of society. In order to facilitate these claims, the Constitution provides for the limitation of rights through a general limitation clause in s 36, whereby constitutional rights may be limited by law of general application and on certain constitutionally recognised grounds. The justification for a limitation of a fundamental right must be established by the party relying thereon and it is not for the party challenging it to show that it was unjustifiable (see *Zuma* 1995 (1) SACR 568 (CC)).

The criteria for an acceptable limitation of the rights entrenched in the Bill of Rights are enumerated in s 36 of the Constitution, namely, that they must be reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality. This is not an exhaustive list, but the criteria are the key factors that have to be considered in an overall assessment as to whether or not the contested limitation is reasonable and justifiable—*Manamela* 2000 (1) SACR 414 (CC). In addition, certain factors mentioned in s 36(1)*(a)-(e)* must also be considered in any appraisal of the reasonableness and justifiability of the limitation. A competent court must apply these criteria when deciding any alleged infringement of an alleged constitutional right. In the same manner the constitutional validity of a limited right of appeal must be assessed according to these criteria.

Although every accused person has in terms of s 35(3)*(d)* of the Constitution a right to a fair trial, which right includes the right to have his trial begin and conclude without unreasonable delay, such a delay does not necessarily call for a remedy. While undue delay in the hearing of criminal appeals is obviously undesirable, particularly when an appellant is in custody, it does not follow that any undue delay constitutes an infringement of the constitutional right to a fair trial—*Pennington* 1999 (2) SACR 329 (CC). Generally, delays in finalisation of appeals deny justice to the persons concerned and should be avoided at all cost and consequently the directors of public prosecutions must ensure that appeals, especially

those of unrepresented accused, are not lost in the system—*Heslop* 2007 (1) SACR 461 (SCA). In *Carter* 2007 (2) SACR 415 (SCA) the court emphasised that appellants, whether the State or the accused, are under a duty to pursue appeals with reasonable expedition. An undue delay could amount to an abandonment of an appeal and the attorneys representing appellants would be acting to the potential detriment of both their clients and the public interest if they chose to ignore expeditious prosecution of the appeal, simply because they did not regard their clients as responsible for the delay. The directors of public prosecutions, likewise, owe a similar duty to the appellant and to the public to pursue an appeal with reasonable expedition.

In *Dzukuda; Tshilo* 2000 (2) SACR 443 (CC) at 456*d-e*, Ackermann J held that the right to an appeal embraces more than the principle of justice:

There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality.

In *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) at [21] the Supreme Court of Appeal described, generally, an appeal against the conviction and/or sentence as a complete rehearing without the leading of evidence, where a court's conclusions of both fact and law may be challenged in a higher court by having regard to

the evidence on record only. The Constitutional Court notwithstanding, higher courts are those courts deciding those appeals. In the following paragraphs the regime of appeals from lower courts (district courts and regional courts) to superior courts will be discussed (superior courts being the Constitutional Court, the Supreme Court of Appeal and the divisions of the High Court of South Africa, inclusive of all the local seats of a division). Section 171 of the Constitution provides that all courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation. These procedures and rules are to be found in the Criminal Procedure Act 51 of 1977, the Superior Courts Act 10 of 2013, directives or practice manuals of the various superior courts, and the uniform rules pertaining to lower and superior courts:

1.2.3 Access to the High Court of South Africa in respect of appeals against decisions and orders of lower courts and of constitutional issues

1.2.3.1 General appeal procedure

Any conviction, sentence or order of a lower court, even a discharge after conviction, is subject to leave to appeal—see ss 309 and 309B of the Criminal Procedure Act. However, in respect of certain age groups with regard to child delinquents, leave to appeal is not required—see s 84 of the Child Justice Act. A court hearing the application is required to reflect dispassionately upon the decision and decide whether there is a reasonable prospect that a higher court may disagree (*Mabena* 2007 (1) SACR 482 (SCA)). When leave to appeal is denied by the lower court, the applicant still has recourse to a higher court by means of a petition to the division of the High Court with appellate jurisdiction, and if leave to appeal is denied by the latter court, the accused may bring an application to the Supreme Court of Appeal for special leave to appeal by the Supreme Court of Appeal. (Note that the Superior

Courts Act does not use the term ‘petitioning’ the Supreme Court of Appeal when leave to appeal was refused by a High Court, but uses the phrase in s 17(2)*(b)* of bringing ‘an application to the Registrar of the Supreme Court of Appeal’). An application for leave to appeal may be accompanied by an application to lead further evidence relating to the conviction or sentence—see s 309B(5) and (6). The trial court granting the application must evaluate the new evidence and make a finding. The evidence so accepted will be regarded as taken at the trial. See para 2 below ‘Appeals to the High Court of South Africa’, below, for a detailed discussion of this topic.

1.2.3.2 Constitutional issues

When it is alleged in a lower court that a law is invalid because it is inconsistent with the provisions of the Constitution, the jurisdiction of the lower court to decide the issue should be determined with due regard to the provisions of ss 170, 171 and 173 of the Constitution, and with reference to s 110 (which prohibits lower courts from deciding on the validity of any conduct of the President or of the law, including the common law) and s 117 of the Magistrates’ Courts Act 32 of 1944. In terms of s 170 of the Constitution, no lower court may enquire into or rule on the constitutionality of any legislation or any conduct of the President. Section 117 of the Criminal Procedure Act also prohibits lower courts from giving judgment on the validity of any provincial ordinance or proclamation issued by the President. Section 173 of the Constitution prohibits lower courts from developing the common law, as they do not have an inherent power. Only superior courts have inherent jurisdiction to develop the common law. Only where the constitutionality of the conduct or activities of a person or organ of the State is challenged, will lower courts have jurisdiction to decide the constitutional matter involving the interpretation, protection or enforcement of the Constitution in respect of that constitutional matter.

1.2.4 Access to the Supreme Court of Appeal and to a full court of a division of the High Court in respect of appeals against decisions and orders of divisions of the High Court

1.2.4.1 General appeal procedure

(a) Appeal from a decision of a division of the High court sitting as a trial court

In terms of the Criminal Procedure Act there are three ways in which a person who has been convicted in a division of the High Court may bring his case before the court of appeal. They are, first, by an application for leave to appeal in terms of s 316, which provides for a wide and general appeal on the facts and on the legal issues of the case. Secondly, in terms of s 317, an application may be made for a special entry where the proceedings are alleged to have been irregular and not according to law. Finally, the accused can make use of s 319 to ask for the reservation of points of law. However, if a question of law has already been dealt with at an unsuccessful application in terms of s 316, and it was concluded that for the point of law no prospect of success on appeal exists, an application for the reservation of the same question of law will be refused.

There is no absolute right of appeal against a decision or order of the High Court as a court of first instance except in the case of certain juvenile offenders of specific

age groups. In all other instances an appeal against a conviction, sentence or order may be noted only with the leave of the trial court—s 315(4) and see s 316. The division of the High Court hearing the application for leave to appeal decides on certain grounds whether the full court of that division or the Supreme Court of Appeal should decide the appeal. A prospective appellant has recourse to the Supreme Court of Appeal by means of a petition against the High Court's decision to refuse leave to appeal or to refer the hearing of the appeal to the full court of a division.

In determining whether or not to allow an application for leave to appeal, the main consideration is whether or not the applicant has a reasonable prospect of success on appeal. Therefore, the approach to such application should not be one as though it is an impertinent challenge to the judge concerned to justify his decision, but whether there is a reasonable prospect that a higher court may disagree—*Mabena* 2007 (1) SACR 482 (SCA). See also *Shinga* (above).

Nevertheless, when an application for leave to appeal has been refused, the accused may approach the Supreme Court of Appeal by means of a petition for leave to appeal by virtue of the provisions of ss 316(8) to (11). In exceptional circumstances the Supreme Court of Appeal may decide the matter, but generally it is referred back to the division of the High Court.

In terms of s 1 of the Superior Courts Act, a full court, in relation to any division of the High Court, means a court consisting of three judges of the division of the High Court. A full court of a division of the High Court is instituted specifically by the Criminal Procedure Act with the powers to hear appeals from the High Court sitting as a court of first instance. If the appeal is denied in the full court, special leave to appeal against the judgment of the full court has to be requested directly from the Supreme Court of Appeal.

Note that appeals in terms of chapter 5 (ss 15 to 20) of the Superior Courts Act do not include an appeal in a matter regulated in terms of the Criminal Procedure Act, or provided for in terms of any other criminal procedural law. These provisions are consequently relevant where the Criminal Procedure does not provide for a particular matter (see s 1 of the Superior Courts Act). In terms of ss 16 (1)*(a)* and *(b)* of the Superior Courts Act, the appropriate court to approach on appeal, in respect of an appeal against any decision of a division as a court of first instance (ie as the trial court), lies upon leave having been granted. Where the court consisted of a single judge, the appeal is made to the Supreme Court of Appeal or to a full court of that division, depending on the directions issued in terms of s 17(6); or where the court consisted of more than one judge, the appeal is to the Supreme Court of Appeal. If leave to appeal is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal—s 17(2) the Superior Courts Act.

(b) Appeal from a decision of a division of the High court sitting as the court of appeal

An appeal against any decision of a division of the High Court, *on appeal to it*, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal, unless specifically provided otherwise.

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1.2.4.2 Constitutional issues

When constitutional issues are raised in a lower court within the jurisdiction of a division of the High Court, the latter court must, in terms of s 172(1) of the Constitution, deal with them and give judgment. The High Court is now obliged to make a ruling, unlike the previous position under the interim Constitution, when it had the power to refer any issue of validity falling within its jurisdiction to the Constitutional Court.

If the constitutional validity of an Act of Parliament, a provincial Act or conduct of the President is challenged, the High Court (or the Supreme Court of Appeal) is not obliged to make an order and the issue may be referred to the Constitutional Court (s 172(2)*(a)*). In the event where an order is sought for invalidating a statutory provision which is threatening a constitutional right, a High Court may be approached before the start or completion of the criminal proceedings—*De Vos v Minister of Justice and Constitutional Development* 2015 (1) SACR 18 (WCC).

1.2.5 Access to the Constitutional Court

1.2.5.1 General

The Constitutional Court is the highest court in the Republic and has the inherent power, in the interests of justice, to protect and provide for its own process and to develop the common law. This court also gives final judgment on whether an Act of Parliament, a provincial Act or any conduct of the President is constitutionally valid, and no order of unconstitutionality given by the Supreme Court of Appeal, the High Court of South Africa or a court with similar status has any force unless it is confirmed by the Constitutional Court (s 167(5) of the Constitution). The jurisdiction of the Constitutional Court is dealt with in Chapter 2. See also *Pennington* 1997 (4) SA 1076 (CC).

Section 172 of the Constitution empowers a court with jurisdiction, when deciding a constitutional matter within its power, to make any order that is just and equitable. An appropriate remedy will, in essence, be the relief that is required to protect and enforce the values in the Constitution as set out in s 1 thereof. A court has a discretion to decide what, in a particular case, the appropriate remedy should be. In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at [19], the court, considering the various constitutional remedies a court may grant, held:

Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to ensure the protection and enforcement of these all-important rights.

The Constitutional Court may, in terms of ss 38 and 172 of the Constitution, be approached for relief by any person (which may include juristic persons—see s 8(4)) with sufficient interest in the matter to be admitted as a party, if any right entrenched in Chapter 2 of the Constitution is infringed or threatened. Section 38 is much broader than the common law on standing, but standing is the starting point when a person seeks to vindicate an infringement. Those with *locus standi in iudicio* are—

(1) anyone acting in his or her own interests—which interests or potential interests must be directly affected by the infringement and the direct effect must not be

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unsubstantiated—*Tulip Diamonds FZE v Minister for Justice and Constitutional Development* 2013 (2) SACR 443 (CC);

(2)

anyone acting on the behalf of another person who cannot act in his or her own name;

(3) anyone acting as a member of, or in the interest of, a group or class of persons;

(4) anyone acting in the public interest;

(5) an association acting in the interests of its members;

(6) an *amicus curiae.* An *amicus curiae* is any person interested in any matter before the Constitutional Court and who has been admitted as such. An *amicus curiae* may, with the written consent of all the parties in the matter before the court and upon such terms and conditions, rights or privileges as are agreed upon in writing with all the parties before the court, be admitted. If the consent has not been secured, an application to be admitted as an *amicus curiae* may be directed to the Chief Justice, who may admit a person as an *amicus curiae.* The Chief Justice may grant the application upon such terms and conditions, rights or privileges as he may determine (rule 10 of the Rules of the Constitutional Court promulgated under Government Notice R 1675 in *Government Gazette* 25726 of 31 October 2003, referred to as 'CC Rules');

(7) any person or organ of state with sufficient interest. Such a person or organ may appeal directly or apply directly to the Constitutional Court to confirm or vary an order of constitutional invalidity given by a court in respect of parliamentary or provincial legislation or any conduct of the President (s 172(2)*(d)* of the Constitution). ('Organ of the state' is defined in s 239 of the Constitution and, broadly speaking, includes any functionary of the state or any person performing public functions or any state department, excluding a judicial officer or a court.)

Practical directives concerning the procedures that are to be followed when instituting an appeal in the Constitutional Court are issued by the Constitutional Court. The rules of the Constitutional Court must make provision for direct appeals to the Constitutional Court—s 29(3) of the Superior Courts Act; and see CC Rules 18-21.

1.2.5.2 Ways of access to the Constitutional Court

(a) Direct access to the Constitutional Court

(i) Direct access in terms of s 167(4) and 167(6) of the Constitution to the Constitutional Court by a member of the public shall be allowed in exceptional circumstances only, and must be in the interests of justice (see *Zuma* 1995 (1) SACR 568 (CC)). It is not an appeal, as this court is asked to sit as court of first and last instance—*Shongwe* 2003 (2) SACR 103 (CC); *Moloi v Minister of Justice and Constitutional Development* 2010 (2) SACR 78 (CC). It will be in the interests of justice for a constitutional issue to be decided first by the Constitutional Court without being considered by other courts, where there are compelling reasons that it should be done—*Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC). The factors that are relevant in considering what would be in the interests of justice were summed up in *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at [10], and include: the importance of a determination of the constitutional

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issues raised, the applicant's prospects of success on appeal, and whether the matter is appealable to the High Court and/or to the Supreme Court of Appeal. Exceptional circumstances will ordinarily be where the matter is of such urgency or of such importance that the delay necessitated by the application of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government. In terms of rule 18 of the CC Rules, an application for direct access as contemplated in s 167(6)*(a)* of the Constitution must be brought by way of a notice of motion supported by an affidavit setting forth the facts upon which the applicant relies for relief. The application must set out the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted, the relief sought, the grounds upon which such relief is based and whether

the matter could be dealt with without the hearing of oral evidence, or if not, how such evidence should be adduced and conflict of facts resolved.

(ii) In terms of ss 79, 80, 121(3), 122 and 144(2) read with s 167(4) of the Constitution, direct access to the Constitutional Court is permitted in the following instances which are in the exclusive jurisdiction of the Constitutional Court:
- in the case of *a referral* of a Bill of Parliament or of the provincial legislature by the President of the RSA or by the Premier of a province;
- when the constitutionality of the whole or part of an Act of Parliament or that of a provincial legislature is challenged by members of the National Assembly or of a Provincial Legislature;
- when the certification or amendment by the Constitutional Court of a provincial constitution is requested. (CC Rules 14, 15 and 17 regulate the rules and procedures in respect of such matters.)

(iii) An order of constitutional invalidity by a court as contemplated in s 172 of the Constitution is referred directly to the Constitutional Court for confirmation. A state organ or a person may, in terms of s 172(2)*(d)* of the Constitution, approach the Constitutional Court directly where a competent court has in terms of s 172(2)*(a)* declared legislation promulgated by Parliament (or by a province), or any conduct of the President, unconstitutional and invalid.

(iv) A person or state organ who wishes to appeal against such an order or to have it confirmed by the Constitutional Court must, within 15 days after the order has been made, lodge a notice of appeal (in the case of an appeal) or lodge an application for confirmation (in the case where confirmation is sought) with the registrar of the Constitutional Court and lodge a copy thereof with the registrar of the court that has made the order—CC Rule 16.

An application for direct access to the Constitutional Court has to be made according to the terms and procedures as specified in the CC Rules. The Chief Justice may extend any time limit prescribed in these Rules. The Constitutional Court may, on sufficient cause shown, condone any failure to comply with the CC Rules—CCR Rule 30.

(b) Access to the Constitutional Court by means of an appeal with the leave of the Constitutional Court

The Constitutional Court may be approached directly in an application for leave to appeal to the Constitutional Court against a decision on a constitutional matter (other than an order of constitutional invalidity in terms of s 172 of the Constitution) that has been given by any court, including the Supreme Court of Appeal. The aggrieved litigant is not denied access to the Constitutional Court simply because the President of the Supreme Court of Appeal has refused leave to appeal or special leave to appeal. The appellant or litigant who is aggrieved by the decision of a court and who wishes to appeal directly to the Constitutional Court must, within 15 days after that decision was handed down, apply for leave to the registrar of the Constitutional Court. Notice must be given to all interested parties. The application must clearly indicate, among other things, what constitutional matter was considered in the decision, and mention what other connected constitutional issues were raised—see CC Rule 19(3).

The decision whether to grant or refuse leave to appeal is a matter for the discretion of the Constitutional Court (CC Rule 19(6)*(a)*; *Boesak* 2001 (1) SACR 1 (CC) at [25]). In *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC) the court set out the requirements that must be satisfied when seeking leave to appeal. The Constitutional Court may decide to deal with the application summarily without receiving oral or written argument other than that contained in the application itself (CC Rule 19(6)*(b)*). However, the court may order that the application for leave to appeal be set down for argument and direct that the written argument of the parties deal not only with the question whether leave to appeal should be granted, but also with the merits of the dispute. In *Molaudzi* 2015 (2) SACR 341 (CC) the appellant and his co-accused were convicted of serious crimes and sentenced to life imprisonment by a single judge in the

High Court. The appellant applied to the Constitutional Court for leave to appeal, which was refused. Subsequently two of his co-accused applied for leave to appeal to the Constitutional Court, which was granted. Their appeals succeeded on the basis of the erroneous admission of certain evidence by the trial court, which also affected the conviction of the appellant. Pursuant to directions by the Constitutional Court, the appellant brought a further application for leave to appeal to the Constitutional Court, which was granted, based on the court's inherent powers irrespective of its final order and rendering that order *res judicata*. The court held that a departure from the *res judicata* doctrine could be justified by 'truly exceptional cases where the application of res judicata would fail to give effect to the fundamental rights of an accused and would result in grave injustice' (at [42]) in 'rare and exceptional circumstances, where there is no alternative effective remedy' (at [45]).

The Constitutional Court may hear further evidence, but the considerations for a successful application in the Constitutional Court are not necessarily the same as for ordinary appeals—*Prince v President, Law Society, Cape of Good Hope* 2001 (1) SACR 217 (CC).

It is the practice of the Constitutional Court to consider applications for leave to appeal at conferences attended by at least eight justices and applications are not refused unless the majority of those justices are of the opinion that there are no reasonable prospects of success consistent with the Constitution—*Pennington* 1997 (4) SA 1076 (CC); *Bierman* 2002 (2) SACR 219 (CC).

1.3 No appeal before conviction

The general rule is that an appeal should not be decided piecemeal and usually the court of appeal will exercise its powers only after termination of the criminal trial. In the normal course of events it is preferable to reach finality in the disposal of cases: that all issues should be decided during a single session so that a final judgment can be given at the end of the proceedings which disposes of the case as a whole. The approach that a case should not be heard piecemeal also applies to the final disposal of the appeal—cf *Adams* 1959 (3) SA 753 (A). Furthermore, there is no statutory provision to prosecute an unterminated criminal trial—*Wahlhaus v Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A) at 119. In exceptional cases, however, the court of appeal will, even before the termination of the trial, exercise its inherent power and the obligation imposed by the Constitution to prevent irregularities in lower courts (see *Van Rooyen v The State* 2002 (5) SA 246 (CC) at [24]), for example, where a magistrate unreasonably denies the accused the opportunity to obtain legal representation. The High Court has granted relief where a regional court had dismissed an application for a permanent stay of prosecution based on an inexplicable and inexcusable delay of seven years between completion of investigation of the alleged offences and the accused being brought to court, as well as the fact that part of important documentary evidence seized by the State had been lost, resulting in the accused suffering irreparable trial prejudice in preparing a proper defence—*Broome v Director of Public Prosecutions, Western Cape; Wiggins v Acting Regional Magistrate, Cape Town* 2008 (1) SACR 178 (C). Where grave injustice might otherwise result or where justice might not be attained by other means, the High Court will not hesitate to interfere—*Goncalves v Addisionele Landdros, Pretoria* 1973 (4) SA 587 (T). In *Malinde* 1990 (1) SA 57 (A) at 67B it was held that although the High Court does not possess inherent power to enhance the substantive jurisdiction which it has by virtue of statutory provisions, there is no doubt that this court possesses an inherent power to regulate its procedure in the interest of the proper administration of justice. (In that matter, after conclusion of the trial, the Supreme Court of Appeal granted an order to separate the hearing of the special entry from the whole of the appeal.) The High Court's inherent power to regulate and protect its own process is confirmed by the Constitution, s 173.

Whenever the High Court is approached to exercise its inherent powers to prevent irregularities in lower courts, the court may grant a *mandamus* (an order directing the magistrate to act as ordered) or an interdict (an order directing the magistrate not to act in a certain manner). See *Bailey* 1962 (4) SA 514 (E), where the magistrate improperly refused to recuse himself. See also *Ncukutwana v Acting Additional Magistrate, Lady Frere* 1968 (1) SA 140 (E), where a magistrate unreasonably refused to allow the defence attorney to record the court proceedings by means of a tape recorder.

If, however, the magistrate performs his functions in a proper and regular way procedurally, but comes to a wrong conclusion on the merits, no application may be made to the court of appeal before conviction—*Ginsberg v Additional Magistrate, Cape Town* 1933 CPD 357; *Marais* 1959 (1) SA 98 (T). It follows that, if the grounds for complaint are such that they can afford an effective basis for relief in appeal or review proceedings after the trial, such an interlocutory application will not be entertained—*Van Heerden* 1972 (2) PH H74 (E).

