NOTES

Criminal Procedure 2
CMP301-A

1. INDICTMENTS AND CHARGE SHEETS

Section 32 of the Constitution - 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 35 of the Constitution – 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;

1.1. Lodgement and service of indictments and charge sheets

High Court: Indictment

Lower Courts: Charge sheets

Accused is entitled to have access to documents in the police file (***Shabalala v Attorney-General***), unless such disclosure may prejudice the police investigation or prosecution of the crime. He further has the right to be informed of the charge with sufficient detail to answer it. The legislature has, however, endeavoured to avoid criminal trials being rendered abortive merely because of insignificant mistakes made by the persons who draw up indictments or charge sheets.

Golden rule: An indictment or charge sheet should inform the accused in clear and unmistakable language of the charge he has to meet – ***Pillay***.

Section 76 of the CPA - Charge-sheet and proof of record of criminal case

(1) Unless an accused has been summoned to appear before the court, the proceedings at a summary trial in a lower court shall be commenced by lodging a charge-sheet with the clerk of the court, and, in the case of a superior court, by serving an indictment referred to in section 144 on the accused and the lodging thereof with the registrar of the court concerned.

- **In superior courts**

The DPP must lodge an indictment with the Registrar of the High Court after deciding to indict an accused, which is presented in the name of the DPP wherein he informs the court that the accused is guilty of the crime alleged therein. Such an indictment must contain:

(i) the charge against the accused;

(ii) the date and place at which the crime was allegedly committed;

(iii) certain personal particulars of the accused;

(iv) where no preparatory exam has been held, a summary[1] of the facts of the case must be attached to the indictment (this need not be given where it will be prejudicial to the administration of justice or the security of the state);

(v) a list of witnesses and their addresses that may be called by the state (this may be withheld if the DPP believes the witnesses may be tampered with or intimidated).

The indictment must be served on the accused by the sheriff at least 10 days before the date of the trial, unless the accused agrees to a shorter period.

- **In the lower courts**

Unlike the indictment, this is presented in court where he may examine it and is not served on the accused. The accused is brought to court on written notice, by summons or under arrest. If a summons is served on him, it must be served at least 14 court days before the date of the trial. If this is insufficient time for him to prepare his defence, the court may grant a postponement. In ***Singh v Blomerus*** it was held that short service to which no objection had been made at the trial could not be relies on before the appeal court.

[1] The State is not bound by the summary of facts and can lead evidence which contradicts it.

1.2. Form and substance of charges and indictments

Charge sheets should be kept as simple as possible and should reflect all the elements of the offence or, put differently, the charge sheet should disclose an offence.

Section 84 of the CPA - Essentials of charge

(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. {Specifically required}

Drafters of indictments should not slavishly follow the wording of a statute, but should confine the charge to what is relevant (***Mangqu***) and, in terms of Section 84(3) of the CPA, the description of a statutory offence will be sufficient if the words of the enactment or similar words are used.

If **time** isn't an essential element of the crime, failure to refer to it won't render the charge defective - Section 92(1). If the time is mentioned but it is proved that the act was committed on any day or time not more than 3 months before or after the day alleged, such proof will be taken to support such allegation, provided the time is not of the essence of the offence - Section 92(2). If the accused raises an *alibi* as a defence (i.e. at the time he was elsewhere) and the court believes that the accused will be prejudiced in making such defence if proof were to be admitted that the offence were committed on some other day or time (even though the time to be proved is within the 3 month period, such proof must be rejected.

Place may also be important as some crimes can only be committed in certain places[2] and the charge will be defective if it does not allege that the offence was committed in such a place. Where **mental attitude**[3] is an essential element of a crime, it should be averred or else the charge will not disclose an offence.

Golden rule: Incriminating factors (necessary averments) must be proved by the prosecution and reflect on the charge sheet; exculpatory factors (exceptions) need not be mentioned and must be proved by the accused. If unnecessary averments have been included, it may be amended unless refused by the court. Such unnecessary averment will not affect the validity of the proceedings unless it embarrasses the accused in his defence.

If the accused believes the particulars in the indictment are inadequate to inform him properly of the charge, he can request **further particulars** from the State. In addition, he can request further particulars even if the charge sheet is not inadequate in order to enable him to prepare his defence. Reluctantly, the High Court will intervene in pending proceedings in the Magistrate's Court by granting a *mandamus* to direct the Magistrate to order the prosecutor to deliver further particulars only if it is necessary to prevent a grave injustice. Such further particulars may be delivered to the accused free of charge at any time before evidence is led. The function of particulars is to define the issues and not enlarge them. When the accused fails to apply for further particulars, he may not set up the inadequate narration of particulars on appeal. Where the request for further particulars was refused and it is shown on appeal that such refusal prejudiced the accused, the court will set aside the accused's conviction. Where particulars are given, the state must prove the charge as particularised and where a conviction is based on evidence not covered by the particulars, the conviction may be set aside on review.

1.3. Defect in indictment or charge cured by evidence

Before 1959 the courts consistently required indictments to disclose an offence and if a material element of the crime was omitted, the accused could not be found guilty, even if the evidence at the trial proved the omitted element.

Section 88 of the CPA - Defect in charge cured by evidence

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 judgement, 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 alleviates the burden of prosecutors, but is open to criticism:

- At the very least, the offence with which the accused is charged should be named (e.g. use the word "theft" in the indictment on a charge of theft).