In matters heard before the High Court of South Africa, an appeal based on a

question of law reserved (see below) *generally* cannot take place unless the trial has been concluded—*Adams* 1959 (3) SA 753 (A). This rule, set by the court in *Adams*, was extended to a certain extent when the court in *Basson* 2007 (1) SACR 566 (CC) allowed the State to appeal against the quashing of an indictment although there was no conviction or sentence—see para 3.7 below. Also, an order made by a court that is final and definitive in its effect, such as a court's decision on an exception to a charge or on a plea objecting to a court's jurisdiction in terms of s 106(1)*(f)*, may be appealed against before finalisation of the trial—*De Beer* 2006 (2) SACR 554 (SCA).

The general rule that no appeal should lie to the Supreme Court of Appeal, whether by means of a special entry, reserved question of law or in the ordinary way, unless the accused is first sentenced, may, however, also be departed from in exceptional circumstances. See *Majola* 1982 (1) SA 125 (A), in which case it appeared before sentencing that the appellant had never been consulted by his legal adviser as to whether he wanted to give evidence or not.

1.4 Appeal against a sentence

(1) Although an appeal court is vested with jurisdiction to reduce a sentence, it is to be noted that a court of appeal, whether the Supreme Court of Appeal or the 'provincial' or 'local' division with appeal jurisdiction, does not have a general discretion to correct the sentences of trial courts. Principles derived from judicial precedent regulate the powers of the appeal court on appeal against a sentence. It is the trial court that has the discretion to impose a proper sentence—*Whitehead* 1970 (4) SA 424 (A) 435. The mere fact that the court of appeal would have imposed a lighter sentence if the punishment were within its discretion is not in itself sufficient reason for the court to intervene.

A court of appeal cannot interfere with a sentence unless the trial court has not exercised its discretion judicially, that is in a proper and reasonable manner—*Kock* 1988 (1) SA 37 (A); *S* 1988 (1) SA 120 (A); *Tshoko* 1988 (1) SA 139 (A). This will be the case—

(a) when the sentence is vitiated by an irregularity and it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect (eg where a magistrate imposes a sentence beyond his penal jurisdiction)—cf *Pillay* 1977 (4) SA 531 (A);

(b) when the trial court misdirects itself (eg by taking into consideration irrelevant factors). See, for example, *Runds* 1978 (4) SA 304 (A). A mere misdirection does not suffice to warrant interference by a court of appeal. The misdirection must be of such a nature, degree or seriousness that it vitiates the trial court's decision on a sentence—*G* 1989 (3) SA 695 (A); *Mtungwa* 1990 (2) SACR 1 (A);

(c) when the sentence is so severe that no reasonable court would have imposed it—*Anderson* 1964 (3) SA 494 (A). Over the years different tests have been applied for determining whether an imposed sentence is such that the court of appeal is competent to interfere. Thus, the Supreme Court of Appeal has asked itself whether the sentence appealed against induces a 'sense of shock'; in some cases again the question was whether the sentence was 'startlingly inappropriate', and then again in other cases whether there was a 'striking disparity' between the sentence imposed and the sentence which the Supreme Court of Appeal would have imposed,

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had it acted as a court of first instance (see *Sadler* 2000 (1) SACR 331 (SCA)). On the disparity criterion, the court stated in *Matlala* 2003 (1) SACR 80 (SCA) at [10] and in *Monyane* 2008 (1) SACR 543 (SCA) that such a criterion is not always the appropriate measure by which to determine whether appellate interference is competent. The crucial factor which allows for the applicability of the disparity approach is whether the appellate court is able to arrive at a definite view (''n besliste mening') as to what sentence it would have imposed. Other criteria applied by the Supreme Court of Appeal are whether 'no reasonable court would have imposed the sentence which was imposed by the trial court' or 'whether the trial court has reasonably exercised the discretion conferred upon it'—cf *M* 1976 (3) SA 644 (A). The different formulations may be combined into the one crucial question that needs to be answered, that is, whether the trial court could reasonably have imposed the sentence which it did—*Pieters* 1987 (3) SA 717 (A) at 734C-H; *Gross* 1982 (1) SA 593 (A); *S* 1988 (1) SA 120 (A). Therefore, the fundamental approach to an appeal on sentence is that a court of appeal will interfere with an imposed sentence only if it is satisfied that the trial court exercised its discretion improperly or unreasonably—*Pieters* (above). Obviously, this applies only if no misdirection occurred.

In an appeal against a sentence on the ground that the sentence imposed on the appellant is disturbingly inappropriate when compared with the sentence imposed in a different trial on another accused for the same crime, the question whether the sentence appealed against is disturbingly inappropriate must obviously be answered on the basis of a comparison between that sentence and the lesser sentence which was imposed on a convicted person who played an equal part in the commission of the same crime and who shared comparable personal circumstances. Even if there is a striking difference between the two sentences when they are compared, it does not necessarily mean that interference is justified. Interference is justified only if the lighter sentence is a reasonable or commonly imposed sentence. Where the lighter sentence is unreasonable or clearly inappropriate and the heavier sentence is in all circumstances an appropriate one, interference with the latter sentence would be improper—cf *Marx* 1989 (1) SA 222 (A).

(2) Unless an appeal is based solely on a question of law, a court of appeal has jurisdiction to impose on appeal any other form of sentence in lieu of or in addition to the sentence imposed, provided that no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect—ss 309(3); 322 (1) and (2) of the Criminal Procedure Act. However, once the sentence is set aside on appeal on the ground of an irregularity, misdirection or inappropriateness, the court of appeal is competent to impose a sentence which was not available to the trial court at the time of sentencing the accused—*E* 1992 (2) SACR 625 (A). In this case, the Appellate Division (as the Supreme Court of Appeal was then called) imposed a sentence of correctional supervision, a punishment that was not in operation when the accused was sentenced. Cf also *Prokureur-generaal,*

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Noord-Kaap v Hart 1990 (1) SA 49 (A). Also, the accused has a right in terms of s 35(3)*(n)* of the Constitution to the benefit of the least severe prescribed punishment where the prescribed punishment has changed between the time of the commission of the offence and the time of sentencing—*Senyolo* 2010 (2) SACR 571 (GSJ) at [11]-[12].

(3) All divisions or local seats of any divisions of the High Court with criminal appeal jurisdiction have the power to increase any sentence on appeal unless the appeal is based solely on a question of law—ss 309(3) and 322(6) of the Criminal Procedure Act. A court may increase the sentence on appeal even though the appeal is against conviction only—*F* 1983 (1) SA 747 (O). This power is conferred upon the court to see that justice is done because 'it is just as much in the interest of justice that a guilty person should be adequately punished as that he should be convicted'—*Grundlingh* 1955 (2) SA 269 (A) at 277H. At present, after the decision in *Bogaards* 2013 (1) SACR 1 (CC), it is a rule of practice that if an increase of sentence is considered, the court shall *mero motu* (on its own initiative) give notice to the accused In *Sonday* 1994 (2) SACR 810 (C) the practice of the courts to give notice of a possible increase in the sentence, even though such an increase was not requested by the prosecution, was alleged to be invalid. It was alleged that it constituted a violation or threatened violation of an appellant's constitutional right of access to a court, which had been entrenched in s 22 of the interim (now, s 34 of the final) Constitution, and of his right to a fair trial—more specifically, the right to have recourse by way of appeal to a higher court than the court of first instance (s 25(3)*(h)* of the interim Constitution; s 35(3)*(o)* of the final Constitution). Holding the allegations to be devoid of merit, the court ruled that the power to increase a sentence on appeal is a well-established rule in our law and that the practice to give notice is no indication that the court has already made up its mind to dismiss the appeal even before hearing the appellant's argument or that the court has taken over the role of the prosecution in respect of a sentence. However, the court has no jurisdiction to entertain an application by the State in terms of the said rule of practice to increase a sentence on appeal if the State has not brought a cross-appeal in terms of s 310A—*Nabolisa* 2013 (2) SACR 221 (CC) at [66].

In the exercise of this power to increase a sentence on appeal, the general principles with regard to appeals against sentence are applied. Therefore, a sentence will be increased only if the trial court has exercised its discretion unreasonably or improperly, or misdirected itself (cf *Du Toit* 1979 (3) SA 846 (A) at 856B). Careful consideration of the offence, the offender and the interests of society forms an integral part of deciding on a possible increase in sentence. Naturally, a court of appeal will not lightly increase a sentence even though that court would have imposed a heavier sentence—*Du Toit* (above) at 855H. (See 'Powers of court of appeal'.)

1.5 Appeal on the facts

A court of appeal is usually loath to interfere with the findings of the trial court on questions of fact *Francis* 1991 (1) SACR 198 (A)). The reason is that the trial court is in a better position than the court of appeal to make reliable findings on credibility. It enjoys an advantage over the court of appeal in that it sees and hears the witnesses in the atmosphere of the court and is therefore better equipped to assess

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the demeanour, appearance and personality of the witnesses. Where the findings of fact by the trial court are based to any great extent on the impressions made by witnesses, a court of appeal will be particularly unwilling to upset the findings on the facts and will do so only if the court is convinced that they are wrong (*Monyane* 2008 (1) SACR 543 (SCA)). Courts of appeal, while slow to disturb credibility findings based on the personal impressions made on the trial court by the demeanour of witnesses, have greater liberty in doing so where findings are based on inferences, other facts and probabilities. In such

cases, courts of appeal, having the benefit of the proceedings in the full record, may often be better placed in drawing inferences than the trial court—*Minister of Safety and Security v Craig NNO* 2011 (1) SACR 469 (SCA). It is well-established law that if there is no misdirection on the facts, there is a presumption that the trial court's evaluation of the evidence as to the facts is correct, and that a court of appeal will interfere only if it is convinced that the evaluation is wrong—*Mkohle* 1990 (1) SACR 95 (A); *Mlumbi* 1991 (1) SACR 235 (A); *Kekana* 2013 (1) SACR 101 (SCA). In determining whether the trial court's findings of fact were clearly wrong, the evidence ultimately has to be assessed as a whole—*Hadebe* 1998 (1) SACR 422 (SCA); *Ramulifho* 2013 (1) SACR 388 (SCA). In special cases, where there are circumstances which convince the court of appeal that, having made every allowance for observations as to the demeanour of witnesses, the court *a quo* should have entered a different finding, an appeal on the facts will be allowed—*Mpeta* 1912 AD 568, and cf *Dhlumayo* 1948 (2) SA 677 (A) on the general principles that should guide a court of appeal in an appeal purely on the facts.

The demeanour of witnesses in court is, however, only one of various factors which play a part—*Abels* 1948 (1) SA 706 (O) at 708:

> [I]t must now be regarded as settled law that the demeanour of a witness whilst testifying is in many cases the decisive and determining factor in the search for the truth. It is however difficult to conceive of a case where it is the only factor; for even where great stress is laid on the demeanour of a certain witness one knows by experience that the setting, the surrounding circumstances, the probabilities, the inferences, all go towards creating that subtle, pervasive and indefinable atmosphere at a trial from which the witness emerges as the symbol of truth.

It is desirable that the court should place on record in what respects the demeanour of a witness is unsatisfactory. The reasons given by the court must be those of the majority (ie, assessors and presiding officer) and not of the presiding officer alone—*Kalogoropoulos* 1993 (1) SACR 12 (A). If the question is whether a correct inference has been drawn from the facts, which facts are not themselves in dispute, the court of appeal is in as favourable a position as the trial court. Similarly, the court of appeal can determine just as well as the trial court whether corroborative evidence (where this is required) is present.

1.6 Difference between an appeal on facts and an appeal on a question of law

It is not always easy to distinguish between an appeal on a question of fact and one on a question of law. In an appeal on a question of fact, it is the duty of the court of appeal to retry or rehear the case on the record before the court together with any other evidential material it may have decided to admit, and then decide for itself whether there is a reasonable doubt about the appellant's guilt.

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In an appeal on a question of law the question is not whether the court of appeal would have made the same finding but whether the trial court *could* have made such a finding. A question of law arises only when the facts upon which the trial court based its judgment could have a legal consequence other than that which the trial court found. A court's exclusion of certain relevant evidence in arriving at an opinion as to whether the accused established a particular defence and acted with a particular intention (such as *dolus directus* or *dolus eventualis*) is a question of law—*Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA). Accordingly, whether the trial court's factual findings are right or wrong is totally irrelevant in determining whether the court erred in law (*Basson* 2003 (2) SACR 373 (SCA)), although the facts upon which the trial court based its decision must be determined and must be certain in order to determine whether the legal question could have had a legal consequence other than the one which the trial court had found—*Basson*, above, at 378-379; *Boekhoud* 2011 (2) SACR 124 (SCA) at [34]. The question of law, therefore, cannot be whether the *evidence supports* the finding of the court, because that would be a question of fact. In *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) the Supreme Court of Appeal held that the trial court, in determining the presence or otherwise of *dolus eventualis*,

incorrectly applied the principles of *dolus eventualis*, which constituted an error of law or a point of law.

Where the prosecution appeals in terms of s 310(1) or applies in terms of s 319(1) for the reservation of a question of law for the consideration of the Supreme Court of Appeal, the question of law may not be formulated in such a fashion that a question of fact is masquerading as a question of law. This is illustrated by the case of *Magmoed v Janse van Rensburg* 1993 (1) SACR 67 (A), where a purely factual question was formulated as a legal one, by asking whether a particular inference is the only possible inference to be drawn from a given set of facts. See also *Colgate-Palmolive* 1971 (2) SA 149 (T) at 154 and *Coetzee* 1977 (4) SA 539 (A).

1.7 Appearance of the appellant

If an appellant who has noted and prosecuted his appeal fails to appear, the following courses of action are open to the court of appeal:

(1) It may summarily dismiss the appeal.

(2) It may strike the appeal off the roll—*Hlongwa* 1993 (2) SACR 225 (A). This will be the case, for example, where the appellant is a fugitive from justice. Such an appellant has no right to be heard on appeal and the appeal will be struck from the roll—*Stopforth v Minister of Justice* 1999 (2) SACR 529 (SCA). Where an appeal has been struck from the roll, it will be reinstated only if a substantive application is brought, indicating a reasonable prospect of success—*Tshapo* 1967 (3) SA 100 (N).

(3) It may postpone the appeal if there is reason to believe that the appellant has been prevented from appearing through no fault of his own: cf *Mohapi* 1990 (1) SACR 573 (O); *Letweli* 1982 (2) SA 666 (NC), where guidelines were laid down on the procedure to be followed where attorneys withdraw after noting an appeal, or are unable to obtain instructions or are requested not to proceed with the appeal, or have to request a postponement.

(4) It may hear the appeal. In various cases where the appellant has failed to appear and where the circumstances mentioned in (3) above are not present,

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the Supreme Court of Appeal has, of its own accord, heard the appeal. A division or local seat of the High Court that has appeal jurisdiction would be competent to hear the appeal by virtue of s 304(4) as if it had been brought before it on review—*Hlope* 1962 (2) SA 607 (T). See in general *Govender* 1955 (2) SA 130 (N); *Grundlingh* 1955 (2) SA 269 (A) at 276; *Solomon* 1966 (3) SA 145 (A).

1.8 Withdrawal of appeal

Generally it may be said that an accused must have a right to withdraw his appeal. However, where an increase in the sentence is considered, this right is curtailed by the courts. In such an instance, leave of the court to withdraw is required. In all other instances the appeal may be withdrawn at any time but notice ought to be given to the court and the director of public prosecutions—*Mohapi* 1990 (1) SACR 573 (O) at 575. It is reasonable that certain time limits should be set within which the appellant may reconsider his decision to appeal. The application for leave to appeal is now, in most instances, a prerequisite for noting an appeal. Where the prosecution of an appeal has progressed to the point where the court of appeal has taken cognisance of the matter or where the appeal is called for argument in open court, the appellant may not withdraw the appeal without the leave of the court. The court may in its discretion decide to dispose of the case—cf *Grundlingh* 1955 (2) SA 269 (A); *Wilken* 1971 (3) SA 488 (A).

It was held in *Du Toit* 1979 (3) SA 846 (A) with regard to the question whether an appellant is entitled unilaterally to withdraw his appeal subsequent to the date of set-down that, as far as appeals to the Supreme Court of Appeal are concerned, practical and equitable reasons would require an appellant to obtain leave to withdraw his appeal only in those instances where either the Supreme Court of Appeal had already given notice that an increase of the sentence would be considered by the Supreme Court of Appeal or

the State has noted its intention to ask for leave to cross-appeal the appeal sought by the accused. These practical and equitable reasons are equally relevant to appeals noted to the High Court—*Kirsten* 1988 (1) SA 415 (A). In *Kirsten* it was further held that a withdrawal of an appeal need not be embodied in a formal notice. All that is required is that an appellant must decide to withdraw his appeal and that such decision must be conveyed to the court of appeal and the State.

1.9 Publication of proceedings

Since an appeal is a continuation of the trial, the provisions of ss 153 and 154 concerning the exclusion of the public and prohibition of publication also apply to appeals—*Ex parte X* 1938 AD 244. However, appeal courts do have a discretion whether to allow other forms of open justice and publication, as was seen in the appeal proceedings in *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA), as a continuation of the trial court's decision in *Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another: In Re Pistorius* 2014 (1) SACR 589 (GP) (application to broadcast the trial) and *Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014) (the trial in the High Court). The trial court proceedings as well as the appeal court proceedings were attended by unparalleled worldwide publicity and covered on live television in both courts.

Where the exercising of the court's discretion in respect of the application of the principle of open justice (which principle is also embodied in the abovementioned

sections of the Criminal Procedure Act) impinges on constitutional rights, the appeal court is required to ensure that the impairment is proportional to the purpose sought to be achieved, and that the proceedings before it remain fair—*South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 (1) SACR 408 (CC).

1.10 Inspection *in loco*

A court of appeal may hold an inspection *in loco*—*Carelse* 1943 CPD 242—but a court may not participate in the proceedings during such inspection and must record its observations. It is trite law that an inspection *in loco* would normally be requested by a party to the proceedings. Where a presiding official *mero motu* requests an inspection *in loco*, the presiding official must explain the reason for calling for such an inspection, because there sometimes is a thin line between conduct reflecting that of an impartial arbiter and that of a presiding official actively descending into the arena and having his vision clouded by the dust of the conflict—see *City of Johannesburg Metropolitan Council v Ngobeni* (314/11) [2012] ZASCA 55 (30 March 2012) para 34ff.

1.11 Aspect first raised on appeal

In *Herschel* 1920 AD 575 at 581, the Supreme Court of Appeal (then called the Appellate Division) made the following pronouncement about an aspect of the case which was raised, not during the trial, but on appeal for the first time:

In criminal appeals from magistrates' courts formal defects apparent on the face of the charge sheet cannot be relied upon for the first time on appeal; objections to them must be made by way of exception before a plea. Material defects of such a nature that the charge sheet discloses no crime may be relied upon on appeal, even though the point was not taken at the trial. But where the charge sheet, though materially defective, does disclose a crime . . ., then the defect cannot be relied upon if, in the opinion of the Court of Appeal, it could, if timeously taken, have been remedied by amendment without prejudice to the accused in the conduct of his defence.'

The effect of *Herschel's* case and later decisions on defective charge sheets was considerably influenced by the enactment in 1959 of s 88 of the previous Criminal Procedure Act.

The *dictum* in *Herschel's* case would now also apply when the defect has been cured by evidence, but with due consideration to the accused's constitutional rights and the issue

of prejudice, as cases decided before the constitutional order, such as *Herschel*, must be measured and weighed against the norms and fair trial guarantees afforded by the Constitution—see *Moloi and Others v Minister for Justice and Constitutional Development and Others* 2010 (2) SACR 78 (CC).

The trial court has the power to amend a charge in terms of s 86 even if it discloses no crime. See s 86 and *Crause* 1959 (1) SA 272 (A). However, the trial court's power to amend the charge sheet is subject to the possibility of prejudice to the accused and the accused's fair trial right to be informed with sufficient detail to conduct his defence—*Crause* (above) at 281; *Alberts* 1959 (3) SA 404 (A); *Kruger* 1989 (1) SA 785 (A); *Kuse* 1990 (1) SACR 191 (E). Thus, if the accused objects to a materially defective charge during the trial, and the trial court alters the charge without prejudice resulting to the accused, he cannot on appeal rely on the fact

that the charge was defective. However, the fact that an accused person is entitled under the Constitution to a fair trial, which includes the right to be informed with sufficient particularity of the charge (s 35(3)*(a)*), may well cause a court of appeal to take a different approach.

If an amendment is competent on the test set in respect of ss 86 and 88, it may be granted on appeal. This does not resolve the matter, however. An additional consideration is that an amendment will only be granted where no possible prejudice could result to the appellant (*Motha v S* 2012 (1) SACR 451 (KZP)). On appeal the charge sheet or the indictment may be amended if the court is satisfied, first, that the proposed amendment is an amendment as envisaged by s 86, and second, that the accused would not be prejudiced—cf *Barketts Transport (Edms) Bpk* 1988 (1) SA 157 (A). Although the test regarding prejudice is the same during the trial as on appeal, a court of appeal will be less inclined to grant an amendment on appeal for the obvious reason that evidence would already have been given and the trial conducted on a different basis from that on which it would perhaps have been conducted, had the amendment been granted at the trial—*Ndhlovu* 1991 (2) SACR 322 (W).

1.12 Record of the proceedings

It is important, for purposes of appeal, to have a reliable record of the proceedings of the trial court. Where there is an error in the record of the proceedings or the certified transcript thereof, the accused or the prosecutor may within a certain time period apply to the court to correct such error. Such an application must be brought in open court—*De Wet v Greeff NO* 1991 (2) SACR 17 (T). If the time limit specified has expired, an application may be brought in the High Court—*Slabbert* 1958 (1) SA 275 (O). If essential evidence has been omitted from the record and cannot be supplemented satisfactorily, the accused's appeal must succeed—*Collier* 1976 (2) SA 378 (C); *Marais* 1966 (2) SA 514 (T); *Joubert* 1991 (1) SA 119 (A). However, a court of appeal will not be inclined to set proceedings aside on the basis of a mere speculation that the missing parts of the record of the proceedings that could not be reconstructed were material evidence. There must be some indications in the record itself or by way of affidavits made by the appellant of the materiality of the missing evidence—*S* 1995 (2) SACR 421 (T).

Where it is impossible to reconstruct a lost record and the lost portion of the record contains evidence which is of material importance to the adjudication of the appeal, the appeal ought to succeed and the conviction and sentence should be set aside. In such circumstances it is not permissible to refer the matter back to the trial court for a trial *de novo—Fredericks* 1992 (1) SACR 561 (C) (*contra Zondi* 2003 (2) SACR 227 (W)), holding that the provisions of s 324 were applicable in such a case). An accused is entitled not only to know what was written as a reconstruction of a lost record, but to participate in the process of reconstruction—*Leslie* 2000 (1) SACR 347 (W)). The State and the appellant have a duty to try to reconstruct the record of proceedings in the trial court from secondary sources if the record is inadequate for the proper consideration of the appeal—*Zondi* (above).