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[2] Example: Reckless and negligent driving can only be committed on a public road

[3] I.e. Intentionally, knowingly, maliciously or negligently

- The prosecutor should exercise caution by framing the charge in such terms that it does disclose an offence, otherwise the accused can raise an exception against it before pleading.
- If the accused brings the defect to the court's attention before judgment and it refuses to amend the charge, the accused can rely on this on appeal to have his conviction set aside.
- A defect can only be cured by evidence proper, not by the invocation of statutory provisions and presumptions. The replies of an accused who has pleaded guilty to questioning may be treated as evidence capable of curing a defect in the charge.
- Section 88 doesn't authorise replacement of one offence by another offence proved by evidence (eg. 'meat' for 'jersey' in a theft charge)

1.4. Correction of errors in charge

Section 86 allows for the amendment of charge sheets that are defective where:

- a material allegation, such as an element of the offence in question, isn't reflected therein;
- there is a material difference between the allegation in the charge sheet and the evidence that has been led;
- where words have been omitted, unnecessarily inserted or any other error is made.

Before 1959 it was generally accepted that a charge could only be amended where it disclosed an offence. In 1959 the Supreme Court of Appeal in ***Crause*** held, however, that a trial court could correct the indictment even though it did not disclose an offence. This was confirmed by an express provision in the 1959 CPA. The following points regarding amendment should be noted:

- Court may order an amendment only if it considers that the making of the amendment will not prejudice the accused in his defence. There won't be prejudice if there is only 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.
- Section 86 makes provision for the amendment of the charge and not replacement thereof by an altogether new charge. If the proposed amendment doesn't correspond at all to the original charge, then we talk of substitution and not amendment. Should a new charge be framed in the course of a trial, the possibility of prejudice to the accused is strong as he comes to court prepared to meet a particular charge and now will be faced with a different issue.
- Section 86(4) provides that the fact that the charge is not amended doesn't affect the validity of the proceedings, unless the court has refused to allow the amendment. If the failure to amend wouldn't have prejudiced the accused in his defence, the failure to effect the amendment will not invalidate the proceedings. Because Section 88 allows for defects to be cured by evidence, the need for amendments has largely fallen away, except where the accused brings the defect to the attention of the court.

The combined effect of Section 86 and 88:

- Unless it is prejudicial, any amendment to a charge can be made at any time before judgment is passed;
- Inadvertent failure to amend a charge doesn't affect a verdict of guilty, provided that all the necessary evidence has been adduced;
- A defect in the charge can only be adduced on appeal if the trial court knowingly failed to correct it.

1.5. The splitting of charges or duplication of convictions

Frequently, one and the same act of a person constitutes more than one offence[4]. Furthermore, one person can commit several offences by conduct spread over a period[5] or by a series of actions[6]. A perpetrator may be charged with all the offences, but he shouldn't be convicted of all of them in consideration of fairness.

Section 83 of the CPA - Charge where it is doubtful what offence committed

If by reason of any uncertainty as to the facts which can be proved or if 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 the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.

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[4] Example: A man assaults a woman below the age of 16 and forcibly has intercourse with her. His conduct may constitute any of the following: common assault; assault with intent to rape; rape; statutory rape.

[5] Example: A person pretends to be a medical doctor and treats patients for a year

[6] Example: A man attacks a women, rapes her and runs away with her handbag → assault with intent to commit rape; rape; robbery and theft

The courts developed a rule against splitting (or duplication) of charges, but in truth the emphasis has always been on preventing a duplication of convictions. Thus, if there is uncertainty as to which facts can be proved (including legal uncertainty), the state may formulate as many charges as the available facts justify. The rule against duplication of convictions is to be approached on the basis of the following possibilities:

- **A single act constitutes more than one statutory offence, or statutory and common law offences**

  Section 336 provides that where an act constitutes an offence under 2 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 but not liable to more than one punishment. Examples:

  (i) Where a man is charged with incest on the ground of connection with his daughter who is under 16, as well as connection with a girl under 16, this is undue splitting.

  (ii) There is undue splitting if the accused is charged in respect of the same act with assault and with committing the statutory offence of pointing a firearm.

  (iii) Where an accused is convicted of driving under the influence of liquor and reckless driving it is duplication of convictions.

- **A single act constitutes more than one offence at common law**

  Examples:

  (i) Where an accused was found stripping lead from a roof intending to steal it, he could be convicted of theft but not also of malicious injury to property.

  (ii) Where an accused was charged with rape and incest arising from the same act, he could only be convicted of one.

  (iii) Where 2 people are killed in the same road accident, it is improper to convict the accused on 2 counts of culpable homicide. A single charge should refer to both deceased.

- **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)**

  Test: 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?

  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. In ***Kuzwayo*** it was pointed out that there are borderline cases which may not be covered precisely by the tests and, therefore, whether the actions of an accused amounts to more than one offence must be judged in each case on the basis of "sound reasoning and the court's perception of fairness". 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. Examples:

  (i) 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.

  (ii) If a man breaks into a house with intent to steal and thereupon commits theft from the house, he should only be charged with housebreaking with intent to steal and theft, but where a burglar breaks into different flats in one block, this is different offences.

  (iii) If an assault is committed pursuant to, and in the course of, an attempt to escape, the accused should be convicted of only one of these offences.