After conviction a court may not amend certain portions of the record. At the conclusion of the trial the presiding officer is *functus officio* and unable to amend the record *mero motu—Mpopo* 1978 (2) SA 424 (A).

2 Appeals to the High Court of South Africa

2.1 To which division?

A division of the High Court has jurisdiction over all persons who reside or are present within its area of jurisdiction and has the power to hear and determine appeals from all inferior courts within its area of jurisdiction and to review the proceedings of all such courts. If a division of the High Court has one or more local seats, the main seat of that division has concurrent appeal jurisdiction over the area of jurisdiction of the local seat of that division—s 6(4) of the Superior Courts Act. A criminal matter on appeal from a lower court must be brought to the division of the High Court having appeal jurisdiction. The division in whose area of jurisdiction the trial by a lower court was held has jurisdiction, irrespective of where the offence was committed—*Ex parte die Minister van Justisie: In re S v De Bruin* 1972 (2) SA 623 (A). However, where a conviction in a regional court takes place within the area of jurisdiction of a division of the High Court and any resultant sentence is passed or order is made within the area of jurisdiction of another division, any appeal against such conviction or sentence or order shall be heard by the last-mentioned division—s 309(1)*(b)*.

When the appellant wishes to appeal further against a judgment or order of the division of the High Court given on appeal, special leave to appeal from the Supreme Court of Appeal must be applied for—s 16(1)*(b)* of the Superior Courts Act, 2013.

In terms of s 14(3) of the Superior Courts Act, an appeal to a division of the High Court against a judgment or order of a lower court must be heard by not fewer than two judges. If the judges are not in agreement, a third judge may be added to hear the appeal before judgment is handed down—s 14(3) of the Superior Courts Act.

2.1.1 Appeal against a bail decision

In *Magistrate, Stutterheim v Mashiya* 2003 (2) SACR 106 (SCA) at [16] the court held that it is obvious that finalising an application for bail is always a matter of urgency, and when bail is refused, the decision can be appealed. The court held that '[t]he right to a prompt decision is thus a procedural right independent of whether the right to liberty actually entitles the accused to bail'. In *Botha* 2002 (1) SACR 222 (SCA) the court held that bail applications are in essence criminal proceedings and in the instance of an appeal against a decision of a lower court on a bail application, such appeal shall be heard by a single judge of a division or local seat of a division of the High Court—s 65(1)*(b)* of the Criminal Procedure Act. No application for leave to appeal is necessary—*Van Wyk* 2005 (1) SACR 41 (SCA). An appeal against the refusal by a division of the High Court to grant bail lies to the Supreme Court of Appeal, upon special leave to appeal having been granted by the Supreme Court of Appeal—s 16(1)*(b)* of the Superior Courts Act.

2.2 When may an accused appeal?

2.2.1 Appeal from lower court by person convicted

Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to the provisions of s 84 of the Child Justice Act, and subject to leave to appeal being granted by the trial court in terms

of s 309B or s 309C of the Criminal Procedure Act, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction—s 309(1)*(a)*.

An appeal under s 309 shall be noted and prosecuted within the period and in the manner prescribed by rule 67 of the 'Rules regulating the conduct of the proceedings of the magistrates' courts of South Africa' ('Magistrates' Rules' published in Government Notice R 740 on 23 August 2010, as amended): Provided that the magistrate against whose decision or order the appeal is to be noted, or if he or she is unavailable, any other magistrate of the court concerned, may on application and on good cause shown extend such period. In order to note an appeal, an application for leave to appeal against the conviction, sentence or order of the trial court must be made to the trial court—s 309B(1)*(a)*.

2.2.2 Exceptions

The following are specific exceptions to the general principle that any convicted person may appeal, with leave, against his or her conviction (these exceptions apply also in respect of appeals to the Supreme Court of Appeal):

(1) A fugitive convicted person may not appeal—*Isaacs* 1968 (2) SA 184 (A). The reason for this is that by his flight the convicted person puts himself, so to speak, beyond the jurisdiction of the court. While he or she thus disregards the legal process, he or she cannot invoke it for any legal relief—*Molotsi* 1976 (2) SA 404 (O). See also *Ex parte Hansmann* 2001 (2) SA 852 (CC), where the Constitutional Court confirmed this principle, and see *Stopforth v The Minister of Justice* 1999 (2) SACR 529 (SCA).

(2) A third party who has an interest in a verdict of guilty or in a subsequent order has no *locus standi* to appeal. An example is *Raftopulos* 1952 (4) SA 85 (T), in which case the accused was found guilty of gambling in that he unlawfully had a pintable in his shop. The magistrate ordered that the table be forfeited to the State, but it appeared later that the table was the property of a certain R. R appealed against the order of forfeiture, but the court held that he had no power to do so. R in this case had not been found guilty by the court and could therefore not rely on s 309.

(3) A finding of not guilty because the accused lacked criminal capacity is not an appealable verdict where the finding was made in consequence of such an allegation made *by the accused*—s 78(8).

(4) An accused may not appeal against the putting into operation of a suspended sentence—*Khalpy* 1958 (1) SA 291 (C); *Khan* 1961 (1) SA 282 (N); *Gasa v Regional Magistrate for the Regional Division of Natal* 1979 (4) SA 729 (N).

(5) An appeal may not be continued after the death of the accused because all appeal proceedings then lapse—*Vos* 1914 CPD 139; *Tremearne* 1917 NPD 117. The same applies where the proceedings were brought by the State, save possibly where the state should derive some pecuniary benefit in the event of the appeal being upheld—*January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A). If an appellant dies before judgment is given on appeal, and the judgment of the court *a quo* affects his estate (eg where the sentence is a fine), the court of appeal has jurisdiction to pronounce judgment—*P* 1972 (2) SA 513 (NC); *Molotsi* 1976 (2) SA 404 (O). When a fine is imposed, it provides the executor of the deceased with the necessary *locus standi* to prosecute the

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appeal—*Von Molendorff* 1987 (1) SA 135 (T) (not approving *Vos* 1914 CPD 139), and see also s 288.

2.3 Who has to apply for leave to appeal?

Section 309(1)*(a)* provides that an appeal to the High Court is subject to leave to appeal except in the instances below, where an appeal may be noted without having to apply for leave to appeal as contemplated in s 309B:

(1) Where the convicted person was, in terms of s 84 of the Child Justice Act, at the time of the commission of the offence—
   (i) below the age of 16 years; or
   (ii)

16 years or older but under the age of 18 years and had been sentenced to any form of imprisonment that was not wholly suspended; or

(2) Where the convicted person was sentenced to life imprisonment by a regional court under s 51 of the Criminal Law Amendment Act 105 of 1997. (After the decision in *Chake* 2014 (1) SACR 177 (SCA), where the Supreme Court of Appeal held that appellants sentenced to life imprisonment by regional courts did not enjoy an automatic right of appeal, the legislature corrected s 309(1)*(a)* and s 309B(1)*(a)* and provided unequivocally that appellants sentenced to life imprisonment in terms of s 51 of the Criminal Law Amendment Act 105 of 1997 have an automatic right of appeal without first having to seek leave to appeal.)

As far as children are concerned, the first provision above serves as a measure to ensure that young child offenders below sixteen years of age who were sentenced in any lower court and young offenders aged sixteen or older but below eighteen years of age who were sentenced to a period of unsuspended imprisonment have been fairly tried and justly sentenced, no matter which lower court imposed that sentence. The most expeditious way to attain this is to allow such offenders direct recourse to the appropriate division of the High Court. In respect of appeals against a decision by the High Court, the same lower age criteria for automatic appeal procedures are applicable—see para 3.4 below. The courts have to inform the convicted juvenile of his or her rights in respect of appeal, legal representation, and the correct procedures to give effect to these rights, and bail pending the appeal (ss 84 and 86 read with s 25 of the Child Justice Act). Nevertheless, as contemplated by the Child Justice Act, child offenders must at all times be represented in court by legal counsel—see ss 82 and 83 of the Child Justice Act.

2.3.1 Duty of court in relation to unrepresented accused persons regarding their rights

An accused as contemplated in s 309(1)*(a)* (except for the child offender as contemplated by the Child Justice Act—see above), who is unrepresented at the time he or she is convicted and sentenced, must be informed by the presiding officer of his or her rights in respect of appeal and legal representation and of the correct procedures to give effect to these rights—s 309D(1)*(a)*.

If an unrepresented accused has been convicted and sentenced to any form of imprisonment that was not wholly suspended, or to any form of punishment which in the view of the presiding officer may lead to substantial injustice for the accused, and he or she indicates to the presiding officer his or her intention to apply for leave

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to appeal in terms of s 309B(1)*(a)*, or for leave to petition in terms of s 309C(2)*(a)*, the presiding officer must refer the accused to the Legal Aid Board for the purpose of allowing him or her an opportunity to request legal representation to assist such accused in his or her application—s 309D(3).

When leave to appeal has been denied, the court must explain to such an accused any further recourse he or she has in terms of an appeal to a higher court.

2.4 An application for leave to appeal in a lower court

In terms of s 309B any convicted accused, other than those mentioned above, who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to the court of first instance (trial court) for leave to appeal against that conviction, sentence or order. Such an application must be made—

(i) within 14 days after the passing of the sentence or order following on the conviction; or

(ii) within such extended periods as the court may, on application and for good cause shown, allow.

Any application for leave to appeal must be heard by the magistrate whose conviction, sentence or order is the subject of the prospective appeal (hereinafter referred to as the trial magistrate) or, if the trial magistrate is not available, by any other magistrate of the court concerned, to whom it is assigned for hearing (s 309B(2)*(a)*). If the application is

to be heard by a magistrate other than the trial magistrate, the clerk of the court must submit a copy of the record of the proceedings before the trial magistrate to the magistrate hearing the application: Provided that where the accused was legally represented at a trial in a regional court, the clerk of the court must only submit a copy of the judgment of the trial magistrate, including the reasons for the conviction, sentence or order in respect of which the appeal is sought, unless the magistrate hearing the application deems it necessary in order to decide the application to request the full record of the proceedings before the trial magistrate.

Notice of the date fixed for the hearing of the application must be given to the director of public prosecutions concerned, or to a person designated thereto by him or her, and to the accused—s 309B(2)*(d)*.

2.4.1 Grounds of appeal

Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal—s 309B(3)*(a)*. If the accused applies orally for such leave immediately after the passing of the sentence or order, he or she must state such grounds, which must be recorded and form part of the record.

What are regarded as clear and specific grounds? It was held in *Horne* 1971 (1) SA 630 (C) at 631-2, a case containing several issues and conflicts of fact, that on this issue the governing principles are:

- The magistrate must know what the issues are which are challenged, so that he can deal with them in his reasons for judgment;
- Counsel for the State must be duly informed so that he or she can prepare and present argument which will assist the court of appeal in its deliberations;

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- The court of appeal itself should be apprised of the grounds so that it can know what portions of the record to concentrate on and what preparation, if any, it should make in order to guide and stimulate argument in court;
- Grounds of appeal should not embody arguments or conclusions reached by an appellant.
- These guidelines are still sound, even though *Horne* was decided at a time when the accused's right of appeal to a higher court was unlimited. See also *McKenzie* 2003 (2) SACR 616 (C).

2.4.1.1 Prospects of success on appeal

The main threshold in respect of an application for leave to appeal, irrespective of whether the application is made in the High Court or in a lower court, is whether the appellant has shown that he has reasonable prospects of success on appeal. What the test of reasonable prospects of success suggests is an objective and dispassionate decision, based on the facts and the law on which the court of appeal could reasonably arrive at a conclusion different from that of the trial court—*Mabena* 2007 (1) SACR 482 (SCA) at [22]; also *Khoasasa* 2003 (1) SA 123 (SCA); *Thekiso v S* (73/2012) [2012] ZASCA 129 (25 September 2012). In order to succeed, therefore, the appellant must convince the court that there are sound, rational grounds for concluding that there are prospects of success on appeal. Rationality requires that those prospects are not remote but that the appeal has a realistic chance of succeeding. An argument which suggests that there is a 'mere possibility of success', or that 'the case is arguable on appeal', or that 'the case cannot be categorised as hopeless', is not enough—see *Smith* 2012 (1) SACR 567 (SCA) at [7]; *Matshona* 2013 (2) SACR 126 (SCA).

2.4.2 Amendment of grounds of appeal

A convicted person may amend his or her application for leave to appeal within the prescribed time. Any amendment beyond the prescribed period is allowed with leave of the trial magistrate on application for condonation—s 309(2). It is within the court's discretion to grant or refuse such application. It will be granted more readily if the

appellant does not put off making his application until the last minute. When an amendment is made, notice must be given to the prosecutor (rule 67(8) of the Magistrates' Courts Rules). On refusal of such amendment, condonation and leave to amend may be sought on a petition from the division of the High Court with jurisdiction (s 309C(2)*(a)*(i)).

Where the accused has appealed against the sentence and received leave to appeal, the court does not have the power to order an amendment of the grounds of appeal to include an appeal against the conviction. The only remedy in such a case is to apply for condonation for late application for leave to appeal—*Zulu* 2003 (2) SACR 22 (SCA).

2.4.3 Procedure after leave to appeal is granted or denied

If an application for leave to appeal is granted, the clerk of the court must, in accordance with the rules of the court, transmit copies of the record and of all relevant documents to the registrar of the division of the High Court concerned: Provided that instead of the whole record, with the consent of the accused and the

director of public prosecutions, copies (one of which must be certified) may be transmitted of such parts of the record as may be agreed by the director of public prosecutions and the accused to be sufficient, in which event the division of the High Court concerned may nevertheless call for the production of the whole record—s 309B(4)*(a)*.

If leave to appeal or any other application (ie for condonation for late application or to adduce further evidence) is denied, the magistrate must immediately record his or her reasons for such refusal. An accused in respect of whom an application for leave to appeal is refused must be informed by the presiding officer of his or her rights in respect of the proceedings contemplated in s 309C and legal representation, and of the correct procedures to be followed in order to give effect to these rights—s 309D(2).

2.5 An application for condonation

The Criminal Procedure Act, read with the Magistrates' Courts Rules, prescribes certain time limits within which an appeal should be noted, leave to appeal applied for and prosecuted. If an appeal is not noted within these time limits, condonation for late noting should be applied for see s 309(2) and s 309B(1)*(b)*.

The grounds on which the courts will condone the late noting are in the discretion of the court. In *Rheeders v Jacobsz* 1942 AD 395, the court expressed its approval of the view 'that the Court will take a liberal view of the matter but must be careful to see in each instance that there is some reasonable ground for the exercise of its discretion in favour of the applicant'.

In criminal cases the courts are more accommodating about granting condonation than in civil cases because it is desirable that an accused should be given every reasonable opportunity to present his case as fully as he wishes to the court of appeal (*De Vos* 1975 (1) SA 449 (O)).

In *Abdool Latieb & Co v Jones* 1918 TPD 215 at 216 it was said:

> I think when we find that there has been gross negligence or absolute indifference as to whether the appeal is or is not set down, we ought to say that good cause has not been shown. But when we come to the conclusion that there has been a bona fide mistake due to misunderstanding, or that for some excusable reason the appeal has not been set down at the proper date, we ought to come to the assistance of the litigant.

In *Mohlathe* 2000 (2) SACR 530 (SCA) the court set out the criteria to be applied when considering an application for condonation. It confirmed, on the strength of a number of cases decided in the Supreme Court of Appeal on this point, that whether an explanation is acceptable or not for the purpose of granting condonation is essentially a matter for the discretion of the court, to be exercised judicially. Such discretion is exercised in the light of all the circumstances of the case—including the merits of the case—and also

taking into account considerations such as the degree of lateness, the explanation for it, the prospects of success and the importance of the case. However, all factors are interrelated and not decisive on their own. The court also held that although there is a limit beyond which a litigant cannot escape the results of the attorney's lack of diligence, the dilatoriness of the practitioner cannot be visited on the client when the latter kept a keen and active interest in the prosecution of the appeal and kept abreast of the developments of the appeal. (See also *Van der Westhuizen* 2009 (2) SACR 350 (SCA)).

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2.6 An application to adduce further evidence

In terms of s 309B(5) an application for leave to appeal may be accompanied by an application to adduce further evidence (hereafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted.

An application for further evidence must be supported by an affidavit stating that—

(i) further evidence, which would presumably be accepted as true, is available;
(ii) if accepted, the evidence could reasonably lead to a different decision or order; and
(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

The court granting an application for further evidence must receive that evidence and any additional evidence rendered necessarily thereby, including evidence called in rebuttal by the prosecutor and evidence called by the court. The court must record its findings or views with regard to that evidence, including its findings on the cogency and the sufficiency of that evidence and the demeanour and credibility of such witness. Such further evidence shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial.

2.7 Refusal of application: Petition procedure

If any application—

(i) for condonation;
(ii) for further evidence; or
(iii) for leave to appeal,

is refused by a lower court, the accused may by petition apply to the judge president of the division of the High Court having jurisdiction to grant any one or more of the applications in question—s 309C(2)*(a)*. Any such petition must be made within 21 days after the application in question was refused; or within such extended periods as may be allowed on good cause shown on an application for condonation accompanying that petition—s 309C(2)*(b)*. An accused who submits a petition must at the same time give notice thereof to the clerk of the lower court.

When receiving the notice, the clerk of the court must without delay submit to the registrar of the division of the High Court concerned copies of—

(a) the application that was refused;
(b) the magistrate's reasons for refusal of the application; and
(c) the record of the proceedings in the magistrate's court in respect of which the application was refused—s 309C(4).

2.7.1 Powers and duties of a court considering a petition

A petition contemplated in this section must be considered in chambers by *two* judges designated by the judge president. If these two judges differ in opinion the petition must also be considered in chambers by the judge president or by any other judge designated by the judge president, and any decision of the majority of the judges considering the petition shall be deemed to be the decision of all three judges.

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All applications contained in a petition must be disposed of, as far as is possible, simultaneously and as a matter of urgency where the accused was sentenced to any form of imprisonment that was not wholly suspended—s 309C(8).

Judges considering a petition may in terms of ss 309C(6)-(8)—

(1) call for any further information from the magistrate who refused the application in question, or from the magistrate who presided at the trial to which any such application relates, as the case may be; or
(2) in exceptional circumstances, order that the petition or any part thereof be argued before them at a time and place determined by them;
(3) grant or refuse any application;
(4) if an application for condonation is granted they may—
    (i) direct that an application for leave to appeal must be made to the court of first instance within the period fixed by them; or
    (ii) if they deem it expedient, direct that an application for leave to appeal must be submitted to any other assigned magistrate of the court concerned if the trial magistrate is not available;
(5) grant or refuse the application in the case of an application for leave to appeal on a petition, subject to their decision on the application for further evidence;
(6) in the case of an application for further evidence, grant or refuse the application, and, if the application is granted, they (the judges) may, before deciding the application for leave to appeal, remit the matter to the magistrate's court concerned in order for further evidence to be received in accordance with s 309B(4).

The Registrar of the relevant division of the High Court must give notice of the date fixed for any hearing of a petition under s 309C, and of any place determined in exceptional circumstances for any hearing, to the director of public prosecutions concerned, or to a person designated by him or her, and to the accused—s 309C(9). When a petition is denied by the High Court, the petitioner may approach the Supreme Court of Appeal or even the Constitutional Court depending on the issues involved and depending on leave to appeal with due regard to the provisions s 16 of the Superior Courts Act.

2.8 Hearing of appeal by a division of the High Court

An appeal brought under s 309 must be disposed of by a division of the High Court with appeal jurisdiction and the parties or their legal representatives must be allowed the opportunity to present oral argument to the court regarding the appeal in open court. The former provisions of s 309(3A) allowing the hearing of the appeal *in chambers* on the written argument of the parties or their legal representatives was declared unconstitutional by the court in *Shinga v The State (Society of Advocates (Pietermaritzburg Bar) Intervening as Amicus Curiae)*: *O'Connell* 2007 (2) SACR 28 (CC) (at [24] and [27]).

2.9 When may the prosecution appeal?

2.9.1 Appeal against a bail decision

Following English law, our law is slow in allowing the prosecution a right of appeal. The prosecution may not appeal against an acquittal on the facts of the case—

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Brash 1911 AD 525; *Gasa* 1916 AD 241. A decision to grant an accused bail is generally a factual one and consequently an appeal against such decision turns on the facts. However, in balancing the interests of the State to prosecute crime against the accused's right to freedom and the presumption of innocence, the State is allowed to appeal a bail decision of a court as an exception to the rule: section 65A allows the director of public prosecutions to appeal against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail as contemplated by s 62. The right to appeal is subject to leave to appeal granted by a judge in chambers in terms of s 310A The appeal may be heard by a single judge of a division of the High Court or of a local seat of the division of the High Court—s 65(1)*(b)-(c)*.

An appeal against the decision of the High Court on appeal is allowed, with the leave of the High Court, to the Supreme Court of Appeal—s 65A(2)*(a)*. If the appeal is refused by the High Court, the Supreme Court of Appeal may be approached on petition—s 65A(2) *(a)* and *(b)* read with s 316(8)*(a)*(ii) of the Criminal Procedure Act.

The prosecution may, as far as lower courts' and High Court's proceedings are concerned, except for an appeal against a bail decision (which right of appeal is in any event only available to the director of public prosecutions), appeal against questions of law decided by a court and against a sentence imposed by a court only. As far as the right to appeal against a decision on a sentence is concerned, such right is of limited application—see below. The South African Law Commission in Project 73 (November 2000) *Simplification of criminal procedure (the right of the director of public prosecutions to appeal on questions of fact)* recommended that provision be made for the director of prosecutions to appeal on facts (p 67 at para 5.31). In *Mabasa* 2005 (2) SACR 250 (NC) 254 it was stated by Kgomo J that the objective of the Law Commission's recommendation was not only to effect some equilibrium to the skewed scales of justice between a perpetrator and a victim (apart from the broader community interests), but also to simplify this aspect of criminal procedure. He added that the inordinate and sometimes futile debate in appeal courts as to whether the appeal is on a point of law or on the merits or has elements of both would be rendered largely academic or could be significantly reduced. On policy issues relating to the question of whether the State should be allowed to appeal on the facts, see Van Rooyen 'Appeals by the state in criminal cases—some policy considerations' 1970 *CILSA* 360; *Report of the Commission of Inquiry into Criminal Procedure and Evidence* by Botha J (RP 78/1971), and for a contrary opinion by the SA Law Commission (arguing for state appeals on facts), its Third Interim Report, Project 73, as indicated above.

2.9.2 Appeal restricted to a question of law

When a lower court in criminal proceedings has given a decision in favour of the accused on any question of law, the director of public prosecutions or any other prosecutor may appeal against such decision. This includes an order by the court in favour of the accused to either amend or quash the charge or to deliver particulars to the charge (see s 85(2) read with s 310(1) and paragraph 3.6 below). For examples of such appeals see *Van Heerden* 1949 (4) SA 949 (N); *Kungeka* 1954 (4) SA 76 (E); *C* 1955 (1) SA 464 (T); *Zoko* 1983 (1) SA 871 (N).

The legal competency of a court in terms of s 174 to grant an application for a

discharge at the close of the case for the prosecution is a legal question. Differently stated, the decision of the trial court, namely that there is no evidence upon which a reasonable person could convict at the close of the case for the prosecution, is one of law. This is so because the forming of an opinion as envisaged by s 174 does not involve the exercise of discretion in its proper form, but merely an evaluation of the evidence and its relevance to the essentials of the crime which the prosecution must prove—*Attorney-General, Venda v Molepo* 1992 (2) SACR 534 (V), following *Thielke* 1918 AD 373 at 376. (Cf also *Attorney-General, Zimbabwe v Mzizi* 1992 (2) SACR 582 (Z) at 583*c-d*.) Section 310 provides that when a lower court has in any proceedings given a decision in favour of the accused on any question of law, the director of public prosecutions or other prosecutor may require the judicial officer to state a case for the consideration of the division of the High Court with jurisdiction, and to formulate such question of law and the court's decision thereon. If evidence has been heard, the court's findings of fact in so far as they are material to the question of law must also be stated. It is not sufficient for the court merely to set forth the reasons for its finding. But if the reasons which it has given make it quite clear what the question of law is, this will be sufficient—*Foley* 1953 (3) SA 496 (E). The director or National Director of Public Prosecutions or other prosecutor may then appeal against the lower court's decision. It is not for the director himself to state the question of law: This must be set forth in the case stated by the magistrate or

regional magistrate—*Saib* 1975 (3) SA 994 (N); *Petro Louise Enterprises* 1978 (1) SA 271 (T). Where the State in terms of s 310 of the Criminal Procedure Act wishes to appeal a decision of a lower court with regard to a legal question, an application for leave to appeal is not required but the State must approach the trial court to state a case.

In an appeal in terms of s 310 (and s 311—see below) the court of appeal will, as a general rule in deciding the appeal, confine itself to the findings of fact as reflected in the case stated by the judicial officer, but that is not a hard and fast rule. In some cases the court of appeal (or Supreme Court of Appeal) may have recourse to the facts of the case as disclosed at the trial—cf *Attorney-General, Transvaal v Flats Milling Co (Pty) Ltd* 1958 (3) SA 360 (A).

Where the prosecution appeals the decision, the accused must be notified of such an appeal—*Van Wyk* 1960 (2) SA 106 (C). The procedure regarding the noting of an appeal by the prosecution and related procedure is set out in rule 67(9)-(15) of the Magistrates' Courts Rules. Non-compliance with the Rules could be condoned—cf *Heyns* 1958 (2) SA 253 (E); but see the court's refusal to condone non-compliance in *Basson* 2003 (2) SACR 373 (SCA).

The prosecution may not appeal in order to obtain a decision on a purely academic question which will not affect the outcome of the case (*Attorney-General, Transvaal v Raphaely* 1958 (1) SA 309 (A); *Attorney-General, Transvaal v Flats Milling Co (Pty) Ltd* (above); *Attorney-General, Transvaal v Lutchman* 1959 (2) SA 583 (A); *Suid-Afrikaanse Uitsaaikorporasie* 1991 (2) SA 698 (W)). The purpose of an appeal by the prosecution in terms of s 310 is not only to clarify a legal question but also to ensure that justice is done—*Lusu* 1953 (2) SA 484 (A) at 494F-H. To distinguish between a question of law and a question of fact can at times be difficult, as is borne out by the case of *Attorney-General, Transvaal v Kader* 1991 (4) SA 727 (A).

The prosecution may appeal on a legal question where the lower court has convicted the accused of a lesser offence which is a competent verdict on the offence

actually charged—*Zoko* 1983 (1) SA 871 (N) at 875E-H. The decision to acquit the accused on the offence actually charged is a decision *in favour of the accused* as envisaged by s 310. (In *Zoko's* case the accused was charged with culpable homicide but convicted of assault with intent to do grievous bodily harm. The evidence showed that the killing was committed with the intention to kill. The regional magistrate erroneously found (see s 259) that the accused could only be found guilty of an offence that requires *mens rea* in the form of intention and not of an offence of culpable homicide that requires negligence only.)

If the appeal is allowed, whether wholly or in part, the court of appeal may itself impose such sentence or make such order as the lower court should have imposed or made. The court of appeal may also remit the case and give certain directions. If the case is remitted, the presiding officer who gave the decision must reopen the case (after giving notice to both parties) and deal with it in the same manner as he should have dealt with it if he had given a decision in accordance with the law laid down by the court of appeal—s 310(4) and (5).

If the prosecutor's appeal is not upheld and the decision is in favour of the accused on the legal issue, the prosecution may *with the special leave of the court* approach the Supreme Court of Appeal. Note that s 311(1) is silent on the issue of leave as a requirement (*Attoney-General, Transvaal v Nokwe* 1962 (3) SA 803 (T)) and consequently the Superior Courts Act applies, as s 16(1)*(b)* does not differentiate between the State or the accused as the appellant and therefore special leave must be obtained from the Supreme Court of Appeal—see paragraph 3.3 below.

2.9.3 Appeal against a sentence

The director of public prosecutions may appeal also against a *sentence* imposed upon an accused in a criminal case in a lower court—s 310A. (In view of the fact that the Act does

not mention any other prosecutor it has to be inferred that the right to appeal a sentence is not available to a private prosecutor or any other prosecutor under statutory right. Compare the wording of s 311 with that of s 310A.) Section 310A(1) permits an appeal against the sentence by the prosecutor, provided that an application for leave to appeal has been granted by a judge in chambers who may either grant or deny leave to appeal—s 310A (1). A written notice of such an application, together with the grounds for the application, must be lodged with the registrar of the division of the High Court within 30 days of the passing of the sentence. Condonation may be granted on just cause if the time limits have not been complied with: *Attorney-General, Venda v Maraga* 1992 (2) SACR 594 (V) at 600*f-i*. The accused may lodge a written submission with the judge hearing the application.

It has been pointed out that s 310A does not restrict the prosecution's right to appeal in instances where the sentence imposed is unfair to the State, and that it is also appropriate where an incorrect sentence or a sentence against binding authority has been imposed and the director of public prosecutions wishes to bring the matter to the attention of the High Court—*Maseti* 1992 (2) SACR 459 (C). Whether the director of public prosecutions or an accused appeals against a sentence, the power of a court of appeal to interfere remains the same—*Kgosimore* 1999 (2) SACR 238 (SCA).

Section 310A is designed to widen the powers of the director of public prosecutions in connection with the increase of a sentence on appeal and not to restrict

them. In essence, however, s 310A repealed an established practice whereby the prosecution could request an increase of the sentence when the accused brought an appeal against the sentence. When the accused appeals the sentence imposed and the State intends to ask for an increase of the sentence, the State has to ask for leave to cross-appeal the sentence—*Nabolisa* 2013 (2) SACR 221 (CC) at [66]. These provisions of s 310A are peremptory, as are those of s 316B. Section 310A is in all material aspects identical to section 316B but the latter deals with appeals by the State against sentences imposed by a High Court.

In *Maraga* (above) the court warned that an appeal by the director of public prosecutions against a sentence should not be too readily instituted. Where the appeal against a sentence is dismissed, provision has been made to order the accused's costs to be borne by the State—s 310A(6).

In the absence of a provision similar to that of s 311, it has to be concluded that the legislature did not intend to give the director of public prosecutions the right to a further appeal or a further application for leave to appeal or special leave to appeal to the Supreme Court of Appeal against a sentence to be brought before the Supreme Court of Appeal once the appeal against a sentence has been dismissed by a division of the High Court or leave to appeal has been refused by the judge. The decision of the court of the division sitting as a court of appeal would then be final (see *Director of Public Prosecutions, Western Cape v Kock* (20841/2014) [2015] ZASCA 197 (1 December 2015) at [18] and [19]); *Director of Public Prosecutions, Gauteng v Mphaphama* 2016 (1) SACR 495 (SCA)). If an incompetent sentence were to be upheld by the appeal court, the director of public prosecutions would have no further redress—*Director of Public Prosecutions v Olivier* 2006 (1) SACR 380 (SCA).

2.10 Powers of court of appeal

The powers of the divisions of the High Court sitting as courts of appeal are regulated by s 304(2) read with s 309(3) and s 19 of the Superior Courts Act—see also para 3.10 below. These powers in terms of the Criminal Procedure Act are the following:

(1) The court *may hear further evidence*. The power to hear further evidence is derived from s 304(2)*(b)*, and the amended ss 309B(5) and 309C(7)*(d)* of the Criminal Procedure Act provide for the hearing of further evidence. A court of appeal may exercise this power on its own initiative (*mero motu*) or on application by the

appellant. A request for leave to lead further evidence must be made simultaneously with the appeal—s 309(5)*(a)*. The court will not consider a request for leave to lead further evidence after the appeal has been dismissed—*D* 1953 (4) SA 384 (A) at 391. Section 304(2)*(b)*, read with s 309(3), provides that the court of appeal may summon any person to appear and to give evidence or to produce any document or other article. The court does not have to hear the evidence itself but may remit the matter to the court of first instance with instructions as to the hearing of new evidence (cf s 309C(7)*(d)*). Normally the remittal for the hearing of further evidence will only be ordered where the desired evidence is of a merely formal or technical character; or where the evidence is such as would prove the case without delay and without real dispute; or where it has been omitted at the trial—not deliberately but by oversight—and, in addition, a satisfactory explanation is furnished as to why the desired evidence was not adduced in the first instance—*Mokgeledi* 1968 (4)

SA 335 (A) at 339; *Gumede* 1992 (2) SACR 237 (N). The fundamental enquiry involved in whether to allow the hearing of further evidence is whether the true interests of justice require a case which has been completed to be reopened for the hearing of further evidence, because it is in the interest of justice that finality should be reached in criminal cases (see *Roux* 1974 (2) SA 452 (N) at 454H). It is not in the interests of the administration of justice to allow further evidence on appeal when the only evidence sought to be adduced is that contained in affidavits made by persons recanting their evidence at trial—*H* 1998 (1) SACR 260 (SCA).

(2) The court may *confirm, alter or quash the conviction*. If the accused was convicted on one of two or more alternative counts, the court may, on quashing that conviction, convict the accused on the alternative count or on one of the alternative counts. However, where the prosecutor has *withdrawn* alternative charges after conviction on the main charge, the court, on quashing that conviction, may not consider the alternative charges—*Conradie* 1972 (2) PH H109 (T).

(3) The court may *confirm, reduce, alter or set aside the sentence or order*. If the appeal is noted against the sentence only, the court of appeal has no jurisdiction to extend the ambit of the notice of appeal to include an appeal against conviction—*Matshoba* 1977 (2) SA 671 (A) at 677D; *Abrahams* 1990 (2) SACR 420 (A).

(4) The court may *correct* the proceedings of the lower court.

(5) The court may generally give such judgment or impose such sentence or make such order as the lower court should have given, imposed or made on any matter which was before it at the trial of the case in question. If punishment-tempering provisions are enacted by an amendment Act after the imposition of a sentence and before the hearing of the accused's appeal against his sentence, the court of appeal would be entitled to impose a sentence according to the new punishment measures. The *ratio* behind this is that when an original sentence is set aside by a court of appeal, the status of the accused at that stage is juridically the same as that of an accused who has not been sentenced—*Prokureur-generaal, Noord-Kaap v Hart* 1990 (1) SA 49 (A).

(6) The court may *remit* the case to the magistrate's court with instructions to deal with any matter in such manner as the court of appeal may think fit. When a conviction and sentence have been set aside due to non-compliance with the provisions of s 112(1)*(b)* or (2), or on the ground that s 113 should have been applied, the court of appeal is in terms of s 312 obliged to remit the case to the court by which the sentence was imposed and direct that court to comply with the provisions in question or to act in terms of s 113, as the case may be—s 312(1). Section 312(1) obliges a court of appeal to set aside the conviction and sentence and remit the matter to the court *a quo* in circumstances where the trial court did not question the accused or did not question the accused properly in order to satisfy itself that the accused had admitted the allegations in the charge or where the trial court

erroneously did not apply the provisions of s 113 where it was clear that the court should have had doubts as to the accused's plea of guilty.

(7) The court may make an order affecting the suspension of the execution of a sentence against the person convicted or his admission to jail or, generally,

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affecting any relevant matter or proceeding which the court of appeal deems calculated to promote the ends of justice.

(8) Sentences may be *increased* on appeal. In addition to the powers of the court of appeal to set aside the conviction and sentence, or to reduce the sentence, the court also has the power to increase the imposed sentence or to impose another form of sentence in lieu of or in addition to such sentence—s 309(3). But the court of appeal may not exercise its power to increase the sentence of a lower court (or to impose another form of a sentence in lieu of or in addition to such sentence) where the appeal is based *solely upon a question of law*—s 309(3). The practice in a constitutional dispensation based on substantive fairness now requires that the court must notify the appellant that an increase of the sentence will be considered by the court *mero motu* if the appeal fails—*Bogaards v S* 2013 (1) SACR 1 (CC); and in *Nabolisa v S* 2013 (2) SACR 221 (CC) the court held that where the State, being aware of the appellant's appeal against the sentence, had failed to bring a cross-appeal in terms of s 310A, the court of appeal lacked jurisdiction to increase the sentence on appeal. Notification of intention to ask for an increase of sentence in the state's heads of argument does not amount to a cross-appeal by the prosecution.

The approach of a court of appeal, when considering whether a sentence should be increased, is to compare the sentence it would have imposed with that actually imposed by the court *a quo*. If in such comparison it appears that the difference is substantial, the court has a duty to interfere with the sentence—*De Vos* 1970 (2) SA 590 (C); *Human* 1979 (3) SA 331 (E); *Du Toit* 1979 (3) SA 846 (A). A court of appeal does not have the jurisdiction to increase, on appeal, a sentence beyond the penal jurisdiction of the trial court—*Louw* 1990 (3) SA 116 (A) at 126B; *Peter* 1989 (3) SA 649 (CkA).

The power of the court of appeal to increase the sentence may be exercised also where the appeal is against the *conviction* only (and not against the sentence as well, or against the sentence only)—cf *Deetlefs* 1953 (1) SA 418 (A); *F* 1983 (1) SA 747 (O). On an appeal against the *sentence* only, a court of appeal has no power to substitute a conviction of a more serious crime—*Tladi* 1989 (3) SA 444 (B).

(9) The court of appeal has the power to give any judgment or make any order which the circumstances may require (and see also s 19*(d)* of the Superior Courts Act). Consequently, the court may give such judgment or impose such sentence as the trial court should have given or imposed (s 304(2)*(iv)* read with s 309(3)). The court of appeal may substitute a more serious offence for the offence of which the accused was convicted in the court *a quo*. This power is, however, limited—*Morgan* 1993 (2) SACR 134 (A) at 160*c*—162*g*. On conviction on appeal of the more serious offence, the sentence may be increased or the matter may be remitted to the trial court for the imposition of a proper sentence—cf *E* 1979 (3) SA 973 (A) at 977D–E. In *V* 1953 (3) SA 314 (A) the accused was charged in the alternative and found not guilty on the main charge but guilty on the alternative charge. On appeal the court held that the conviction should be set aside, that the accused was guilty on the main charge and that the court of appeal was entitled to convict the accused (appellant) on the main charge. The court of appeal remitted the case to the magistrate for sentence. See also *Du Toit* 1966 (4) SA 627 (A). However, where an accused is

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convicted on one charge and acquitted on another substantive charge and he appeals against his conviction, the court of appeal has no power to alter the verdict of not guilty to one of guilty—*Phewa* 1962 (3) SA 370 (N); *Motha* 1987 (1) SA 374 (T). This is not a case of a main and alternative charge as in *V's* case, but of two substantive independent charges.

2.11 Execution of a sentence pending appeal

The execution of any sentence is not suspended pending appeal unless the court which imposed the sentence sees fit to order that the convicted person be released on bail—see s 307(1), read with s 309(4). Prior to 1963, a convicted person was entitled to bail as of right—*Sisulu* 1963 (2) SA 596 (W). The court now has a discretion whether to grant bail or not. Steps may be taken to cancel bail where the convicted person is about to abscond—*Allie v De Vries NO* 1982 (1) SA 774 (T).

Although the execution of a *sentence* is not suspended, an appeal suspends the operation of an order as, for example, an order which authorises the suspension of a driver's licence—s 18(1) of the Superior Courts Act; *Abraham* 1964 (2) SA 336 (T).

2.12 Remission for a new sentence

When a case is remitted on appeal to that lower court which originally tried the matter, for an altered sentence or an addition to a sentence, such sentences need not be passed by the judicial officer who originally passed the sentence—s 275.

2.13 Fresh trial

In terms of s 324, read with s 313, proceedings may be instituted again when a conviction of a lower court is set aside on any of the following grounds:
(1) the court was not competent to convict; or
(2) the charge sheet was invalid or defective; or
(3) there was a technical irregularity in the proceedings.

When a trial is instituted afresh on any of the above grounds, a plea of *autrefois acquit* will be of no avail to an accused if he is prosecuted again on the same charge. However, s 313 must be interpreted in consonance with the principles regarding the constitutional protection against double jeopardy, in the interests of fairness and public interest in the finality of proceedings. See *Basson* 2004 (1) SACR 285 (CC). (The discussion in para 3.9.1 'Setting aside or alteration of conviction on ground of irregularity' below applies *mutatis mutandis*.)

The proviso in s 309(3) restricts the instituting of fresh proceedings on the grounds of irregularities. It provides that, notwithstanding that the court is of opinion that a point may be decided in favour of the appellant, no conviction or sentence may be reversed or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted. The proviso contained in s 309(3) must be read in the context of the constitutional demand for a fair trial. In our constitutional era it is the function of a court of appeal to enquire into the fairness of the trial and to ensure that the accused's right to a fair trial is fulfilled, particularly where an irregularity appears *ex facie* the record of the proceedings—*Chabedi* 2004 (1) SACR 477 (W). However, where proceedings are void *ab initio*, a court of appeal will not

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hesitate to intervene *mero motu* and set the proceedings aside—*Prinsloo* 1970 (3) SA 550 (O). See also the discussion relating to the proviso contained in s 322 in para 3.9 below.

3 Appeals to a full court of a division of the High Court and to the Supreme Court of Appeal

The Supreme Court of Appeal is the court of appeal that decides questions of law reserved, special entries of irregularities and appeals in connection with criminal cases

heard by divisions of the High Court, except in cases where a division of the High Court in granting leave to appeal is satisfied that the appeal does not require the attention of the Supreme Court of Appeal. In such cases it directs that the appeal be heard by a full court. In relation to appeals from divisions of the High Court as courts of first instance, the words 'court of appeal' means either a full court or the Supreme Court of Appeal—s 315(5)*(a)*. Appeals to the Supreme Court of Appeal or to a full court of a division are not as of right but allowed only if leave to appeal has been granted by the High Court or, in case of a refusal, with leave to appeal granted on a petition or on application to the Supreme Court of Appeal. However, an absolute right of appeal is available to certain young offenders.

3.1 Jurisdiction and constitution

3.1.1 The Supreme Court of Appeal

The composition and jurisdiction of the Supreme Court of Appeal are set out in general terms in s 168 of the Constitution. Accordingly, the court consists of a President (formerly Chief Justice), Deputy President and a number of judges of appeal and acting judges of appeal determined by legislation. The Supreme Court of Appeal may decide any appeal of whatever matter, even constitutional matters. It is the second highest court of appeal and may decide —

(a) appeals;
(b) issues connected with appeals; and
(c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.

The Court generally sits in panels of three or five judges, depending on the nature of the appeal. The President of the Supreme Court of Appeal (formerly called the 'Chief Justice') or, in his absence, the senior available judge of the Supreme Court of Appeal, may direct that a criminal appeal be heard before a court consisting of three judges—s 13 of the Superior Courts Act. However, in deciding constitutional issues or other matters of public importance, the quorum shall be five judges—*Prince v President, Law Society, Cape of Good Hope* 2001 (1) SACR 217 (CC), but see s 13(1)*(b)* of the Superior Courts Act.

The Supreme Court of Appeal has jurisdiction to hear and determine an appeal against any decision of a division of the High Court. In respect of appeals and questions of law reserved in connection with criminal cases heard by a single judge of a division of the High Court, the court of appeal shall be the Supreme Court of Appeal, except in so far as the provisions regarding appeals to a full court of a division provide otherwise—s 315(1)*(a)*.

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3.1.2 A full court

In terms of s 1 of the Superior Courts Act, a 'full court' means, in relation to any division of the High Court, a court consisting of three judges. However, it seems as though the Superior Courts Act does not restrict the meaning of a full court to a court of appeal only, but equates it to a 'full bench' with a maximum of three judges as the only criterion irrespective of whether such court is constituted as a court of appeal or a trial court with more judges than a single judge. However, in terms of s 315(5)*(b)* of the Criminal Procedure Act, a 'full court' means the court of a division of the High Court, or the Gauteng High Court, Johannesburg (a local seat of the Gauteng Division, Pretoria), sitting as a court of appeal and constituted before three judges. In terms of the Criminal Procedure Act, a full court is a court of appeal and not a court of first instance and consequently a criminal trial cannot be conducted before such a court. In relation to appeals from divisions of the High Court as courts of first instance, the words 'court of appeal' means either a full court or the Supreme Court of Appeal—s 315(5)*(a)*.

The decision of the majority of the judges of a full court of a division is the decision of the court. Where the majority of the judges of any such court are not in agreement, the

hearing must be adjourned and commenced *de novo* before a court consisting of three other judges—s 14(4) of the Superior Courts Act.