  (iv) Where an accused drives under the influence of alcohol and through his negligent driving causes the death of other persons, he may be convicted of culpable homicide and driving under the influence of intoxicating liquor.

- **Conduct of the perpetrator is spread over a long period of time and amounts to a continuous repetition of the same offence**

  The decisions of our courts are conflicting on whether such conduct should form the subject of one conviction only. Example:

  (i) Once it is established that someone is wrongfully practicing as a medical doctor, each act of treating a patient is a separate contravention.

  (ii) Where an accused has stolen goods from 2 complainants living in the same room he can only be convicted on one charge of theft.

(iii) If the accused has been convicted or acquitted of offence X and is thereafter charged with offence Y (which, if charged together, would have amounted to a splitting of charges), A can plead *autrefois acquit*[7].

1.6. **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. Apart from undue splitting, any number of offences may be charged against the same accused in one indictment. It must, however, take place at any time before any evidence has been led in respect of any particular charge. If this is not complied with, the proceedings are void.

The court can order that the charges so joined be tried separately if it believes this would be in the interests of justice. It is desirable that where the state has knowledge of a number of charges against a person, it should endeavour to bring such charges before the court in one indictment so that they are tried together. Before 1963, murder could not be joined in the same indictment with any other charge, but this limitation has now been removed. No additional charges can be joined after questioning of the accused in terms of Section 112(1)(b) has commenced.

1.7. **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. The receiver of property obtained by means of an offence shall be deemed to be a participant in the offence. Section 156 provides that if 2 people have committed separate offences at the same place and time, and evidence against the one will also be admissible against the other, such persons may be tried jointly.

Thus, persons who, through participation in the same transaction, commit different offences may be jointly charged and tried. A proper joinder is dependant on the opinion of the prosecutor as to admissibility and the court should be satisfied as to the *bona fide*s of the prosecutor. The provisions regarding joinder are not absolute, but merely permissive. There is no provision for the addition of further accused during the trial. Questioning of an accused in terms of Section 112(1)(b) is not evidence in terms of Section 157(1) and further accused can be joined after an accused has been questioned in terms of Section 112(1)(b). Directors of a company may be charged jointly with the company.

2. THE COURT

2.1. **Venue of the court**

If an accused is brought before a court which lacks jurisdiction, he may object. However, if he fails to object and the trial runs its course and there is a conviction, lack of jurisdiction will not help him on appeal. In terms of Section 149, the prosecution or the accused may apply for the removal of a criminal case from one superior court to another. Such removal won't be granted unless the applicant can show that the change of venue would be in the interests of justice (e.g. to protect witnesses whose lives are being threatened).

2.2. **Constitution of the court**

Lower courts

These courts are presided over by Magistrates. In a District or Regional Court, the Magistrate may summon 1 or 2 assessors to assist him in the proceedings, if he deems it necessary for the administration of justice:

→ before any evidence has been led; or

→ in considering a community based punishment of any person who has been convicted of any offence.

In the Regional Court on a charge of murder, the judicial officer must summon 2 assessors to assist him, unless the accused requests the trial to proceed without assessors, in which case the judicial officer may still summon 1 or 2 assessors to assist him in his discretion.

He may summon 1 or 2 persons (also lay persons) who he believes may assist him either at the trial, or in the determination of a proper sentence, to sit with him as assessors. Assessors begin with their functions after the plea has been recorded. Assessors only decide on questions of fact and in this regard the decision of the majority of the members of court shall be the decision of the court. The judicial officer (Magistrate) alone decides questions of law.

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 is satisfied that:

[7] Example: X is charged with raping a 15 year old girl and found not guilty. He can't then be charged with statutory rape.

(i) the assessor has a personal interest in the proceedings;

(ii) 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;

(iii) there are reasonable grounds for believing that there is a likelihood of bias on the part of the assessor;

(iv) the assessor is absent for any reason; or

(v) the assessor has died.

The assessor may also request his own recusal based on (i)-(iii) above. The court will give the prosecution and the accused opportunity to address arguments on the issue of the assessor's recusal and the assessor may respond. The presiding officer is obliged to give reasons for his order of recusal of the assessor and may, in the interest of justice, direct that the proceedings continue before the remaining members; or begin ***de novo*** (anew); or be postponed upon the return of the assessor (where he has been absent).

Superior courts

Criminal cases are presided over by one judge or a judge plus 1 or 2 assessors. The presiding judge usually has a discretion whether or not to sit with assessors, but usually relies on the recommendation of the DPP.

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 – S145(1)(b)

Usually judges use advocates, magistrates, retired magistrates, attorneys or professors of law. If an expert is going to lead evidence on a particular topic, a judge may sit with an assessor who is professionally qualified in the field in question (e.g. medicine, accounting). If an assessor dies or becomes unable to act[8] as assessor, at any time during the trial, the judge may direct that the trial proceed before the remaining members of court or begin *de novo*. The parties are entitled to be heard before a judge comes to a decision that the assessor has become unable to act.

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 the oath is administered by the judge, they are members of the court, with the following provisos:

(i) A decision of the majority of the members on any question of fact will be the decision of the court, except where a judge sits only with 1 assessor, in which case the decision of the judge will be conclusive if there is a difference of opinion.

(ii) Regarding the question of the admissibility of a confession or statement by the accused against him, the judge may deem it in the interest of the administration of justice that the assessors shouldn't take part in such decision and will sit alone. However, the assessors may assist him in this regard.

(iii) The judge alone decides upon questions of law or whether a question is one of law or fact and for this purpose he may sit alone[9].

(iv) The judge shall give the reasons for his decision where he decides any question of law or whether a question is one of law or fact or his decision in (ii) above, whether he sit with or without assessor. Where a judge sits with assessors and there is a difference of opinion on a question of fact, the judge must give reasons for the minority decision.

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***. An assessor must show absolute impartiality. Assessors have no part in sentencing, but it is not irregular for a judge to seek their advice in this regard (frequently done).

Trial by jury

The jury system was introduced in South African in 1827 via Britain, but was abolished by the Abolition of Juries Act, 34 of 1969 as it became unsuitable for South Africa.

2.3. Impartiality and fairness

The CPA sets out certain rules of procedure that must be observed, but otherwise the trial as managed by the judicial officer presiding over it. All parties, the court staff and the public must obey the orders given in the judicial discretion and wilful disobedience can lead to committal or a fine for contempt of court.

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[8] "Unable to act" includes physical and mental disabilities. An assessor who is subjected to serious and continuous stress during the trial, may become unable to act as an assessor. Pressing commitments elsewhere won't constitute such inability - ***Gqeba***

[9] Example: An application at the close of the State's case for the accused's discharge in terms of Section 174 is one of law and the decision is that of the judge alone.

As stated in **Sussex Justices**, it is of fundamental importance that justice must be done and be seen to be done. One facet of this is that witnesses and the accused must be treated courteously by the court, the defence and the prosecution. The standards which a judicial officer should maintain in the questioning of witnesses and the accused have been summarised in ***Mabuza*** as follows:

- The court shouldn't conduct its questioning in such a manner that its impartiality can be questioned or doubted.
- The court shouldn't take part in the case to such extent that it is unable to adjudicate properly on the issue.
- The court shouldn't intimidate or upset a witness or the accused so that his answers are weakened or his credibility shaken.
- 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, especially the accused.

The judicial officer must be attentive to his own weaknesses, personal opinions and whims, and must continually restrain them.

Impartiality and courtesy

Judicial officers must endeavour to be absolutely fair to both prosecution and the defence. Individuals have the right to equality before the law and equal protection of the law – Section 8 of the Constitution. Every criminal court is, therefore, presupposed to be impartial. Witnesses and the accused shouldn't be addresses by means of the impersonal terms "witness" and "accused", but rather by their surname. It is disrespectful and degrading to address an adult as a juvenile (ie address him by his first name).

Audi alteram partem

No ruling should be made without giving both parties the opportunity of expressing their views and the principle of *audi alteram partem* should always be observed.

Section 35 of the Constitution – Arrested, detained and accused persons

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

(i) to adduce and challenge evidence;

Decisions solely upon evidence; the oath

The judicial officer must base his decision solely upon evidence heard in open court in the presence of the accused and he should have no communication whatsoever with either party except in the presence of the other or any witness except in the presence of both parties. He may also not take notice of documentary information contained in the docket, which has not been tendered into evidence

Evidence must be given on oath, a solemn affirmation in lieu of an oath or upon an admonition to speak the truth. The presiding judicial officer, judge or registrar may administer the oath in respect of witnesses, but the prosecutor may not do so. An interpreter may be used in the presence of the judge or magistrate. Witnesses must be allowed to give evidence in their own words in their own way and at their own tempo.

- **Fairness to the accused**

  Where the accused is undefended, the court should ensure that he is aware of his rights at all times and that he is given every opportunity of conducting his defence adequately. These rights have to be explained to the accused by the presiding officer and include the:

  (i) right to cross-examine;

  (ii) right to give evidence and cross-examine in the language of his choice irrespective of his apparent race;

  (iii) right to put his defence to state witnesses during cross examination;

  (iv) right to call witnesses;

  (v) right to produce relevant documents, facts and figures, to record the evidence he so wishes; and the

  (vi) right to testify, present argument to court and make representations regarding sentence.

  The presiding officer should be patient with the accused and courteous at all times. If the accused is unduly hampered by the court in his cross-examination of State witnesses, this could result in his conviction being set aside upon review or appeal. A conviction will also be set aside if an unrepresented accused is prejudiced by the judicial officer failure to inform him of his legal rights.

The court is not entitled to question the accused on the merits of the case unless he ***suo moto*** (on his own) testifies under oath. The accused may, therefore, 'defend' himself by remaining silent. However, in certain circumstances the accused's silence may damage his case. The accused's right to silence has been qualified only by Section 115 relating to the 'plea explanation' procedure – refer 3 below.

After the accused is convicted, the court is entitled to know of the previous convictions of the accused in assessing the proper punishment, but during the trial, all knowledge of previous convictions must be withheld from the court. The prosecution is only in exceptional cases entitled to prove previous convictions before verdict, such as where the where accused attacked the character of a State witness. If it is improperly revealed during the trial that the accused has previous convictions, the accused will not be entitled to complain as the conviction will generally be set aside unless the court of appeal is satisfied that no failure of justice has resulted from such disclosure. If such knowledge is revealed by the defence, it will as a rule not invalidate the conviction.

Recusal

No person who has an interest in or harbours any prejudice in respect of the matter to be tried should adjudicate on such matter. There are no provisions in the CPA on recusal, therefore the common law rules must be applied.