The powers of a full court of a division are those of a division sitting as a court of appeal. An appeal which is to be heard by a full court of a division shall, in terms of s 315 (3), be heard—

(1) in the case of an appeal in a criminal case heard by a single judge of a division, by the full court of the division concerned;

(2) in the case of an appeal in a criminal case heard by a single judge of the Gauteng High Court, Johannesburg—

(a) by the full court of the Gauteng Division of the High Court, Pretoria, unless a direction by the judge president of that division under *(b)* applies to it; or

(b) by the full court of the said *local* seat of that division (ie Gauteng High Court, Johannesburg), if the said judge president has so directed in the particular instance—s 315 (3).

In terms of s 6(4)*(a)* of the Superior Courts Act, where a division has one or more local seats, this section provides further that—

> the main seat of that Division has concurrent *appeal jurisdiction* over the area of jurisdiction of any local seat of that Division, and the Judge President of the Division may direct that an appeal against a decision of a single judge or of a Magistrates' Court within that area of jurisdiction may be heard at the main seat of the Division. [Emphasis added.]

This section, and especially the reference to concurrent 'appeal jurisdiction' over 'any local seat' of that division, creates the impression that all local seats are now empowered with appeal jurisdiction and not only the Gauteng High Court, Johannesburg; but this is uncertain. This uncertainty is reflected in the research and discussion in *Mohomed Hassim Ismail v Edith Nomafusi* in the KwaZulu-Natal Division, Durban (judgment delivered on 25 September 2015), where the court held that the local seat of Durban does not have appeal jurisdiction.

3.1.2.1 When will a full court of a division hear an appeal?

(a) Appeals from decisions by a single trial judge of a division of the High Court:

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When an application for leave to appeal in a criminal case is heard by a single judge of a division (irrespective of whether the judge sat with or without assessors) and granted under s 316 (see below), the court or judge or judges granting the application shall, if they are satisfied that the questions of law and of fact and the other considerations involved in the appeal (such as public importance) are of such a nature that the appeal does not require the attention of the Supreme Court of Appeal, direct that the appeal be heard by a full court (s 315(2)*(a)*). The criterion for allowing an appeal to the full court is largely whether the appeal is without obvious difficulties—see *Sinama* 1998 (1) SACR 255 (SCA).

Any such direction by the court or a judge of the division may be set aside by the Supreme Court of Appeal, on application (by way of a petition addressed to the President of the Supreme Court of Appeal) by the accused or the director of public prosecutions or other prosecutor within 21 days (now 30 days, by virtue of a Supreme Court directive) after the direction was given (or such longer periods as may on application to the Supreme Court of Appeal on good cause be allowed)—s 315(2)*(b)*. The full court of a division hearing an appeal has the same jurisdiction as the Supreme Court of Appeal in relation to the powers provided in s 322—s 316 (3)*(e)*. Section 322 prescribes the powers of the court of appeal.

An appeal against the judgment or order of a full court of a division given on appeal in terms of s 315(3) shall be allowed only with the special leave of the Supreme Court of Appeal on application either by the accused or by the prosecution.

(b) Appeals from decisions handed down by a division of the High Court sitting as a court of appeal:

Only matters heard by a division of the High Court as a court of first instance may be adjudicated by a full court of a division as a court of appeal. A full court of a division does not have jurisdiction to hear unsuccessful appeals that originated from lower courts and were heard by a division of a High Court as a court of appeal. See also *McMillan* 2001 (1) SACR 148 (W).

(c) A full court of a division has no jurisdiction to hear an appeal in the following instances:

(1) Where it has been directed by the division of the High Court hearing the application for leave to appeal that the questions of law or of fact or other considerations require the attention of the Supreme Court of Appeal.

(2) Where leave to appeal on a special entry of irregularity or illegality against the proceedings of a division of the High Court has been granted.

(3) Where a question of law has been reserved by a division of the High Court, unless the court has directed that the question of law shall be heard by the full court of a division.

(4) Where an appeal is brought against the judgment or order of a division of the High Court given on appeal in matters emanating from lower courts.

3.2 Right of appeal to the Supreme Court of Appeal or to a full court of a division of the High Court

Section 315(4) provides that appeals with regard to proceedings in divisions or local seats of divisions of the High Court as courts of first instance shall lie only as

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provided in ss 316-319 and shall not be as *of right*, that is, leave to appeal must first be obtained. Section 16(1)*(a)* of the Superior Courts Act provides that an appeal against any decision of a division as a court of first instance lies, upon leave having been granted—

(i) if the court consisted of a single judge, with the leave of the trial court, either to the Supreme Court of Appeal or to a full court of that division, depending on the direction by the court; or

(ii) if the court consisted of more than one judge, with the leave of the trial court, to the Supreme Court of Appeal.

Section 16(1)*(b)* provides that an appeal against any decision of a division *on appeal to* it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal.

An automatic right of appeal to the full court of a division or to the Supreme Court of Appeal exists only in the following instances: If an accused was convicted of any offence by the High Court and that accused was, at the time of the commission of the offence—

(i) below the age of 16 years; or

(ii) at least 16 years of age but below the age of 18 years and was sentenced to imprisonment that was not wholly suspended,

he or she may note such an appeal without having to apply for leave to appeal (cf s 84 of the Child Justice Act and s 316(1)*(a*) of the Criminal Procedure Act).

In summary, a criminal matter may be taken on appeal to the Supreme Court of Appeal in the following manner:

(1) In cases *tried in lower courts* and taken on appeal by the prosecution or the accused to a division of the High Court with appeal jurisdiction, a further appeal to the Supreme Court of Appeal is possible only with the special leave of the Supreme Court of Appeal itself.

(2) In cases *tried in higher courts*, appeals to the Supreme Court of Appeal are possible in the following circumstances only:

(a) Where leave to appeal against a conviction and/or sentence or order following thereon is granted by the trial judge (or any other judge of that division of the High Court if the trial judge is not available or in the case of a conviction before a circuit court where that court is not in session)—s 316(1) and (2)*(a)*.

Where leave to appeal is refused, the Supreme Court of Appeal may be approached by way of petition addressed to the President of the Supreme Court of Appeal;

(b) Where an application for appeal on grounds of a special entry is *granted* by the trial court based on an alleged irregularity or illegality—ss 317 and 318. Where an application for a special entry is refused, the Supreme Court of Appeal may be approached by way of petition addressed to the President of the Supreme Court of Appeal;

(c) Where a question of law is reserved by the trial court either *mero motu* or at the request of the prosecution or the accused—s 319. Here, too, a further remedy to the Supreme Court of Appeal is available on a petition if the trial court refuses to reserve a question of law;

(d) Where the State has been given leave to appeal against the sentence—s 316B;

(e) Where a matter is brought to the Supreme Court of Appeal by the minister for decision of the Supreme Court of Appeal concerning a question of law, where the minister is doubtful as to the correctness of any decision given by any High Court in any criminal case, or where conflicting decisions on a question of law in criminal matters have been given by different divisions—s 333. There are no legal consequences for an accused as a result of this procedure. See Chapter 2 for a discussion;

(f) If the matter was tried before three judges, an appeal lies with leave to appeal to the Supreme Court of Appeal.

(3) Matters *decided on appeal by a full court of a division* may only be brought to the Supreme Court of Appeal with the special leave from the Supreme Court of Appeal (s 316(3)*(a); Banger* 2016 (1) SACR 115 (SCA)).

3.3 Appeals to the Supreme Court of Appeal regarding appeals in criminal cases originating in lower courts

An appeal against a judgment or order of the High Court having appeal jurisdiction in a matter which originated in a lower court, and which was brought before a division of the High Court on appeal, is regulated by s 16(1)*(b)* of the Superior Courts Act. This section provides that there is no appeal to the Supreme Court of Appeal on a decision given by any division on an appeal to such division, unless with the special leave of the Supreme Court of Appeal—see also s 17(3) of the Superior Courts Act, which prescribes that special leave must be applied for within 30 days after the decision sought to appeal against, was delivered. The division of the High Court against whose decision an appeal is brought may grant or refuse the appellant bail—s 309(5) of the Criminal Procedure Act.

Every application for leave to appeal, whether oral or formal, must set out clearly and specifically the grounds upon which the accused desires to appeal. The grounds of appeal to the Supreme Court of Appeal need not coincide with the grounds of appeal from the lower court to the High Court—*Attorney-General, Transvaal v Flats Milling Co (Pty) Ltd* 1958 (3) SA 360 (A). Note that an application for special leave to appeal to the Supreme Court of Appeal must show, in addition to the ordinary requirement of 'reasonable prospects of success', that there are 'special circumstances' which merit a further appeal to this court, such as that the appeal raises a substantial point of law, or that the matter is of very great importance to the public or appellant or that the prospects of success are so strong that the refusal of leave to appeal would probably result in a denial of justice—*Van Wyk* 2015 (1) SACR 584 (SCA) at [21]. Section 17(1)*(a)*(ii) of the Superior Courts Act also provides for special leave where there are compelling reasons why the appeal should be heard, such as conflicting judgments on the matter under consideration.

If leave to appeal is not applied for within the prescribed time, condonation could be applied for simultaneously with the application for leave to appeal. The Supreme Court of Appeal may in exceptional circumstances, by virtue of s 17(2)*(f)* of the Superior Courts

Act, apply for condonation in respect of the delay in bringing the application for leave to appeal—*Ntlanyeni* 2016 (1) SACR 581 (SCA). The President of the Supreme Court of Appeal is not time-bound and has such authority now.

The National Director or a director of public prosecutions or other prosecutor may appeal against a decision given on appeal by a division of the High Court in

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a matter arising in a lower court, if such division has given a decision in favour of a *convicted* accused on a *matter of law*, after having obtained the necessary leave to appeal. Such leave must, as previously indicated, be obtained from the Supreme Court of Appeal. If leave is refused, the director of public prosecutions may petition the Constitutional Court for leave. See s 311(1) read with s 17(3) of the Superior Courts Act; *Attorney-General, Transvaal v Nokwe* 1962 (3) SA 803 (T) (*contra*: *Dave* 1954 (4) SA 736 (A)). (See also 'Appeal by prosecution to the Supreme Court of Appeal' below.)

3.4 Appeal against decisions of a division of the High Court to higher courts

3.4.1 Application for leave to appeal:

3.4.1.1 Appeal against decisions by a division of the High Court as a trial court

(1) Any accused, other than those juvenile offenders mentioned above, convicted before a higher court of any offence may, within a period of 14 days of the passing of the sentence or order as a result of such conviction, apply to the trial court for leave to appeal against such conviction, sentence or order—s 316(1)*(b)*. The period may be extended on good cause shown. See also s 16(1)*(a)* of the Superior Courts Act.

(2) The director of public prosecutions may, within a period of 14 days of the passing of the decision, apply for leave to appeal against the decision of a High Court to release an accused on bail—s 65A(2). The director of public prosecutions may not appeal the imposition of any condition of bail as contemplated in ss 65(1)*(a)*–65A (2)*(a)* (cf s 65A(1)*(a)*). If leave to appeal is sought against a decision to release an accused on bail, the director of public prosecutions may apply for leave to appeal to the court that gave the decision in the same manner as an accused convicted by a division of the High Court—s 65A(2)*(b)* read with s 316(8), and see (*Bange*r 2016 (1) SACR 115 (SCA) at [10]).

(3) The Criminal Procedure Act does not provide for an appeal by an accused person against the refusal of bail by the High Court sitting as a court of first instance; consequently such appeal is regulated by the Superior Courts Act. Therefore, in the case of an appeal against the refusal of bail by the High Court sitting as a court of first instance, application for leave to appeal must be made to that court. If the application is refused, leave may be granted by the Supreme Court of Appeal in terms of s 17(2)*(b)* of the Superior Courts Act. If the High Court consisted of a single judge, the appeal lies to a full court, unless a direction is given in terms of s 17(6) that the matter requires the attention of the Supreme Court of Appeal. If the High Court consisted of more than one judge, the appeal lies directly to the Supreme Court of Appeal (*Bange*r 2016 (1) SACR 115 (SCA) at [12]).

3.4.1.2 Appeal against decisions by a division of the High Court as a court of appeal

Leave to appeal against a judgment or order given on appeal by a division of the High Court must be applied for by the appellant within 15 days after the date on which the judgment or order was given—see rule 49(1)*(a)* and *(b)* of the Supreme Court Rules. See also s 16(1)*(b)* of the Superior Courts Act.

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3.4.1.3 To whom must the application be made?

(1) Application is made to the judge who presided at the trial. If he or she is not available, application is made to another judge of the division concerned. In the

case of conviction before a circuit court, application is made to that court, but if it is not in session, it may be made to a judge of that division of the High Court—s 316 (2)*(a)*; s 17(2)*(a)* of the Superior Courts Act.

(2) If leave to appeal is sought against any judgment or order of a division given on appeal, application for leave to appeal is to be made to the Supreme Court of Appeal—s 17(3) of the Superior Courts Act.

3.4.1.4 Grounds of appeal

An application for leave to appeal must set forth, clearly and specifically, the grounds upon which the accused wishes to appeal. This also applies to an application brought by a director of public prosecutions. If the party applies verbally for leave immediately after the passing of the sentence by a higher court, he must state the grounds and they must be taken down in writing and form part of the record—s 316(4), and see rule 49(1)*(a)* and *(b)* of the Supreme Court Rules; see also *Hlatswayo* 1982 (4) SA 744 (A).

When leave to appeal is granted, the leave may be limited to particular grounds of appeal. But if leave to appeal is granted generally, without restricting the grounds, all issues may be canvassed on appeal—*Jantjies* 1958 (2) SA 273 (A). Where leave to appeal has been granted on limited grounds, the Supreme Court of Appeal may be approached for an extension of such grounds. The Supreme Court of Appeal has the power to grant leave to appeal on wider grounds than those allowed by the trial judge—*Mpompotshe* 1958 (4) SA 471 (A) at 473. A division does not, however, have the power to grant leave for the extension of grounds of appeal after leave to appeal has been granted on particular grounds by that division—*Van H* 1959 (3) SA 648 (T).

The question whether the Supreme Court of Appeal may allow an appellant to appeal against his conviction, although he appealed only against the *sentence* imposed by a lower court, was raised in *L* 1960 (3) SA 503 (A), but left undecided. If the accused applies to the *trial court* for leave to appeal only against his *sentence* and that is refused, he cannot later apply to the Supreme Court of Appeal for leave to appeal against his *conviction—Cassidy* 1978 (1) SA 687 (A). In *Abrahams* 1990 (2) SACR 420 (A), it was again held that the Supreme Court of Appeal cannot assume jurisdiction to set aside a conviction where there is an appeal against the sentence only. Where the trial court has granted leave to appeal to the Supreme Court of Appeal against the conviction, the Supreme Court of Appeal may interfere with the sentence—*Mazibuko* 1978 (4) SA 563 (A) at 565.

3.4.1.5 When leave to appeal should be granted

When determining whether or not to grant an application for leave to appeal, the dominant criterion is whether or not the applicant has a reasonable prospect of success on appeal or whether there is some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration (s 17(1)*(a)* of the Superior Courts Act). The mere circumstance that a case is 'arguable' is insufficient, unless the term 'arguable' is used in the sense that there is substance in the argument advanced on the behalf of the applicant. In the

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nature of things, it is always somewhat invidious for a judge to have to determine whether a judgment which he has himself given may be considered by a higher court to be wrong. That is, however, a duty imposed upon judges by the legislature. The primary consideration in an application for leave to appeal is therefore whether or not (both in relation to questions of fact and of law) there is a reasonable prospect of success—cf *Baloi* 1949 (1) SA 523 (A); *Kuzwayo* 1949 (3) SA 761 (A) at 765; *Shaffee* 1952 (2) SA 484 (A); *Ackerman* 1973 (1) SA 765 (A)—or a compelling reason of public importance. The judge is thus faced with no easy task, but he must exercise his power judicially and objectively, and ask himself whether there is a reasonable prospect that another court might come to a different conclusion—*Sikosana* 1980 (4) SA 559 (A).

The *mere possibility* that another court might come to a different conclusion is not sufficient to justify the granting of leave to appeal—*Ceaser* 1977 (2) SA 348 (A) at 350. Nevertheless, in *Milne and Erleigh (3)* 1950 (4) SA 599 (A) the court took into consideration that a number of difficult and novel questions of law were involved. See also *Muller* 1957 (4) SA 642 (A).

Leave to appeal may, however, be granted even if there is no prospect of success on the existing record, if there is a reasonable prospect that leave to adduce further evidence will be granted and that, if it is, the result may be different—*Jantjies* 1958 (2) SA 273 (A).

If the application is refused, the judge must furnish reasons for the refusal—s 320, *Sikosana* (above), and see *White* 1952 (2) SA 538 (A). The fact that an accused pleaded guilty before the court of first instance does not mean that leave to appeal will never be granted. See *In re Clark* 1958 (3) SA 394 (A); *Mavhungu* 1981 (1) SA 56 (A). The mere fact that the State does not oppose an application is not a proper ground for granting leave to appeal—*Mosia* 1971 (2) PH H135 (A).

3.4.2 Application for leave to adduce further evidence

When applying to the trial court or another judge of a division of the High Court for leave to appeal, a convicted person may also apply for leave to lead further evidence—s 316(5) *(a)*. It is in the interest of justice that finality be reached in criminal cases. Once the facts have been decided upon, the case will not lightly be reopened—cf *De Jager* 1965 (2) SA 612 (A); *Yusuf* 1968 (2) SA 52 (A). Because of the finality principle involved in criminal matters, it is a general principle regarding further evidence that such evidence should be allowed in exceptional circumstances only, although a certain measure of leniency towards applications for the hearing of further evidence is apparent in certain cases. In exceptional cases the court might come to the relief of the accused if it is satisfied that there is a reasonable probability that he would not be convicted if given the opportunity of a further hearing—*Myende* 1985 (1) SA 805 (A); *Ndweni* 1999 (2) SACR 225 (SCA). (On this aspect, see the discussion below under ‘Powers of the Supreme Court of Appeal’.)

An application for further evidence must be supported by an affidavit stating that—

(i) further evidence which would presumably be accepted as true is available;
(ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and
(iii) there is a reasonably acceptable explanation for the failure to produce the

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evidence before the close of the trial (cf s 316(5)*(b)*). The failure of a legal representative to call available witnesses is not an acceptable explanation—*N* 1988 (3) SA 450 (A); *Venter* 1990 (2) SACR 291 (NC).

The *onus* of satisfying these requirements rests upon the appellant. It is not in the interests of the proper administration of justice that further evidence should be allowed on appeal, or that there should be a retrial for the purpose of hearing that further evidence, when the only further evidence was that contained in affidavits made after trial and conviction, by persons who recanted the evidence they gave at the trial. Some good reason has to be shown why a lie was told in the first instance, and a good reason has to be given for thinking that the witness would tell the truth on the second occasion—*H* 1998 (1) SACR 260 (SCA).

Normally the courts demand that all three requirements be fulfilled. Although an application for leave to lead further evidence may be brought in terms of s 316(5), it can be made only in conjunction with a competent application for leave to appeal. If leave to appeal has been refused with final effect, an application for leave to lead further evidence is incompetent—*Ebrahim* 1972 (2) SA 61 (C); *Gavanozis* 1979 (1) SA 1020 (W). Furthermore, the trial judge is empowered to hear such evidence only and not to set aside the conviction and sentence even if it is clear that the conviction cannot

stand—*Masinda* 1981 (3) SA 1157 (A) at 1165B. Nevertheless, the court is entitled to express an opinion on issues affected by the new evidence and to furnish the court of appeal with the reasons for such an opinion—*Tsawane* 1989 (1) SA 268 (A).

The court granting an application for further evidence must—

(i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and

(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness—s 316(5)*(c)*.

Any evidence received under s 316(5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question—s 316(6). If an application for leave to call further evidence is refused, the accused may (just as in the case of condonation or leave to appeal) petition the President of the Supreme Court of Appeal—s 316(8).

If an accused discovers further evidence after the trial court has already *refused* an application for leave to appeal, the remedy of further evidence in terms of s 316(5) is exhausted. If *leave to appeal* was *granted* but leave to lead further evidence refused, an accused may approach the Supreme Court of Appeal in terms of s 316(8) and the Supreme Court of Appeal may grant leave to lead further evidence. If, however, the Supreme Court of Appeal has already refused a petition for leave to lead further evidence in terms of s 316(8), the Supreme Court of Appeal has no jurisdiction to act and the only remedy available to the accused is as contemplated by s 327.

3.4.3 Application for condonation

Leave to appeal must be applied for within the prescribed time limits, unless condonation is obtained for the late filing of notice of appeal. Section 316(1)

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provides for an application for leave to appeal within such extended periods as may on good cause be allowed.

In an application to condone a defective procedure, the court will not grant condonation where the appellant has no reasonable prospect of success on appeal, and accordingly, the court is entitled to consider the merits of the appeal—*Mofokeng v Prokureur-Generaal, OVS* 1958 (4) SA 519 (O). In *Tsedi* 1984 (1) SA 565 (A) the Supreme Court of Appeal (then called the Appellate Division) indeed took into consideration the absence of any prospect of success in rejecting the appellant's application for condonation. The test of whether there are reasonable prospects of success on appeal is a lesser one than that which has to be applied in deciding whether the appeal ought to succeed or not—*N* 1991 (2) SACR 10 (A) at 13*(b)*-*(c)*; *Kgolane* 1959 (4) SA 483 (A).

If an application for condonation is refused, the accused may, within a period of 21 days (now, 30 days) of such refusal, or within such extended periods as may on good cause be allowed, by petition addressed to the President of the Supreme Court of Appeal submit his application for condonation—s 316(8).

It was decided in *Moosajee* 2000 (1) SACR 615 (SCA) that a person who was unsuccessful in an appeal to a division of the High Court requires leave to appeal further, whereas a person who was refused condonation for the late filing of an appeal or heads of argument, has an automatic right of appeal to the Supreme Court of Appeal.

3.4.4 Refusal of application: petition procedure

Where an application—

(1) for leave to appeal against a judgment, sentence or order handed down by a higher court;

(2) to adduce further evidence; and/or

(3) for condonation,

is refused, the accused has another legal remedy, namely to apply to the Supreme Court of Appeal for leave to appeal. Such application must be made within 21 days after refusal by the High Court, and is made by petition addressed to the President of the Supreme Court of Appeal. If the accused has not applied within 21 days, he may on good cause be allowed to apply later—s 316(8).

A petition referred to in s 316(8), including an application for leave to appeal, must be considered in chambers by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal. In the case of a difference of opinion, the petition shall also be considered by the President of the Supreme Court of Appeal or by any other judge of the Supreme Court of Appeal to whom it has been referred by the President—s 316(11). Any decision of the majority of the judges considering the petition shall be deemed to be the decision of all three judges.