Application for recusal should be made at the beginning of the trial, if possible, in order to avoid a discontinuation or the need to start the trial *de novo*. If unavoidable, the application may be made during the trial. The application should be made courteously and not wilfully insultingly. The requirements of the test for the presence of judicial bias are:

(i) There must be a suspicion that the judicial officer might be, not would be, biased.

(ii) The suspicion must be that of a reasonable person in the position of the accused.

(iii) The suspicion must be based on reasonable grounds.

(iv) The suspicion is one which the reasonable person referred to would, not might, hold.

Usually if a judicial officer is aware of his partiality, antagonism or any motive which might motivate him in deciding a matter, he will of his own accord recuse himself. It is also grossly irregular for a presiding officer to hear an application for bail when he has previously taken down a confession from the same accused. The presiding officer should be impartial, open-minded and uninformed adjudicator in the sense that he takes cognisance of only those facts about the case which are proven in court.

Principle: In an application for recusal, 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***. The fact that the judicial officer was impartial or is likely to be impartial is not the test. Thus, it is the reasonable perception of the parties as to the impartiality of the judicial officer that is important. The criterion for recusal is an objective one.

A relationship with one or other of the parties to a case affords grounds for recusal, but the mere fact that the judicial officer and the accused belong to different race groups will not amount to grounds for recusal. It has been held that a magistrate is not disqualified because previously in his judicial capacity he dealt with a similar charge against the accused. The mere fact that the judicial officer has knowledge of facts obtained in civil proceedings in which the accused was concerned does not disqualify him from presiding at the subsequent criminal trial. Nor does knowledge of the accused's previous convictions disqualify the judicial officer from trying the case.

It will be preferable for the judicial officer recuse himself if it could not be said that the accused could not harbour a reasonable fear that the court would reject his evidence because of a finding on his credibility in another trial. If a judicial officer refuses to recuse himself when he should have, his refusal would create a good ground for review. A judicial officer should not recuse himself unless he has asked the defence to make its submissions. A judicial officer who recuses himself becomes ***functus officio*** (no longer in officer), the whole trial becomes void and a new trial will be instituted – the accused may not claim that he has been acquitted or found guilty.

3. ARRAIGNMENT AND PLEA OF THE ACCUSED

3.1. Arraignment and general principles

Arraignment is the calling upon the accused to appear, informing him of the crime charged against him, the demanding of him whether he pleads guilty or not guilty and entering the plea. Once the plea has been entered, he is said to stand arraigned.

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 knows exactly what he is required to plead to. 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.

Nothing in the CPA 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. He must be addressed courteously and not as "Accused". The general principle is that the accused must be informed of the charge in open court and be required to plead instantly thereto. Any objections to the charge or indictment must be taken before the accused pleads, not afterwards – Section 85. If he has already pleaded, an objection cannot be raised and the trial must proceed. The defect can, however, be rectified during the trial – Section 86.

The accused can plead himself or his legal representative can do so on his behalf. Where the legal adviser replies in writing or orally to any question by the court, the accused must confirm this but he may not be required to answer personally. An accused's plea must be recorded, otherwise a conviction cannot stand.

3.2. **When plea by accused may be dispensed with**

- **Refusal to plead**

  The court must enter a plea of not guilty if the accused won't plead or answer directly to the charge. This plea will have the same effect as if he had pleaded. These provisions should not be invoked where an accused *bona fide* refuses to plead. If the case was formally postponed, but thereafter brought on early and the accused refuse to plea because it would prejudice him, the correct procedure would be to let the matter stand down until the original date and not enter a plea of not guilty. To insist that the accused should plead after he has informed the court that he wishes to consult a legal representative constitutes a gross irregularity.

- **Ambiguity in plea**

  If, when required to plead, the accused doesn't do so directly, but makes a statement that he admits certain facts or pleads guilty and adds reservations, the court should enter a plea of not guilty and then question the accused in terms of Section 115 to ascertain what facts he is prepared to admit.

- **Obstructive and rowdy behaviour**

  If the accused's refusal to plead is accompanied by improper behaviour that obstructs the conduct of the proceedings of the court, the court may order him to be removed and direct that the trial proceed in his absence – Section 159(1). This power must be exercised with caution and the accused should first be warned, if possible, that he will be removed and the trial continued in his absence.

- **Mentally abnormal accused**

  If, when the accused is called upon to plead, it appears to be uncertain whether he is capable of understanding the proceedings so as to make a proper defence, an enquiry into his mental state should be made in accordance with the procedure laid down in Sections 77 and 79. The investigation is made by the medical superintendent of a psychiatric hospital designated by the court or by a psychiatrist appointed by him. In any particular case, the court can direct that the investigation be made by 3 persons:

  (i) the medical superintendent (or his designate);

  (ii) a psychiatrist appointed by the court; and

  (iii) a psychiatrist appointed by the accused (if he chooses).

  For the purposes of this enquiry, the accused may be committed to a psychiatric hospital for up to 30 days at a time. The report of the enquiry must include a diagnosis of the mental condition of the accused and a finding whether he is capable of understanding the proceedings so as to make a proper defence. If the finding in the report is unanimous and not disputed by the prosecutor or accused, the court may determine the matter without hearing further evidence. If the finding is not unanimous, or is disputed by the prosecutor or accused, the court must determine the matter after hearing evidence. If court finds that he is capable of understanding the proceedings, the proceedings continue in the ordinary way, but if he is found not so capable, the court must direct that the accused be detained in a psychiatric hospital or prison, pending the signification of the decision of a judge in chambers.

  An accused is permitted to appeal against a finding that he was capable of understanding the proceedings if he is subsequently convicted or a finding that he is incapable provided he did not himself allege this at the trial. Where the accused is declared incapable of understanding the proceedings, he may later, on becoming so capable, be indicted and tried for the offence.

The so-called psychopath is generally capable of standing trial as well as being criminally liable and does not fall under the provisions of Sections 77 and 79. If it appears reasonably possible that an accused might not fully understand the nature of the proceedings or wasn't criminally liable at the time of the offence, the court is obliged to direct an enquiry into is mental condition.

If the court finds that the accused committed the act in question but, by reason of mental illness or mental defect, he was not criminally liable, the court must find him not guilty and detain him pending the signification of the judge. If the court so finds after conviction but before sentencing, it must set aside the conviction, find him not guilty and direct that he be detained pending the decision of a judge in chambers.

There provisions are unconditional and the court must declare the accused a state patient.

Objections to the charge

Prior to the CPA, where the charge contained a formal defect[10], one objected to the charge. Where the charge disclosed no offence, one excepted to it. Where the charge was lacking in particularity, the accused had to bring a motion to quash the charge.

Section 85 of the CPA - Objection to charge

(1) An accused may, before pleading to the charge under section 106, 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…; or

(e) that the accused is not correctly named or described in the charge:

Provided that the accused shall give reasonable notice to the prosecution of his intention to object to the charge and shall state the ground upon which he bases his 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. The objection should property be raised before the accused pleads, but there is nothing precluding him from objecting at the end of the case for the prosecution.

Section 88 does not affect the accused's right to object to an indictment.

3.3. Plea bargaining

The main object thereof 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 the risks. Statutory plea bargaining was introduced for the first time in South Africa by insertion of Section 105A into the CPA in 2001.

Traditional plea bargaining

To achieve this object a plea to a lesser offence (being a competent verdict to the offence charged or an alternative charge) is negotiated with the prosecutor, who agrees to accept[11]. Alternatively, the accused pleads guilty on the charge but on a different basis to that alleged[12]. In both an agreement is reached with the prosecutor on the facts which are to be placed before court to justify a conviction on the agreed basis.

When more than one accused stands arraigned, an agreement could also be reached in terms of which the accused who is undoubtedly guilty, will plead guilty in return for the withdrawal of the charges against the other accused. An accused may also supply vital information to the investigating officer on the understanding that the accused will not be prosecuted.

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. The prosecutor and the defence cannot bind the court to a sentence. The prosecutor can, however, agree to suggest to the court a possible light or lighter sentence.

Statutory Plea Bargaining

Section 105A is in essence a codification of the traditional plea bargaining. The central innovation is that the prosecutor can now also reach an agreement with the defence on the

[10] Example: The accused wrongly named

[11] Example: An accused being charged with murder tenders a plea of guilty to culpable homicide

[12] Example: Guilty of murder with *dolus eventualis* instead of *dolus directus*

sentence to be imposed. Certain mandatory formalities are prescribed, such as that the whole agreement must be in writing. The time for entering into the agreement is before the commencement of the trial, before plea. It is a once off situation and if the court has ruled for a *de novo* trial, the parties may not enter into a plea and sentence agreement in respect of a charge arising out of the same facts. The scheme of Section 105A is broadly:

(i) Non-represented accused are excluded from negotiating agreements under this section.

(ii) The judicial officer may not participate in the negotiations.

(iii) In court, the judicial officer must question the accused on the contents of the agreement to satisfy himself 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.

(iv) 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 sentences the accused to the sentence agreed upon.

If the court is not so satisfied, it informs the parties of the sentence which the court considers just when two possibilities arise:

(i) The prosecutor and 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; or

(ii) The parties, or one of them, opt to withdraw from the agreement, which entails that the trial must start *de novo* before another judicial officer.

Once the trial starts *de novo*, Section 105A dictates that the agreement is ***pro non scripto*** (as if never written) and no regard may be had to it and the parties may not plea bargain in terms of Section 105A again on the same facts. This, however, does not prevent them from traditional plea bargaining.

3.4. Pleas which may be raised by accused

Pleas mentioned in the Act

Section 106 of the CPA - Pleas

(1) When an accused pleads to a charge he may plead -

(a) that he is **guilty** of the offence charged or of any offence of which he may be convicted on the charge; or

(b) that he **is not guilty**; or

(c) that he has already been **convicted**[13] of the offence with which he is charged; or

(d) that he has already been **acquitted**[14] of the offence with which he is charged; or

(e) that he has received a **free pardon** under Section 327(6) from the State President for the offence charged; or

(f) that the court has **no jurisdiction** to try the offence; or

(g) that he has been **discharged** under the provisions of Section 204[15] from prosecution for the offence charged; or

(h) that the prosecutor has **no title to prosecute**;

(i) that the prosecution may not be resumed or instituted owing to an order by a court under Section 342A(3)(c).

2 or more pleas may be pleaded together, except that the plea of guilty cannot be pleaded with any other plea to the same charge. In terms of Section 107, the accused may plead truth and public interest to a charge of criminal defamation. This defence must be specially pleaded and may be pleaded with any other plea except a plea of guilty. The accused can also plead ***lis pendens*** (the issue before the court is the subject of adjudication before another court).