All applications contained in a petition must be disposed of as far as is possible simultaneously and as a matter of urgency where the accused was sentenced to any form of imprisonment that was not wholly suspended (s 316(14)).

The judges considering a petition may, in terms of s 316(12)—

(a) call for any further information, including a copy of the record of the proceedings that was legally not required to be submitted (see s 316(10)*(c)*), from the

judge who refused the application in question, or from the judge who presided at the trial to which any such application relates, as the case may be; or

(b) in exceptional circumstances, order that the application or applications in question or any of them be argued before them at a time and place determined by them.

The judges considering a petition may—

(a) in the case of an application for leave to appeal, grant or refuse the application; and

(b) in the case of an application for condonation, grant or refuse the application, and if the application is granted—

(i) direct that an application for leave to appeal must be made, within the period fixed by them, to the division of the High Court; or

(ii) if they deem it expedient, direct that an application for leave to appeal must be submitted within the period fixed by them as if it had been refused by the said division of the High Court; and

(c) in the case of an application for leave to appeal, subject to paragraph *(d)*, grant or refuse the application; and

(d) in the case of an application for further evidence, grant or refuse the application, and, if the application is granted, the judges may, before deciding the application for leave to appeal, remit the matter to the division of the High Court concerned in order that further evidence may be received; or

(e) in exceptional circumstances, refer the petition to the Supreme Court of Appeal for consideration, whether upon argument or otherwise, and the Supreme Court of Appeal may thereupon deal with the petition in any manner referred to above.

Notice of the date fixed for the hearing of any application under this section, and of any time and place determined for any hearing, must be given to the director of public prosecutions concerned and to the accused—s 316(15).

3.5 Appeal on special entry of irregularity or illegality to the Supreme Court of Appeal

Irregular proceedings or proceedings not according to law in a lower court may be taken on review before the High Court. However, there is no review procedure for irregular proceedings in a trial in a higher court. This does not leave the accused without a remedy: the Criminal Procedure Act makes provision for a so-called special entry whereby the accused may, if convicted, take his case to the Supreme Court of Appeal. This procedure is necessary because an irregularity will often not appear from the record, and the accused will therefore not be able to rely on it if he takes the case on appeal.

With a special entry the accused may request during or after the trial that the irregularity be entered on the record. Naturally, the trial judge himself will have to consider the application based on the alleged irregularity and this may influence him in his decision. In *Van der Westhuizen v S* 2011 (2) SACR 26 (SCA) the court held that where a special entry in terms of s 317(1) of the Criminal Procedure Act is sought on the basis that the cross-examination of a State witness was unjustifiably curtailed, the court can avoid making a special entry by recalling the witness for further cross-examination. In *De Vries* 2012 (1) SACR 186 (SCA) at [29] the court reiterated that the purpose of a special entry is the recording

of irregularities affecting the trial but not appearing from the record. An attack on the ruling of a court does not qualify as such.

Two types of irregularity are possible; those *relating* to the trial, and those that arise *during* the trial. For example: the first type of irregularity, for example, where an assessor gained extra-curial information detrimental to the accused, will have to be proved by evidence—*Matsego* 1956 (3) SA 411 (A). See also *Suliman* 1969 (2) SA 385 (A). In the latter type of irregularity, which arose during the trial, a refusal of the judge to allow proper cross-examination as in the case of *Heslop* 2007 (1) SACR 461 (SCA) could justify a special entry, but also an ordinary appeal on grounds of infringement of an accused's right to a fair trial. Where the prosecution fails to disclose a material divergence from the witnesses' statements, it is an irregularity in the proceedings for the purposes of s 317(1)—*Xaba* 1983 (3) SA 717 (A).

Where the irregularity in question clearly appears *ex facie* the record and a general and unqualified leave to appeal has been granted, it is unnecessary for a special entry to be made in that respect—*Ncaphayi* 1990 (1) SACR 472 (A); *Xaba* (above).

Section 317(1) provides that if an accused is of the view that any of the proceedings in connection with or during his trial before the High Court were irregular or not according to law he or she may, during the trial or within a period of 14 days after the conviction, apply for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular or not according to law. The court is bound to make such a special entry upon such application, unless the court or judge to whom the application is made is of the opinion that the application is not made *bona fide* or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court (s 317, *Sefatsa v Attorney-General, Transvaal* 1988 (4) SA 297 (T)). Section 317 is concerned with irregularities or illegalities in respect of procedure. Questions of law cannot, therefore, form the subject of a special entry.

If a special entry is made on the record, the accused may, if convicted, appeal to the Supreme Court of Appeal against conviction on the ground of the irregularity or illegality. The accused must, within 21 days after the entry is made (or within such extended periods as may on good cause shown be allowed), give notice of appeal to the registrar of the Supreme Court of Appeal and to the registrar of the appropriate division—s 318(1).

If the accused fails to make the application within the prescribed period of 14 days, he or she may on good cause shown be allowed to apply for condonation and to make the application later—s 317(1). Usually an application for a special entry is made to the judge who presided at the trial, but it may also be made to another judge of the division of the High Court of which the presiding judge was a member—s 317(2). The terms of a special entry are settled by the court which or the judge who grants the application—s 317(4). (In respect of the formal requirements concerning the wording of a special entry, see *Kroon* 1997 (1) SACR 525 (SCA).)

If an application for a special entry is refused, the accused may, within a period of 21 days of such refusal (or within such extended periods as may on good cause shown be allowed), by petition addressed to the President of the Supreme Court of Appeal, apply to the Supreme Court of Appeal for a special entry to be made on the record. The same

applies to a refusal of an application for condonation—s 317(5). The petition procedure discussed above applies *mutatis mutandis*.

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Where an application for leave to appeal has been refused by the President of the Supreme Court of Appeal, the accused may not, on the same grounds, apply for a special entry to be made—*Serumula* 1962 (3) SA 962 (A). See also *Swanepoel* 1979 (1) SA 478 (A).

In considering the appeal on a special entry the court must heed the proviso to s 322 (1), in terms of which the accused's conviction and sentence are not to be set aside by reason of the irregularity unless it appears to the Supreme Court of Appeal that a failure of justice has in fact resulted from the irregularity. The question would then be whether the irregularity in question is of the kind that *per se* vitiates the proceedings as in *Moodie* 1961 (4) SA 752 (A), or whether it is of the kind, as in *Naidoo* 1962 (4) SA 348 (A), which requires consideration of whether, on the evidence and credibility findings unaffected by the irregularity, there was proof of the accused's guilt beyond reasonable doubt—*Xaba* (above) 735-6; *Ncaphayi* (above). The constitutionality of the proviso contained in s 322(1) is discussed below in para 3.9.

3.6 Reservation of questions of law

It often happens that in the course of a trial in a division of the High Court a question of law relative to that particular case may arise. The court itself may be uncertain about the law regarding a particular point, for example whether specific evidence is admissible, or whether certain actions constitute a crime—cf *Coetzee* 1977 (4) SA 539 (A). See also *Goliath* 1972 (3) SA 1 (A), where the question of law, as to whether the defence of compulsion could ever in law constitute such a complete defence to a charge of murder as to entitle an accused to an acquittal, was reserved. If such a question of law arises during a trial in the High Court, the court may, of its own motion or at the request of either the prosecutor or the accused, reserve that question for the consideration of the Supreme Court of Appeal. The court then states the question reserved, and directs that it be specially entered in the record and that a copy of it be transmitted to the registrar of the Supreme Court of Appeal—s 319(1).

The grounds upon which any exception or objection to an indictment is taken are deemed to be questions of law which may be reserved—s 319(2). The interpretation of s 319 raises a constitutional matter—*Basson* 2004 (1) SACR 285 (CC) at [111]. The refusal of a trial judge to recuse himself from the trial is a question of law because it is the social judgment of the court or, differently put, a juristic normative evaluation on the part of the court, applying common morality and common sense, in deciding whether the reasonable person would reasonably have apprehended that the trial judge would be partial in his adjudication of the case. The correctness of such an evaluation must raise a question of law—*Basson* (above) at [52]-[53]. The refusal of the trial court to permit a bail record to be admitted as evidence is also a question of law, as the admissibility challenge requires that the facts be determined first and then be measured against the test of fairness in order to determine admissibility. The second enquiry is a question of law—*Basson* 2004 (1) SACR 285 (CC) at paras [59]-[60].

The requirements for reserving a question of law in terms of this section were again emphasised in *Director of Public Prosecutions, Natal v Magidela* 2000 (1) SACR 458 (SCA). They are the following:

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(1) Only a question of law may be reserved. Whether facts as found by the court, or facts that should have been found, give rise to an offence having been committed, is a question of law. However, there must be certainty concerning the facts on which the legal points are intended to hinge. This requires the court to record the factual findings on which the point of law is dependent.

(2) The question of law must according to s 319 arise during or 'on trial' in a division of the High Court. This means that the legal point must be apparent from the record, for if it is not, it cannot be said that the question has arisen from the record (cf also *Mulayo* 1962 (2) SA 522 (A)). Accordingly, the State would not be able to reserve a question of law in relation to administrative orders, for example, when a forfeiture order is made and the State is dissatisfied with the order—*Pineiro* 1992 (1) SACR 287 (Nm).

(3) The question must be raised by the court of its own accord or at the request of the prosecutor or the accused, in which event the court should 'state the question reserved' and direct that it be entered in the record. Where the trial court refuses to reserve a question of law, the Supreme Court of Appeal may, if there is a reasonable prospect that an error in law was made, reserve a question of law for consideration of the Supreme Court of Appeal on application by the state. An application which is of mere academic interest and which will bring no relief for the State if it is found that a legal error has been made will not receive such consideration by the Supreme Court of Appeal—*Basson* 2003 (2) SACR 373 (SCA).

(4) The judge must accurately express the legal point he or she had in mind, especially if the questions of law are reserved on the motion of the judge.

(5) A request for the reservation of a question of law must be made after conclusion of the trial (ie, after the conviction or the acquittal)—*Adams* 1959 (3) SA 753 (A); *Mene* 1978 (1) SA 832 (A). However, the *Adams* rule does not bar the prosecution or the accused from requesting a reservation of a question of law relating to the quashing of charges or the trial court's decision to uphold or to dismiss an objection to a charge—*Basson* 2007 (1) SACR 566 (CC) at [151]—or from reserving a question of law on the court's jurisdiction in respect of a specific matter (*Boekhoud* 2011 (2) SACR 124 (SCA), a case that dealt with extra-territorial jurisdiction of a court). A question of law can be brought by the accused only if convicted, and since a verdict in terms of s 78(6) (that the accused committed the offence charged, but was mentally disordered) amounts to an acquittal, a question of law cannot be reserved by the accused where such a verdict has been made—*Ngema; Cele* 1960 (1) SA 137 (A).

(6) There must have been an actual trial. In *Tucker* 1953 (3) SA 150 (A) it was decided that even with a plea of guilty a trial takes place within the meaning of the section (the contrary viewpoint in *Ex parte Laher: In re Laher* 1960 (2) SA 32 (W) cannot be regarded as binding authority).

Section 319 does not make provision for any period of time within which the application must be brought. In *Haarmeyer* 1970 (4) SA 113 (O) it was held that the application must be made as soon as possible after the judgment, or at any rate within a reasonable time. The further procedure to be followed when a question of law is reserved for the matter to be set down for hearing in the Supreme Court of Appeal is the same as in the case of a special entry. When the trial court refuses to reserve a question of law at the request of the accused or the State, the accused or

the State may, by petition to the President of the Supreme Court of Appeal, submit an application to the Supreme Court of Appeal—s 319(3) read with s 317(5).

Where the accused was convicted, a question of law may not be reserved that could have an adverse effect upon the accused in respect of such conviction. A question of law can thus be reserved on the application of the prosecutor in the following instances only:

(1) Where there has been an *acquittal*. (The restriction to a finding of an acquittal is to be found in the wording of s 322(4).) By 'acquittal' is meant a complete acquittal, which is a finding whereby the accused is set free completely. A question of law cannot be reserved where an accused is found guilty in terms of a competent verdict—*Seekoei* 1982 (3) SA 97 (A). However, the court in *Seekoei* did not decide the issue whether an acquittal on the main charge and a conviction on an alternative charge could be considered as a complete acquittal. In *Director of Public*

Prosecutions, Gauteng v Pistorius 2016 (1) SACR 431 (SCA) the Supreme Court of Appeal questioned the correctness of *Seekoei* (above) and held that a conviction on a competent verdict is to be regarded as an acquittal on the main count. It does not prohibit an appeal by the State on a question of law reserved, as it is a legal question. The court also held that the trial court's incorrect application of the legal principles of *dolus eventualis* constituted an error of law. If the prosecution succeeds on appeal on an acquittal, the provisions of s 322(4) will apply. This means that the Supreme Court of Appeal may allow the accused to be reindicted in terms of s 324 or, in the interests of justice, make no order, as was done in the case of *Magmoed v Janse Van Rensburg* 1990 (2) SACR 476 (C) and, on appeal, *Magmoed v Janse Van Rensburg* 1993 (1) SACR 67 (A), above. The question of law may not be academic but must have a practical effect in that there must be a reasonable prospect of the accused being convicted were it not for the mistake of law—*Magmoed.*

(2) Where a court quashes an indictment allowing the State a right of appeal pursuant to its duty to prosecute—*Basson* 2007 (1) SACR 566 (CC). See also *Pillay* 2004 (2) SACR 419 (SCA).

(3) Where there has been a conviction and the question of law may be to the advantage of the accused—*Solomons* 1959 (2) SA 352 (A); *Adams* 1959 (3) SA 753 (A) at 764G–H).

(4) Where the question of law may have a bearing upon the validity of the sentence imposed. In *Ntuli* 1975 (1) SA 429 (A) the Supreme Court of Appeal sanctioned the right of the State to ask for a reservation of a question of law adverse to the accused, in relation to a sentence which was incompetent.

The primary benefit today of this procedure, whereby a question of law is reserved, is that it provides the State with the same opportunity to appeal on a point of law as it has when it appeals a decision of a lower court on a point of law in terms of s 310. The section is of little use to the accused, as he may raise the same points in an ordinary appeal in terms of s 316.

3.7 Appeal by the prosecution to the Supreme Court of Appeal

3.7.1 Appeal against a decision by a division of the High Court on bail

Generally, the Criminal Procedure Act does not allow the prosecution, in respect of a criminal trial held in a High Court or in a lower court, to appeal against a

decision on the merits or facts of a case, and consequently no provision is made for an application by the prosecution for leave to appeal on the facts. Only the accused person may appeal on the merits of a case, and similarly, only an accused may apply for a special entry. However, the position has been changed by the Criminal Procedure Second Amendment Act 75 of 1995, which inserted s 65A into the Criminal Procedure Act. In terms of this, the director of public prosecutions may appeal to the Supreme Court of Appeal against the decision of a division of the High Court to release an accused on bail. A decision of a court to grant bail is based on certain facts and an appeal against such a decision is consequently, inherently, an appeal on the facts. The director of public prosecutions has to apply for leave to appeal in terms of s 316 and all the provisions of s 316 apply *mutatis mutandis*. It is suggested that this right of the prosecution to appeal against a factual decision is *sui generis* and is not to be seen as the beginning of a process of erosion of due process of law in our adversarial system. The court may order the prosecution to pay the accused's cost to defend such an appeal or the application for leave to appeal—s 65A(2)*(c)*.

3.7.2 Appeals limited to questions of law

In respect of legal issues the prosecution may, like an accused, apply for the reservation of a question of law for decision by the Supreme Court of Appeal. Previously a question of law could be reserved only when it might result in a decision in favour of the accused

(see *Herbst* 1942 AD 434), but since 1948 it has also been possible to reserve a question of law where the final decision of the Supreme Court of Appeal may be in the prosecution's favour. See *Gani* 1957 (2) SA 212 (A). Should a division of the High Court give a decision in favour of an accused on the facts and not on the law, the Supreme Court of Appeal will strike the appeal off the roll on the ground that it was incompetent for the prosecution to appeal. However, should it appear from the record that the court gave a decision in favour of the accused on a matter of law, it is the duty of the director or the National Director of Public Prosecutions to consider whether or not the court erred in law; see *Attorney-General, Transvaal v Moores (SA) (Pty) Ltd* 1957 (1) SA 190 (A).

The director (or other prosecutor) may in terms of s 311 appeal to the Supreme Court of Appeal on a point of law against a decision given in favour of a *convicted* accused on an appeal originating from a lower court. To decide whether a question of law was decided in the accused's favour, the judgment of the division of the High Court concerned is relied upon. Leave to appeal will first have to be obtained from the appropriate court. In order for the court to grant leave to appeal to the Supreme Court of Appeal, a case must be made out based on legal arguments of what the legal questions are—cf *Mosterd* 1991 (2) SACR 636 (T).

Where the Supreme Court of Appeal decides in favour of the prosecution, it may order that a prosecution be instituted *de novo* against the accused. The Supreme Court of Appeal cannot substitute a conviction for an acquittal. See s 322(4) read with s 324. When the appeal is brought before the Supreme Court of Appeal in terms of s 311, the powers that this court exercises, in deciding the matter in favour of the appellant, depend upon whether it was the director (or other prosecutor) or the accused who originally appealed against the decision of the lower court. If the accused had successfully appealed against the lower court's decision, and the director of public prosecutions in turn had succeeded with an appeal to the

Supreme Court of Appeal in terms of s 311, it may restore the conviction, sentence or order of the lower court whether in its original form or in amended form—s 311(1)*(a)*; Du Toit et al 30-43. However, if the director originally appealed to the division and the appeal was not upheld, but succeeded on a subsequent appeal to the Supreme Court of Appeal, the Supreme Court of Appeal must give such decision or take such steps as the division of the High Court ought to have taken s 311(1)*(b)*; Du Toit et al 30-43.

The prosecution authority may approach the Minister of Justice to invoke the decision of the Supreme Court of Appeal in terms of s 333. Although s 333 does not allow the prosecution a remedy, but allows the minister to invoke the Supreme Court of Appeal's decision (see discussion of s 333 in Chapter 2), the minister would be willing to exercise his rights in terms of the said section, especially where the prosecution has exhausted its remedies and legal uncertainty exists regarding the correctness of a certain decision. In *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992 (2) SACR 618 (A) the State had to approach the minister regarding an uncertainty in the law concerning a decision of a division in respect of the liability of a company for a crime that requires proof of negligence only. The accused was found not guilty in the lower court and the prosecution's appeal was dismissed. Due to the requirement in s 311(1) that a decision must have been given in favour of a *convicted* accused, the State's remedies were exhausted and approaching the minister was the only alternative left.

3.7.3 Appeal against a sentence imposed by a division of the High Court

The prosecution may also apply for leave to appeal against a sentence imposed by a division of the High Court, in respect of which s 316B provides that the director of public prosecutions may appeal to the Supreme Court of Appeal against a sentence imposed upon an accused in a criminal case in a High Court. Leave to appeal must be obtained and the provisions of s 316 are applicable *mutatis mutandis*. The State may be ordered to pay the costs of the accused—s 316B(3). The State is not allowed to argue for an increase of sentence in terms of the common-law rule of practice that entailed that the

State gives notice of its intention to increase the sentence in its heads of argument: in such a case, where the accused initiated the appeal, the State must in terms of s 316B or 310A ask for leave to cross-appeal the sentence—*Nabolisa* 2013 (2) SACR 221 (CC) at [66] (but see the contrary viewpoint in the minority judgment by Skweyiya J).

3.8 Powers of court on hearing of appeals

(1) In terms s 19 of the Superior Courts Act, the Supreme Court of Appeal or a division exercising appeal jurisdiction may, in addition to any power it may specifically be provided with by any other law (such as those prescribed by the Criminal Procedure Act)—

(a) *dispose of an appeal without the hearing of oral argument*;

(b) receive further evidence;

(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the division deems necessary; or

(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.

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(2) The court's powers in terms of the Criminal Procedure Act are subject to the proviso in s 322 of the Criminal Procedure Act in that, even if the court of appeal is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of *any irregularity or defect in the record or proceedings*, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect—s 322(1). The proviso relates to an irregularity in the record or the proceedings. Such an irregularity is of the kind set out in s 317(1). Irregularities or defects resulting from infringements of constitutional rights should not be subject to the proviso, as they are to be regarded as *per se* a failure of justice violating a fair trial. Compare *Pretorius* 1991 (2) SACR 601 (A), where the trial court misdirected itself in disallowing certain cross-examination. The Supreme Court of Appeal held, based on the evidence, that such a misdirection is not an 'irregularity or defect in the record or proceedings' as intended in the proviso to s 322(1). The proviso relates only to irregular or illegal departures from those formalities, rules or procedure, in accordance with which the law requires a criminal trial to be initiated or conducted—*Mofokeng* 1962 (3) SA 551 (A) at 557G; *Alexander (1)* 1965 (2) SA 796 (A) at 809. (See also para 3.9.1 below, 'Setting aside or alteration of conviction on ground of irregularity'.)

(3) The court of appeal has the power in terms of the Criminal Procedure Act to impose a punishment more severe than that imposed by the court *a quo*—s 322(6). (Prior to 1963, the Supreme Court of Appeal could not increase a sentence imposed by a High Court, although it had the power to increase a sentence in a case which originated in a lower court—see *Deetlefs* 1953 (1) SA 418 (A); *Theunissen* 1952 (1) SA 201 (A); *Mofokeng* 1962 (2) SA 385 (A).) The Supreme Court of Appeal is still vested with the power to increase a sentence on appeal, even where no appeal against sentence has been lodged—*Citizen Newspapers (Pty) Ltd* 1981 (4) SA 18 (A). The principles relevant to an increase of a sentence are the same as those mentioned under the powers of the High Court. Notice must be given to the appellant if an increase is contemplated. The Supreme Court of Appeal has no jurisdiction to consider a sentence imposed by a lower court if an appeal against the sentence was not lodged previously with the High Court. The reason is simply that there was no decision on appeal by a High Court in respect of the sentence and the Supreme Court of Appeal may not be approached directly from the lower court—*Maepa* 1974 (1) SA 659 (A).

(4) The Supreme Court of Appeal has the power to remit the case for the hearing of further evidence or to hear further evidence itself. Generally speaking, there must

be a possibility, amounting almost to a probability, that a miscarriage of justice will take place unless the additional evidence is led—*Sittig* 1929 TPD 669 at 678. In *De Jager* 1965 (2) SA 612 (A), the requirements regarding the hearing of further evidence were summarised as follows, similar to those embodied in s 316(5):

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.

(d) In appropriate cases the Supreme Court of Appeal nevertheless has the power to relax strict compliance with the first requisite mentioned above, but it will only in rare instances exercise that power—*Njaba* 1966 (3) SA 140 (A) above and see *Lehnberg* 1976 (1) SA 214 (C).

The question whether the Supreme Court of Appeal may direct the leading of further evidence even after the trial court has already heard further evidence was answered *obiter* in the negative in *Mdlalose* 1972 (1) PH H10 (A). However, the dictates of fairness require that all relevant information bearing on the applicants' guilt or innocence should be before the trial court to enable it to determine the true facts, to prevent an injustice either to the applicants or the State—*Ndweni* 1999 (2) SACR 225 (SCA).

An application for the hearing of further evidence in terms of s 19 of the Superior Courts Act differs from an application for leave to lead further evidence in terms of s 316 (5) of the Criminal Procedure Act. In terms of s 316(5) leave to lead further evidence may be applied for in combination with an application for leave to appeal only. In terms of this section, application for leave to hear further evidence may not be brought on its own. If leave to appeal and to lead further evidence has been refused, the Supreme Court of Appeal may be approached on a petition in terms of s 316(8). Section 19 of the Superior Courts Act does not specifically require a simultaneous application and the Supreme Court of Appeal may be approached in circumstances where leave to appeal had already been granted before the further evidence came to light. It is submitted that s 19 of the Superior Courts Act does, however, require that the appeal must be before the Supreme Court of Appeal in order for this court to hear further evidence. Leave to appeal must therefore have been granted or at least have been petitioned for in order for the appeal to be before the Supreme Court of Appeal. This court has no power to order further evidence to be heard if leave to appeal has already been refused with final effect by the Supreme Court of Appeal—*Sibande* 1958 (3) SA 1 (A); *Maharaj* 1958 (4) SA 246 (A).

3.9 Statutory or other limitations on the powers of the Supreme Court of Appeal

3.9.1 Setting aside or alteration of conviction on ground of irregularity

The Supreme Court of Appeal is not bound or competent simply to set aside or alter a conviction or sentence by reason of any irregularity or defect in the record or proceedings. This may be done only where it appears to the court of appeal that a failure of justice has, in fact, resulted from such irregularity or defect—s 322(1). In *Moodie* 1961 (4) SA 752 (A) the following rules were formulated in respect of irregularities and the proviso in s 322(1) (compare the proviso in s 309(3), which is identical):

(1) The general rule with regard to irregularities is that the court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted had there been no irregularity.

(2) In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is *per se* a failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial court would inevitably have convicted had there been no irregularity.

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(3) Whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity.

Accordingly, it amounts to this, that a distinction should be drawn between irregularities that are *per se* a failure of justice that vitiates a trial without reference to the merits of that case, and other less serious and less fundamental irregularities. In the case of the latter, the remaining evidence is considered and weighed by the appeal court, while in the case of the irregularities which are fatal *per se*, the conviction is set aside, irrespective of the strength of the evidence for the prosecution (cf *Ponyana* 1981 (1) SA 139 (TSC)). In the collectively decided cases of *Mkhise; Mosia; Jones; Le Roux* 1988 (2) SA 868 (A) at 872G Kumleben AJA held, with regard to what the learned judge of appeal termed 'fatal irregularities', that judicial decisions on the nature of irregularities indicate that the enquiry in each case is whether the irregularity is of so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred. The presence or absence of prejudice in a particular case is not a relevant consideration in deciding in the first place on the fundamental significance of the irregularity.

Where the irregularity is not fatal *per se*, the appeal court will thus consider whether, apart from the evidence which is affected by the irregularity or defect, there is still sufficient evidence to prove guilt beyond a reasonable doubt. See *Naidoo* 1962 (4) SA 348 (A); *Bernardus* 1965 (3) SA 287 (A); *Tuge* 1966 (4) SA 565 (A); *Yusuf* 1968 (2) SA 52 (A); *Rall* 1982 (1) SA 828 (A). Compare also the discussion in Chapter 14 under the heading *autrefois acquit* and the discussion of s 324, below.

Where a conviction and sentence are set aside by the court of appeal on the ground that a failure of justice has in fact resulted from the admission against the accused of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings, the court of appeal may remit the case to the trial court with instructions to deal with any matter, including the hearing of such evidence, in such manner as the court of appeal may think fit—s 322(3).

The effect of the proviso in s 322(1) could have constitutional implications in that it could be perceived as a limitation of an accused's constitutional right to a fair trial. On the strength of such an interpretation, s 322(1) will have to bear the scrutiny of the requirements of the limitation clause embodied in s 36(1) of the Constitution. In *Klein v Attorney-General* 1995 (2) SACR 210 (W) at 222*c* and 224*a* the court assumed, without deciding thereon, that s 322(1) is a justifiable limitation of the constitutional right to a fair trial. In this case an application for an order staying a criminal prosecution in a regional court was brought after the accused had been arraigned on several charges. The order was sought on the basis that the accused's right to a fair trial was made impossible by the fact that the prosecution had obtained information of a confidential and privileged nature and therefore had knowledge of the defence the accused intended to raise during the trial. The court held that there has never been a principle that a violation of any of the specific rights encompassed by the right to a fair trial would automatically preclude the trial. Such a rigid principle would operate to the disadvantage of law enforcement and to the prejudice of the society which the law and the Constitution are intended to serve. Before any remedy can be enforced, the nature and extent of

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the violation of the right must be properly considered in accordance with the rules enunciated per Holmes JA in the *Moodie's* case (above).

A less compromising approach was adopted in *Solo* 1995 (1) SACR 499 (E) at 509*ac*, where Erasmus J was of the opinion that irregularities occurring during criminal proceedings (in this case the refusal of the presiding officer in the court *a quo* to grant the accused a postponement in order to obtain legal counsel) are, since the coming into operation of the interim Constitution, no longer adjudicated according to the

requirements of s 322(1)—or s 309(3), with a similar effect—but according to the provisions of the Constitution and more particularly ss 25(3) and 33 of the interim Constitution. The court held that an appeal must succeed if the accused's right to a fair trial has been infringed, unless the court finds that such right has been limited by law of general application as intended by s 33(1) of the interim (s 36 of the final) Constitution. Support for the approach adopted in *Solo* (above) could be found in the remarks made by Kentridge AJ in *Zuma* 1995 (1) SACR 568 (CC) at 579*h*, that s 25(3) of the interim (s 35(3) of the final) Constitution requires criminal trials to be conducted in accordance with notions of basic fairness and justice. It is the task of all courts hearing criminal trials or criminal appeals to give content to those notions and not simply to enquire whether there has been an irregularity or illegality that is a departure from the formalities, rules and principles of procedure according to which the law requires a criminal trial to be initiated or conducted, as the law was before 27 April 1994.

It is submitted that whichever way alleged irregularities in proceedings are approached, the effect would be the same: A gross irregularity will invariably cause an injustice which in any event suggests a constitutional infringement and reflects negatively on the fairness of the trial. In *Mvelase* 1997 (2) SACR 445 (N), the court held that an infringement during trial of any of the fundamental rights embodied in s 25(3) of the interim (s 35(3) of the final) Constitution has the same effect as a fatal irregularity vitiating the trial as a whole. However, in *Smile* 1998 (1) SACR 688 (SCA), the court held that it is not every constitutional irregularity committed by the trial court that justifies the court in setting aside the conviction on appeal. Whether or not there has been a fair trial must ultimately be answered having regard to the particular circumstances of each case.

3.9.2 The inherent jurisdiction of the Supreme Court of Appeal

The Supreme Court of Appeal is a creature of statute and it used to have no inherent or common-law jurisdiction in criminal matters beyond the provisions of the Criminal Procedure Act—cf *Sefatsa v Attorney-General, Transvaal* 1989 (1) SA 821 (A); *Abrahams* 1990 (2) SACR 420 (A); *Mamkeli* 1992 (2) SACR 5 (A). This position has changed and in terms of the Constitution, this court's jurisdiction, like that of other superior courts, is no longer strictly limited to statutory law, as it has an inherent jurisdiction to protect and regulate its own process, and to develop the common law, when this law is pertinent to an issue. A court of appeal's inherent power to regulate its procedure in the interests of the proper administration of justice does not extend to an assumption of jurisdiction that is not conferred upon it by statute or otherwise. Where an appeal is heard where no automatic right of appeal exists and leave to appeal is not granted, a court of appeal may not ignore the provisions of the Criminal Procedure Act (or the Superior Courts Act for that matter) prescribing a particular procedure to be followed—*Zulu* 2003 (2) SACR 22

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(SCA); nor does it include the power to hear a matter which is not the proper subject of an appeal, because this Court's appellate jurisdiction is not an inherent jurisdiction—*Fourie* 2001 (2) SACR 118 (SCA) at 121.

When developing the common law, a superior court's power is also limited to the following extent: first it needs to ascertain that the right relied upon is applicable to the law or conduct that has given rise to the dispute. Then the court must determine whether the common law is deficient in failing adequately to protect the right—*Khumalo v Holomisa* 2002 (5) SA 401 (CC) at [33]. If there is no legislation or common-law rule giving effect to the right, a court is enjoined to develop the common law in order to do so—*Bogaards* 2013 (1) SACR 1 (CC) at [48].

3.10 Execution of a sentence pending appeal

The execution of a sentence imposed by a division of the High Court is not suspended by reason of an appeal against a conviction or by reason of a question having been reserved for consideration of the Supreme Court of Appeal, except where the division of the High

Court, on appeal, thinks it fit to order that the accused be released on bail, or that he be treated as an unconvicted prisoner until the appeal has been heard and decided—s 321.

With regard to the effect of the suspension of the execution of the sentence on the ultimate calculation of the term of sentence to be served, see the proviso in s 321(1).

3.11 Proceedings de novo when conviction is set aside on appeal

Section 324 provides that proceedings may be instituted *de novo* when a conviction is set aside by the court of appeal on one of the following grounds:

(1) The court which convicted the accused was not competent to do so;
(2) The indictment on which the accused was convicted was invalid or defective; or
(3) There was some other technical irregularity or defect in the procedure.

If a new trial is instituted, the judge or assessor before whom the original trial took place may not take part in the new trial.

This section is interpreted in consonance with the common-law rules regarding *autrefois acquit*—*Naidoo* 1962 (4) SA 348 (A).

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Chapter 22
Clemency and related powers

JP Swanepoel

1 Presidential powers
2 Expungement of certain criminal records relating to specific convictions and sentences
2.1 Expungement of criminal records of children convicted before the Child Justice Act 75 of 2008 came into operation
2.2 Expungement of criminal records of children convicted after the Child Justice Act came into operation
2.3 Expungement of criminal records of convicted adults
3 Reopening of case and powers of the President
4 Parole distinguished from clemency

The Constitution and this chapter:

Section 84—Powers and functions of President

(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for

. . .

(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures . . .

See 1, below

The Child Justice Act 75 of 2008 and this chapter:

Section 87—Expungement of records of certain convictions and diversion orders

(1) *(a)* Where a court has convicted a child of an offence referred to in Schedule 1 or 2, the conviction and sentence in question fall away as a previous conviction and the criminal record of that child must, subject to subsections

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(2), (3) and (5), on the written application of the child, his or her parent, appropriate adult or guardian (hereafter referred to as the applicant), in the prescribed form, be expunged after a period of—

(i) five years has elapsed after the date of conviction in the case of an offence referred to in Schedule 1; or

(ii) 10 years has elapsed after the date of conviction in the case of an offence referred to in Schedule 2,

unless during that period the child is convicted of a similar or more serious offence.

(b) In the case of a dispute or uncertainty as to whether another offence of which a child is convicted during the period is similar to or more serious than the offence in respect of which a record exists, the opinion of the Cabinet member responsible for the administration of justice prevails.

(2) The Director-General: Justice and Constitutional Development must, on receipt of the written application of an applicant referred to in subsection (1), issue a prescribed certificate of expungement, directing that the conviction and sentence of the child be expunged, if the Director-General is satisfied that the child complies with the criteria set out in subsection (1).

(3) Notwithstanding the provisions of subsection (1), the Cabinet member responsible for the administration of justice may, on receipt of an applicant's written application in the prescribed form, issue a prescribed certificate of expungement, directing that the conviction and sentence of the child be expunged, if he or she is satisfied that exceptional circumstances exist which justify expungement, where, in the case of the child—

(a) the period of five years, referred to in subsection (1)*(a)*(i); or

(b) the period of 10 years, referred to in subsection (1)*(a)*(ii),

has not yet elapsed, if the Cabinet member responsible for the administration of justice is satisfied that the child otherwise complies with the criteria set out in subsection (1).

(4) An applicant to whom a certificate of expungement has been issued as provided for in subsection (2) or (3) must, in the prescribed manner, submit the certificate to the head of the Criminal Record Centre of the South African Police Service, to be dealt with in accordance with subsection (5).

(5) *(a)* The head of the Criminal Record Centre of the South African Police Service or a senior person or persons at the rank of Director or above, employed at the Centre, who has or have been authorised, in writing, by the head of the Centre to do so, must expunge the criminal record of a child if he or she is furnished by the applicant with a certificate of expungement as provided for in subsection (2) or (3).

(b) The head of the Criminal Record Centre of the South African Police Service must, on the written request of an applicant, in writing, confirm that the criminal record of the child has been expunged.

(c) Any person who—

(i) without the authority of a certificate of expungement as provided for in this section; or

(ii) intentionally or in a grossly negligent manner,

expunges the criminal record of any child, is guilty of an offence and is, if convicted, liable to a fine or to a sentence of imprisonment for a period not exceeding 10 years or to both a fine and the imprisonment.

(6) The Director-General: Social Development must, in the prescribed manner, expunge the record of any diversion order made in respect of a child in terms of this Act on the date on which that child turns 21 years of age, unless the child has been convicted of any other offence before that date or has failed to comply with the diversion order in question.

(7) Where the Director-General: Justice and Constitutional Development, in terms of subsection (2), or the Minister, in terms of subsection (3), has issued a certificate of expungement and it subsequently appears that the applicant did not qualify for the expungement of his or her criminal record, the Director-General must—

(a) inform the applicant in writing of the information that has come to his or her attention and that he or she or the Minister intends to revoke the certificate of expungement;

(b) afford the applicant an opportunity to furnish compelling written reasons to him or her or the Minister within 90 working days after he or she is informed of the intention to revoke, why his or her record should remain expunged;

(c) inform the applicant in writing within 30 working days after a decision is made of—

(i) his or her or the Minister's decision; and
(ii) the reasons for revoking the certificate of expungement; and

(d) inform the head of the Criminal Record Centre of the South African Police Service, in writing within 14 working days after the decision was made, to revoke the certificate of expungement and to reinstate the convictions and sentences in question.

(8) If the applicant fails to furnish compelling reasons contemplated in subsection (1)*(b)*, the Director-General or Minister, as the case may be, may, subject to the Promotion of Administrative Justice Act, 2000 (Act 2 of 2000), revoke the certificate of expungement.

(9) *(a)* The Director-General: Justice and Constitutional Development may delegate any power or assign any duty conferred upon or assigned to him or her in terms of subsection (2) to an appropriately qualified official in the employ of the Department of Justice and Constitutional Development at the rank of Deputy Director-General.

(b) A delegation or assignment in terms of paragraph *(a)*—
(i) is subject to any limitation, condition and direction which the Director-General may impose;
(ii) must be in writing; and
(iii) does not divest the Director-General of the responsibility concerning the exercise of the power or the performance of the duty.

(c) The Director-General may—
(i) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this subsection, subject to any rights that may have accrued to a person as a result of the decision; and
(ii) at any time, in writing, withdraw a delegation or assignment.

See 2, below

1 Presidential powers

The Constitution of the Republic of South Africa, 1996, empowers the President of the Republic, subject to and in accordance with the Constitution, to pardon or reprieve offenders and to remit any fines, penalties or forfeitures—s 84(2)*(j)* read with s 83 of the Constitution. Although these powers are regulated by statute, they are derived historically from the royal prerogatives of the President's erstwhile predecessor, the British monarch, and are still generally regarded as having the character of presidential prerogatives—see *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at [41]. The powers to reprieve and to extend mercy are an integral part of our criminal justice system and a constitutional mechanism to protect the system and the people against injustices and mistakes. Although there is no right to be pardoned, the function conferred on the President in terms of s 84 to make a decision entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of legality, diligently and without delay. That final decision and the constitutional responsibility for that decision rest solely with the President—*Minister for Justice and Constitutional Development v Chonco* 2010 (1) SACR 325 (CC).

Section 325 of the Criminal Procedure Act affirms *ex abundanti cautela* the President's prerogative by providing that nothing contained in the Act shall affect the powers of the President to extend mercy to any person. In accordance with international tradition, neither the Constitution nor the Criminal Procedure Act lays down specific criteria according to which the prerogatives are to be exercised, and it is clear that the President has a wide discretion when exercising these powers. The only clear limitation is that the President cannot act contrary to the Constitution (see *President of the RSA v Hugo* 1997

(1) SACR 567 (CC)). Prior to the said *Hugo* case the Presidential prerogative was unfettered. Nothing prevents the President from granting mercy *mero motu*, but generally the President is petitioned for mercy by the convicted person or by someone on his or her behalf. Prior to the Constitutional Court declaring the death penalty unconstitutional in 1995 (and thereby invalidating all corresponding legislative provisions), the Criminal Procedure Act provided,

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with regard to convicted persons under the sentence of death, that the Minister of Justice could submit a petition for mercy in cases where such persons had not requested or desired a petition for clemency—cf s 325A (now repealed).

In *Sibiya v Director of Public Prosecutions, Johannesburg High Court* 2005 (5) SA 315 (CC) the Constitutional Court decided on the constitutionality of statutory provisions (ss 1-5 of the Criminal Law Amendment Act 105 of 1997) that prescribed how a death sentence, imposed before the decision in *Makwanyane*, had to be replaced by an alternative appropriate sentence. (There were, at the time of this decision, between 300 and 400 people on death row.) The abovementioned provisions had been passed after the judgment in *Makwanyane* and essentially empowered the President of South Africa, on the advice of a judge, to impose fresh sentences on convicted prisoners sentenced to death in cases where all appeal remedies had been exhausted. The Gauteng High Court, Johannesburg held that the law was unconstitutional because it did not give the accused a fair trial in relation to the new sentence. The Constitutional Court held that in the unique circumstances the law was not invalid. There was no need to comply with the fair trial rights in the Constitution because the people concerned had already had a fair trial in which they had been tried, convicted, sentenced and had their right to appeal. Yacoob J held that the procedure for replacing the sentences had to be, and was, fair. He also held that there was nothing wrong with a judge deciding what the sentence should be or with the President thereafter formally replacing the sentence. It appeared from the *Sibiya* judgment that in the 10 years after the judgment in *Makwanyane* and five years after the law by which the sentences were to be replaced, 62 convicted prisoners' sentences had still not yet been replaced. However, under a *mandamus* and supervisory orders of the Constitutional Court, all sentences had been substituted and the unconstitutionality of the death sentence realised in practice in 2006—*Sibiya v Director of Public Prosecutions, Johannesburg High Court* 2007 (1) SACR 347 (CC).

Convicted persons have no right to be pardoned or reprieved and also have no right to be heard in respect thereof, but may only *hope* for the indulgence of the President—*Rapholo v State President* 1993 (1) SACR 421 (T). The prerogative of commuting any punishment is therefore that of the President. In practice, however, the President will not exercise his prerogative of mercy without considering a report from the Minister of Justice containing the recommendations of the director of public prosecutions, the presiding officer of the trial court and that of the state law advisers. This does not detract from the fact that it remains an executive act which ought not to be influenced by the judiciary but should be open and accountable. The conduct of the President in exercising his powers in terms of s 84 of the Constitution remains subject to judicial review (see s 8(1) and (2) of the Constitution). However, the Constitutional Court must confirm any decision of a court declaring any conduct of the President invalid in terms of the Constitution (s 172(2)*(a)* of the Constitution). Where the sentences of a group of prisoners are remitted by the President, the courts are unlikely to interfere with such conduct unless satisfied that the decision was motivated by bad faith or was so irrational that no reasonable executive authority could have reached such a conclusion (*Kruger v Minister of Correctional Services* 1995 (1) SACR 375 (T)); or that the discretionary exercise of the President's powers was done in an irregular manner because it violated the constitutional rights of others in an unreasonable and unjustified

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manner (see *President of the RSA v Hugo* 1997 (1) SACR 567 (CC) concerning the unique release of female prisoners who had children under the age of 12 years, in terms of Presidential Act no 17).

In addition to the President's prerogatives, the Indemnity Act 35 of 1990, the Indemnity Amendment Act 124 of 1992 and the Further Indemnity Act 151 of 1992 empowered the President to grant to any person or category of persons either temporary amnesty or immunity or conditional or unconditional permanent indemnity. Such immunity or indemnity was granted against arrest, prosecution, detention and legal proceedings. (The distinction between the various kinds of indemnities or immunities was discussed in *Rapholo* (above).) Furthermore, in terms of Act 151 of 1992, the President could, after consultation with the National Council on Indemnity, release certain prisoners serving imprisonment for life or other sentences of long-term imprisonment. The power to grant immunity or indemnity in terms of these Acts had been subject to certain time limits and was generally associated with political objectives and aimed at the promotion of political reconciliation in South Africa. These Acts were all repealed in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995, although the indemnities already granted remain valid. The latter Act also established the Truth and Reconciliation Commission and provided for a multi-party reference group (Committee for Amnesty) to scrutinise applications by political offenders for presidential pardon. The commission operated until the end of November 2009 and a special dispensation group was set up by former President Thabo Mbeki, to advise on the granting of presidential pardons to political offenders who had not applied for amnesty from the Truth and Reconciliation Commission and whose offences had been committed before June 16, 1999 (*Pretoria News* 26 August and 1 October 2008). Because the names of the applicants were not made public, the court ordered the President to furnish a coalition of victim and civil society organisations with the list of prisoners recommended for release by the Committee for Amnesty. The Constitutional Court ordered that the President must hear the victims before granting special pardons, as the exclusion of the victims from the pardon process was irrational and not rationally related to nation building and national reconciliation. See *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (2) SACR 101 (CC).