Guilty

Where an accused pleads guilty, there is no issue between him and the State, and he may be convicted and sentenced there and then. Before the CPA, if a person who pleaded guilty before a superior court to any offence, other than murder, he could be convicted without any evidence being led. Sentence would be based on the preparatory examination and the record. Section 112(1) lays down 2 different procedures (one for serious offences and one for less serious offences) where the accused pleads guilty:

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[13] *Autrefois convict*

[14] *Autrefois acquit*

[15] After giving satisfactory evidence for the State

→ If the presiding officer is of the opinion that the offence does not merit imprisonment or any form of detention without the option of a fine or a fine exceeding R 1,500, he may convict the accused on his plea of guilty only and impose a sentence other than those mentioned above - Section 112(1)(a) (must be used sparingly).

→ If the presiding officer is of the opinion that the offence does merit one of the above-mentioned sentences or if requested to by the prosecutor, he must question the accused with reference to the alleged facts of the case 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, he may convict and sentence him – Section 112(1)(b).

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 alleged in the charge sheet. The presiding officer's questions must be directed at satisfying himself that an accused fully understands all the elements of the charge and that his answers reveal that he has in fact committed the actual offence to which he has pleaded guilty. This is especially the case when an accused is illiterate and unsophisticated and has no legal assistance.

The primary purpose of the questioning is to protect the accused against the consequences of an incorrect plea of guilty and his answers cannot be used as 'evidence' to draw unfavourable inferences. Questions from the bench should be as few as possible and preferably only those necessary to:

→ clear up what the accused has volunteered;

→ canvass any allegations in the charge not mentioned by the accused; and

→ confine the accused to the relevant detail.

Leading questions should be avoided and 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. It must be clear that he understands the nature of the offence, its elements and the nature and effect of the admissions he has made.

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 trial. Questioning in terms of Section 112(1)(b) is peremptory and failure to comply with the requirements of this section will result in the conviction and sentence being set aside. If, in the course of the questioning, it appears that the accused is not guilty of the offence charged, but that he admits his guilt to a lesser offence, the court will record a plea of not guilty in terms of Section 113.

Accused's version

An accused should be encouraged to give his version. The court's function is simply to interpret the answers to see if they substantiate the plea.

Test: What the accused has said and not what the court thinks of it.

If his version does not agreement with that of the State, a plea of not guilty must be entered, except where the dispute doesn't concern the crux or substance of the offence and affects sentence only.

The prosecutor's role

The prosecutor should give the court a brief summary of what the State's case is, which must be noted on the court record. If the accused disputes the details of the State's case, the prosecutor will have to tender evidence to prove them.

When the accused pleads guilty to the actual offence charged, acceptance of the plea by the prosecutor is unnecessary. The acceptance of the plea of guilty is of importance 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 doesn't wish to proceed with the offence charged. If the prosecutor, however, wishes to proceed with the offence charged, he does not accept the plea of guilty and the judicial officer must note a plea of not guilty and act in terms of Section 115.

It may happen that on arraignment, an accused tenders a plea of guilty to a lesser offence which is a competent verdict or to an alternative charge. In both instances, the prosecutor may accept the plea without the leave of the court and it is neither a withdrawal of the main charge nor a stropping of the prosecution. Once the trial is in progress, the position is different and leave of the court is necessary if the prosecutor wishes to accept a subsequent plea of guilty to a lesser or alternative offence.

Statement by accused instead of questioning

Instead of questioning the accused under Section 112(1)(b), the court can convict and sentence the accused on the strength of a written statement by him in which he sets out the facts which he admits and on which he has pleaded guilty. The court must be satisfied he is guilty of the offence to which he has pleaded guilty and may put any questions to him to clarify any matter raised in the statement. The statement must set out not only a series of admissions but also the facts upon which the admissions are based.

Evidence or questioning with regard to sentence

The prosecutor and the accused may present evidence on any aspect of the charge for the purpose of an appropriate sentence and the court may hear evidence or question the accused. The court is not entitled to have regard to evidence given in terms of Section 112(3) in considering whether or not the accused is guilty. Where a magistrate has convicted an accused in terms of Section 112, another magistrate may sentence him at a later stage in the absence of the first magistrate.

Correction of plea of guilty

In terms of Section 113, the court must change the plea from one of guilty to not guilty at any stage before sentencing if:

- → it is in doubt that the accused is in law guilty of the offence to which he pleaded guilty;
- → satisfied that the accused does not admit an allegation in the charge;
- → the accused has incorrectly admitted any such allegation;
- → the accused has a valid defence to the charge; or
- → it is of the opinion that for any other reason the plea of guilty should not stand.

The conviction will lapse automatically. Admissions already made stand as proof of the relevant facts. A prosecutor may not substantially contradict an accused's version who has pleaded guilty. 'Doubt' and not 'probability' is sufficient and such must be reasonable doubt. To give a true reflection of what transpired, the plea must be noted as "guilty (changed to "not guilty" in terms of Section 113)" – ***Mugwedi***.

Committal for sentence by Regional Court

In terms of Section 114(1), if a Magistrate's Court, after conviction following a plea of guilty but before sentence, is of the opinion that:

- → the offence is of such a nature or magnitude that it merits punishment in excess of the court's jurisdiction;
- → the previous convictions of the accused are such that the offence merits punishment in excess of the court's jurisdiction
- → the accused is a dangerous criminal,

the court shall stop the proceedings and commit the accused for sentencing by a Regional Court with jurisdiction. The Regional Court will then pass sentence. However, if the Regional Court is not satisfied that he is guilty, the court will enter a plea of not guilty and proceed with the trial as a summary trial. Note that there is no provision for committing an accused to the High Court for sentencing because it is highly unlikely that he would be brought before a magistrate in the first place.