2 Expungement of certain criminal records relating to specific convictions and sentences

As indicated above, expunging a criminal record for a conviction and subsequent sentence for an offence is an executive action. The legislator may, however, promulgate legislation to expunge certain criminal records relating to specific convictions and or sentences. Such expungement may be effected—

(1) automatically (regarding convictions for offences committed in terms of legislation before the current constitutional dispensation—for example, offences committed in terms of s 11 of the Internal Security Act 44 of 1950—cf s 271C(1) of the Criminal Procedure Act); or

(2) on application by the person concerned (for infractions of legislation enacted by the former self-governing territories before the Constitution of the Republic of South Africa, Act 200 of 1993, took effect, which legislation created offences based on race, or created offences which would not have been considered

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offences in an open and democratic society, based on human dignity, equality and freedom, under the current constitutional dispensation—s 271C(2); or

(3) after a fixed period of time.

Accordingly, the Criminal Procedure Amendment Act 65 of 2008 (which inserted ss 271A-271E into the Criminal Procedure Act and of which ss 2 and 3 came into operation on 6 May 2009), shifted the responsibility to the Director-General: Justice and Constitutional Development for assessing applications to expunge convictions, and for issuing certificates of expungement, charging the criminal record centre of the police with

expungement of the criminal record for those convictions. The Child Justice Act 75 of 2008 has a similar provision in s 87: the task of expunging a juvenile's conviction and sentence for certain offences is entrusted to the Director-General and to the Minister of Justice and Constitutional Development (although only in exceptional circumstance or in case of a dispute). In the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 the registrar of the National Register for Sexual Offences is charged with removing convictions from the register—s 51.

2.1 Expungement of criminal records of children convicted before the Child Justice Act 75 of 2008 came into operation

In essence, these provisions of expungement relating to convicted child offenders provide, in respect of crimes committed before the Child Justice Act came into operation, that despite the provisions of s 4 of that Act, a child who, before the commencement of this Act, was convicted of—

(a) an offence referred to in Schedule 1 or 2; or

(b) any other offence under the common law or statute which has been repealed by the Acts referred to in—

(i) items 2, 13, 14 or 15 of Schedule 1; or

(ii) items 2, 13, 14, 15, 16, 17 or 21 of Schedule 2,

may apply for the expungement of his or her criminal record in terms of s 87 of the Child Justice Act—s 98(4) of the Act.

2.2 Expungement of criminal records of children convicted after the Child Justice Act came into operation

Section 87 of the Child Justice Act provides that, if a court has convicted a child of an offence referred to in Schedule 1 or 2 of the Child Justice Act, the conviction and sentence fall away as a previous conviction, and the criminal record of that child must on the written application of the child, his or her parent, appropriate adult or guardian in the prescribed form, be expunged after a period of—

(i) five years has elapsed after the date of conviction in the case of an offence referred to in Schedule 1; or

(ii) 10 years has elapsed after the date of conviction in the case of an offence referred to in Schedule 2,

unless during that period the child is convicted of a similar or more serious offence.

On receipt of the application, and if he is satisfied that the child qualifies for expungement of his or her record on the basis of the criteria mentioned above, the Director-General: Justice and Constitutional Development must issue a prescribed

certificate of expungement. Where a child in an application for expungement can show that exceptional circumstances exist which justify expungement, the Minister may issue a certificate of expungement before the periods mentioned in (i) and (ii) have elapsed.

A certificate of expungement may be revoked by the Director-General or the Minister if it subsequently appears that the applicant did not qualify for the expungement of his or her criminal record, in which case the conviction(s) and sentence(s) are reinstated.

The head of the Criminal Record Centre of the South African Police Service is responsible for the expungement of the criminal record on the strength of the certificate of expungement. Diversion orders must be expunged by the Director-General: Social Development when the child turns 21 years of age, if the child has not been convicted of any other offence before that date or has not failed to comply with the diversion order.

2.3 Expungement of criminal records of convicted adults

Apart from the provisions of s 271A of the Criminal Procedure Act, which come into operation automatically in respect of previous convictions which fall away if a period of 10 years has elapsed in respect of sentences of less than six months, or more than six

months but where the execution of the sentence was suspended without a sentence being imposed; and apart from the provisions of s 271C(1) dealing with pre-constitutional convictions of certain offences in respect of which criminal records are automatically expunged, the provisions of ss 271B(1) and 271C(2) of the Criminal Procedure Act require that persons convicted must in writing, on the prescribed form, apply for expungement of their criminal records in respect of either certain sentences which qualify for expungement after a period of 10 years has elapsed, or convictions for contraventions of provisions which were created in the former self-governing territories before the commencement of the interim Constitution of 1993. The latter relate to offences that were based on race or which would not have been considered to be offences in an open and democratic society based on human dignity, equality and freedom.

After receipt of the application, and if he is satisfied that the person applying for expungement complies with the criteria mentioned in ss 271B(1) or 271C(1) or (2) of the Criminal Procedure Act, the Director-General: Justice and Constitutional Development must issue a prescribed certificate of expungement and submit it to the head of the Criminal Record Centre of the South African Police Service, who is responsible for the expungement in terms of the provisions of s 271D of the Criminal Procedure Act.

3 Reopening of case and powers of the President

Before 1948 it was generally assumed that the Appellate Division (now the Supreme Court of Appeal) had extraordinary jurisdiction to come to the assistance of a convicted person in order to prevent material and serious injustice, even though no remedy existed. In *Milne and Erleigh (6*) 1951 (1) SA 1 (A), the Appellate Division held *obiter* that the assumption of such jurisdiction could be justified only when the legislature had not provided a remedy. See *Sibande* 1958 (3) SA 1 (A), where the existence of the extraordinary jurisdiction of the Appellate Division (now Supreme Court of Appeal) in criminal matters was questioned, and also *Maharaj*

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1958 (4) SA 246 (A); *Ngema; Cele* 1960 (1) SA 137 (A); *Mofokeng* 1962 (3) SA 551 (A); *Heller* 1970 (4) SA 679 (A).

In *Mokoena v Minister of Justice* 1968 (4) SA 708 (A), the accused was convicted of murder and sentenced to death. He appealed unsuccessfully to the Appellate Division. Thereafter a witness who had given material evidence at the trial declared under oath that he had lied. On the strength of this information Mokoena's execution was postponed, but the State President (as he then was) decided against commuting the sentence of death. By this time Mokoena had exhausted his remedies under the Criminal Procedure Act and consequently instituted civil proceedings for the setting aside of his conviction and sentence in the provincial division, which were dismissed. On a petition to the Appellate Division it was held that our common law does not allow a convicted person to have his case reopened by way of a claim for *restitutio in integrum* in order to prove that he had been convicted on false evidence. However, the Chief Justice pointed out that there was a deficiency in our criminal procedure in that no provision had been made for a procedure whereby the condemned person could petition the State President for the hearing of further evidence after the recognised judicial procedures had been exhausted or were no longer available. This deficiency was remedied by s 327, which was first introduced into our criminal justice system by Act 51 of 1977.

Since the courts are created by statute, the powers and functions of the High Court and the Supreme Court of Appeal with regard to the reopening of a criminal matter and the hearing of further evidence are governed by the Criminal Procedure Act and the Superior Courts Act. Not even the Supreme Court of Appeal itself has extraordinary jurisdiction to reopen a case after it has been finalised by the Supreme Court of Appeal—*Sefatsa v Attorney-General, Transvaal* 1989 (1) SA 821 (A); nor can it usurp powers that are not bestowed upon it by the legislature—*Mamkeli* 1992 (2) SACR 5 (A). The reopening of such a matter is only possible by virtue of the provisions of s 327.

Section 327 provides that if a person convicted of any offence in any court has exhausted all the recognised legal procedures regarding appeal and review, or if they are no longer available to him, such person may submit a petition, supported by affidavits, to the Minister of Justice, stating that further evidence has become available which materially affects his conviction or sentence. The minister may, if he considers that such evidence, if true, might reasonably affect the conviction, refer the petition and affidavits to the court which convicted the accused.

The court thereupon receives the affidavits and may permit the examination of witnesses in connection with the further evidence as if it were a normal criminal trial (the presence of the accused is not essential, however) and assesses the value of such evidence. The findings of the court regarding the further evidence do not form part of the proceedings. The court finally advises the President whether and to what extent the further evidence affects the conviction. The President thereupon considers the finding or advice, and may then—

(1) direct that the conviction be expunged, effectively giving the accused a free pardon; or
(2) commute the conviction to a lesser one and adjust the sentence accordingly.

No further appeal, review or proceedings are permitted in respect of proceedings, findings or advice of the court in terms of s 327. Similarly no appeal, review or

proceedings shall lie against the refusal by the minister to issue a direction to the trial court or by the President to act upon the finding or advice of the court—s 327(7).

See, with regard to the application of s 327, *Hoosain v Attorney-General, Cape (1)* 1988 (4) SA 137 (C); *Hoosain v Attorney-General, Cape (2)* 1988 (4) SA 142 (C); *Sefatsa v Attorney-General, Transvaal* 1988 (4) SA 297 (T); *Sefatsa v Attorney-General, Transvaal* 1989 (1) SA 821 (A). Most of these cases relate to matters where the death sentence was imposed.

4 Parole distinguished from clemency

In *Van Vuren v Minister of Correctional Services and Others* 2012 (1) SACR 103 (CC) at [51]) it is pointed out, with reference to the release and placement policy of the Department of Correctional Services, that 'parole has a restorative-justice aim. It is aimed at the eventual rehabilitation and reconciliation processes of the offender - themes that underpin restorative justice. Importantly, all these interests must be balanced against those of the community, which include the right to be protected against crime.'

Parole is governed by the provisions of the Correctional Services Act 111 of 1998 (except for two aspects dealt with in ss 276B and 299A of the Criminal Procedure Act), and the statutory and policy framework within which parole decisions are made is summarised in *Barnard v Minister of Justice, Constitutional Development and Correctional Services* 2016 (1) SACR 179 (GP) at [19]-[28].

It is accepted that a prisoner has no right to be released on parole, but only a right to be considered for parole (*Van Gund v Minister of Correctional Services and Others* 2011 (1) SACR 16 (GNP) at [11]; *Du Preez v Minister of Justice and Correctional Services and Others* 2015 (1) SACR 478 (GP) at [12]. As it was put in *Van Vuren* at [50]: 'The Act enables sentenced offenders to anticipate consideration for some form of non-custodial supervision.'

Consideration of parole is an administrative action and consequently a prisoner is entitled to a fair procedure (*Van Gund v Minister of Correctional Services* 2011 (1) SACR 16 (GNP) at [11]; *Du Preez v Minister of Justice and Correctional Services* 2015 (1) SACR 478 (GP) at [12]). Examples of judicial review of parole decisions by the Minister of Correctional Services on account of non-compliance with the Promotion of Administrative Justice Act 3 of 2000 are *Derby-Lewis v Minister of Justice and Correctional Services* 2015 (2) SACR 412 (GP) and *Kelly v Minister of Correctional Services* 2016 (2) SACR 351 (GJ).

Presidential clemency, of which free pardon, reprieve and remitting of sentence form part, differs from parole. As pointed out above, it is governed by the Constitution and an *ex abundanti cautela* provision in the Criminal Procedure Act. The discretion for clemency is entrusted to the President himself, and his exercise of his discretion is subject to judicial review. Although no person has a right to receive clemency, he or she is entitled to be considered for clemency. The effect of Presidential clemency is that a conviction or sentence is expunged, and that the convicted person consequently has a clean record as far as the particular conviction and sentence are concerned.

Although there are certain similarities between Presidential clemency and parole, such as that their purposes are both restorative, they differ materially. Apart from the fact that parole is governed and administered by other legislation

and persons than Presidential clemency, the material difference lies in the effect of the action: parole merely ensures the release of a prisoner from a correctional facility, which does not lead to the expungement of his or her criminal record, and can be revoked.

Appendices

Schedules to the Criminal Procedure Act
Selected sections of the Constitution of the Republic of South Africa

Schedules to the Criminal Procedure Act

(Only the schedules that are relevant to the contents of the text are recorded.)

Schedule 1

A list of offences appearing in the first schedule to the Criminal Procedure Act is given below. These offences relate to ss 40 and 42. (See the discussion thereof in the text.)

Treason

Sedition

Public violence

Murder

Culpable homicide

Rape or compelled rape as contemplated in ss 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively

Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in s 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively

Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively

Trafficking in persons as provided for in s 4 and involvement in the offence as provided for in s 10 of the Prevention and Combating of Trafficking in Persons Act, 2013

Bestiality as contemplated in s 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007

Robbery

Kidnapping

Childstealing

Assault, when a dangerous wound is inflicted

Arson

Malicious injury to property

Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence

Theft, whether under the common law or a statutory provision

Receiving stolen property knowing it to have been stolen

Fraud

Forgery or uttering a forged document knowing it to have been forged

Offences relating to the coinage

Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine

Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody

Offences referred to in s 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013

Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule

Schedule 2

Part II

(The offences mentioned in this part of Schedule 2, relate to ss 59 and 72.)

Treason

Sedition

Murder

Rape or compelled rape as contemplated in s 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively

Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively

Offences provided for in ss 4, 5 and 7 and involvement in these offences as provided for in s 10 of the Prevention and Combating of Trafficking in Persons Act, 2013

Robbery

Assault, when a dangerous wound is inflicted

Arson

Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence

Theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, in each case if the amount or value involved in the offence exceeds R2 500

Any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones

Any offence under any law relating to the illicit—

(a) possession of—

(i) dagga exceeding 115 grams; or

(ii) any other dependence-producing drugs; or

(b) conveyance or supply of dependence-producing drugs.

Any offence relating to the coinage

Offences referred to in s 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013

Any conspiracy, incitement or attempt to commit any offence referred to in this Part

Part III

(The offences mentioned in this part of Schedule 2 relate to ss 59, 61, 72, 184, 185 and 189.)

Sedition

Public violence

Arson

Murder

Kidnapping

Childstealing

Offences as provided for in ss 4, 5 and 7 and involvement in these offences as provided for in s 10 of the Prevention and Combating of Trafficking in Persons Act, 2013

Robbery

Housebreaking, whether under the common law or a statutory provision, with intent to commit an offence

Contravention of the provisions of ss 1 and 1A of the Intimidation Act 72 of 1982

Offences referred to in s 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013

Any conspiracy, incitement or attempt to commit any of the above-mentioned offences

Treason

Schedule 5

(The offences mentioned in Schedule 5 relate to ss 58 and 60(11) and (11A) and Schedule 6.)

Treason

Murder

Attempted murder involving the infliction of grievous bodily harm

Rape or compelled rape as contemplated in s 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, in circumstances other than those referred to in Schedule 6

Offences as provided for in ss 4, 5, 7 and 9(1) and involvement in these offences as provided for in s 10 of the Prevention and Combating of Trafficking in Persons Act, 2013

Any offence referred to in s 13*(f)* of the Drugs and Drug Trafficking Act 140 of 1992, if it is alleged that—

(a) the value of the dependence-producing substance in question is more than R50 000; or

(b) the value of the dependence-producing substance in question is more than R10 000 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or

(c) the offence was committed by any law-enforcement officer.

Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament

Any offence in contravention of s 36 of the Arms and Ammunition Act 75 of 1969, on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in s 39(2)*(a)*(i) of that Act

Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or any offence referred to in Part 1 to 4, or s 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004—

(a) involving amounts of more than R500 000; or

(b) involving amounts of more than R100 000, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or

(c) if it is alleged that the offence was committed by any law-enforcement officer—

(i) involving amounts of more than R10 000; or

(ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in s 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, on a child under the age of 16 years

An offence referred to in Schedule 1—

(a) and the accused has previously been convicted of an offence referred to in Schedule 1; or

(b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1.

The offences referred to in s 4(2) or (3), 13 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004

Any offence referred to in s 2, 4, 5, 6 or 9 of the Prevention of Organised Crime Act 121 of 1998

Any offence referred to in—

(a) s 54(1) of the International Trade Administration Act 71 of 2002;

(b) s 32(1)*(a)*, *(b)*, *(c)*, *(d)* or *(k)* in so far as that paragraph relates to s 21(1), *(l)*, *(m)* or *(o)* of the Second-Hand Goods Act 6 of 2009; or

(c) s 36 or 37 of the General Law Amendment Act 62 of 1955,

if it is alleged that ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in s 1 of the Criminal Matters Amendment Act, 2015, is involved.

Theft of ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in s 1 of the Criminal Matters Amendment Act, 2015—

(a) if it is alleged that the offence caused or has the potential to cause—

(i) interference with or disruption of any basic service, as defined in s 1 of the aforementioned Act, to the public; or

(ii) damage to such essential infrastructure; or

(b) if it is alleged that the offence was committed by or with the collusion or assistance of—

(i) a law-enforcement officer, as defined in s 51(8) of the Criminal Law Amendment Act 105 of 1997;

(ii) a security officer, as defined in s 1 of the Private Security Industry Regulation Act 56 of 2001, who was required to protect or safeguard such essential infrastructure;
(iii) an employee of, or contractor appointed by, the owner or the person in charge of such essential infrastructure; or
(iv) a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

An offence referred to in s 3 of the Criminal Matters Amendment Act, 2015

Schedule 6

(The offences in Schedule 6 relate to ss 50(6), 58 and 60(11) and (11A).)

Murder, when—
(a) it was planned or premeditated;
(b) the victim was—
(i) a law-enforcement officer performing his or her functions as such, whether on duty or not, or a law-enforcement officer who was killed by virtue of his or her holding such a position; or
(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1;
(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences:
(i) Rape or compelled rape as contemplated in s 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or
(ii) robbery with aggravating circumstances; or
(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape or compelled rape as contemplated in s 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively—
(a) when committed—
(i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;
(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
(iii) by a person who is charged with having committed two or more offences of rape; or
(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
(b) where the victim—
(i) is a person under the age of 16 years;
(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or
(iii) is a person who is mentally disabled as contemplated in s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

(c) involving the infliction of grievous bodily harm.

Offences as provided for in ss 4, 5 and 7 and involvement in these offences as provided for in s 10 of the Prevention and Combating of Trafficking in Persons Act, 2013

Robbery, involving—

(a) the use by the accused or any co-perpetrators or participants of a firearm;

(b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or

(c) the taking of a motor vehicle.

An offence referred to in Schedule 5—

(a) and the accused has previously been convicted of an offence referred to in Schedule 5 or this Schedule; or

(b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 5 or this Schedule.

The offences referred to in s 2, 3(2)*(a)*, 4(1), 5, 6, 7, 8, 9, 10 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, s 2(1) and (2) of the Civil Aviation Offences Act 10 of 1972, s 26(1)*(j)* of the Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993 and s 56 (1)*(h)* of the Nuclear Energy Act 46 of 1999

Schedule 8

(The offences mentioned in Schedule 8 relate to ss 36D and 36E.)

Treason

Sedition

Public violence

Murder

Any offence referred to in Part I or Part II of Schedule 1 to the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

Culpable homicide

Rape or compelled rape as contemplated in ss 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively

Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in s 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, respectively

Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, respectively

Robbery

Kidnapping

Childstealing

Assault, when a dangerous wound is inflicted

Arson

Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence

Theft, whether under the common law or a statutory provision

Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in Schedule 1, or is in such custody in respect of the offence of escaping from lawful custody

Any—

(a) offence under the Firearms Control Act 60 of 2000 which is punishable with imprisonment for a period of five years or longer in terms of the said Act;

(b) offence under the Explosives Act 15 of 2003 which is punishable with imprisonment for a period of five years or longer in terms of the said Act;

(c) Convention offence or specified offence as defined in section 1 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004;

(d) offence of trafficking in persons as defined in section 1 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013; or

(e) offence of torture as defined in the Prevention and Combating of Torture of Persons Act 13 of 2013.

Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule

Selected sections of the Constitution of the Republic of South Africa, 1996

Section 1—Republic of South Africa

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

. . .

(c) Supremacy of the constitution and the rule of law.

Section 2—Supremacy of Constitution

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Section 7—Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The State must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) . . .

Section 8—Application of rights

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Section 9—Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms . . . .

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital

status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

. . .

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 10—Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

Section 11—Life

Everyone has the right to life.

Section 12—Freedom and security of the person

(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;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

. . .

(b) to security in and control over their body; . . .

Section 14—Privacy

Everyone has the right to privacy, which includes the right not to have—

(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.

Section 21—Freedom of movement and residence

(1) Everyone has the right to freedom of movement. . . .

Section 25—Property

(1) No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.

Section 32—Access to information

(1) Everyone has the right of access to—

(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.

Section 34—Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

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Section 35—Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right—

(a) to remain silent;

(b) to be informed promptly—

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

(d) to be brought before a court as soon as reasonably possible, but not later than—

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right—

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's—

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right—

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial before an ordinary court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

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(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
(o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Section 36—Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Section 37—States of emergency

(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—

(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
(b) the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—

(a) prospectively; and
(b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of

the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of—

(a) a declaration of a state of emergency;

(b) any extension of a declaration of a state of emergency; or

(c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—

(a) the derogation is strictly required by the emergency; and

(b) the legislation—

(i) is consistent with the Republic's obligations under international law applicable to states of emergency;

(ii) conforms to subsection (5); and

(iii) is published in the National *Government Gazette* as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—

(a) indemnifying the state, or any person, in respect of any unlawful act;

(b) any derogation from this section; or

(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

1 Section number	2 Section title	3 Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language
10	Human dignity	Entirely
11	Life	Entirely
12	Freedom and security of the person	With respect to subsections (1) *(d)* and *(e)* and (2)*(c)*
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: — subsection (1)*(d)* and *(e)*; — the rights in subparagraphs (i) and (ii) of subsection (1) *(g)*; and

1 Section number	2 Section title	3 Extent to which the right is protected
		— subsection 1(i) in respect of children of 15 years and younger
35	Arrested, detained and accused persons	With respect to: — subsections (1)*(a)*, *(b)* and *(c)* and (2)*(d)*; — the rights in paragraphs *(a)* to *(o)* of subsection (3), excluding paragraph *(d)*; — subsection (4); and — subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

(a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.

(b) A notice must be published in the National *Government Gazette* within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.

(c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

(d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

(e) A court must review the detention as soon as reasonably possible, but not later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

(f) A detainee who is not released in terms of a review under paragraph *(e)*, or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.

(g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.

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(h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

Section 38—Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

Section 39—Interpretation of Bill of Rights

(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.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Section 84—Powers and functions of President

(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for—

. . .

(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; . . .

Section 165—Judicial authority

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

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(3) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

Section 170—Magistrates' courts and other courts

Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

Section 171—Court procedures

All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

Section 172—Powers of courts in constitutional matters

(1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) *(a)* The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

Section 173—Inherent power

The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

Section 179—Prosecuting authority

(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of—

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) National legislation must ensure that the Directors of Public Prosecutions—

(a) are appropriately qualified; and

(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions—

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.