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 only be allowed if he can give a reasonable explanation why he pleaded guilty and now wishes to change his plea[16]. Where the accused has no legal representation when he pleads, but has legal representation when the trial starts, he won't succeed with an application to change his plea if it appears he understood the charge and was given an opportunity to give an explanation, which he declined to do.

An application to change a plea of guilty to one of not guilty may be brought after conviction but before sentence and the onus is on the accused to show on a balance of probabilities that the plea was not voluntarily made – ***De Bruin***. In contracts, the court held in ***Botha*** that such an application doesn't shift the onus to the accused, but his explanation must be reasonable and more persuasive if the application is brought at a later stage. This decision has been confirmed on appeal.

The court should not refuse an amendment to the plea unless it is satisfied that the explanation is not only 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.

[16] Example: His plea was induced by fear, fraud, duress, misunderstanding or mistake

Only in the most exceptional circumstances will such a change of plea from guilty to not guilty be allowed after verdict. The accused is only required to offer a reasonable explanation for having pleaded guilty and the court should reject the explanation only if it is convinced beyond reasonable doubt that it is false.

Not guilty

Explanation of plea

Section 115 of the CPA - 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.

The court must inform the accused that he is not obliged to answer any questions and failure to do so constitutes an irregularity. The nature of the information given by the court to the accused must appear clearly from the record. The court may, in its discretion, put any questions to the accused in order to clarify any matter, but the questioning should be limited to those issues in the case and in respect of which the accused's statement is unclear.

The conviction and sentence will be set aside where the questioning by the court bordered on cross-examination or seriously prejudiced the accused. The court should explain to the accused that the statement in clarification of the plea is still not evidence under oath and is only directed at preventing unnecessary evidence being led by the State. The explanation of plea is, therefore, not evidential material upon which a conviction can be based.

The procedure in Section 115 must be completed after plea and before the commencement of the State's case. Meticulous care should be taken in recording questions and answers and it will leave no doubt as to what facts have been formally admitted and what still remains to be proved by the leading of evidence - ***Mayedwa***.

Admissions made in the course of explanation of plea

Section 115(2)(b) provides that 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 and deemed an admission in terms of Section 220, which is regarded as "sufficient proof". Sufficient proof is not conclusive proof, but proof in the sense that no further or better proof is required.

The accused can reduce the total number of facts which are put in issue, by admitting facts, which will then no longer be in issue. Such an admission will be a formal admission and the state will not have to prove those facts. Such an admission can only be rebutted if he can prove he made the admission by mistake or through duress. If the accused doesn't consent to the admission being recorded, the onus remains on the state to prove those facts and such admission is regarded as an informal admission.

The judicial officer is only entitled to question the accused if it is unclear from his statement which facts he admits and which he denies. Where it is clear from the accused's statement which elements he admits and which he denies, the judicial officer is not entitled to question the accused regarding the facts upon which he relies.

The statement in terms of Section 115 may not be used in favour of the accused and it is not evidential material in his favour. An accused may also be cross-examined regarding the contents of his statement where he later deviates from it in his evidence and it can have an effect on his credibility. It is important that the court properly explains to the accused what the effect of a formal admission is and that he is under no obligation to assist the State to prove the case against him.

Accused's participation

It is irregular for the court to put questions directly to an accused who is represented. It appears that Sections 115(1) and (2) provides that a court may put questions directly to the accused, but Section 115(3) makes it clear that his legal counsel may act on his behalf and answer. Where legal counsel answers on his behalf, the accused is required to declare whether he confirms his counsel's reply or not.

What an accused says in his explanation of plea cannot be used against a co-accused, except where he repeats his allegations of plea in evidence under oath in which event it is evidence. Section 115 is an invitation to indicate the basis of his defence and it provides for questioning to

ascertain which allegations in the charge are in dispute. In both, the accused must be informed of his right to remain silent. If the accused does not wish to reduce the issues in dispute, he must refuse to give an explanation of plea. He then exposes himself to an adverse inference although he will be given an opportunity to explain his silence should he enter the witness box.

Committal to Regional Court

Where the accused pleads not guilty in a Magistrate's Court, the court shall, subject to Section 115, at the request of the prosecutor refer the accused to the Regional Court for trial. The record of the proceedings in the Magistrate's Court shall form part of the records of the Regional Court upon proof thereof.

Amendment of plea of not guilty

An accused may change his plea of not guilty to guilty at any stage with the leave of the court. Leave is seldom refused and in such cases Section 112 is then applicable. 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***. Where he so seeks to change his plea, the acceptance by the prosecutor isn't as important as at the beginning of trial, as the prosecutor is no longer ***dominus litis*** (master of the suit) and the court isn't 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. Any acceptance by the prosecutor of plea of guilty to a lessor offence can accordingly take place only with the court's consent.

The procedure in essence

Its purpose is to shorten the proceedings by making it unnecessary for the prosecutor to call evidence on matters which are not in dispute. Note that questioning is discretionary only. Extensive questioning by the presiding officer will result in the setting aside of the proceedings on appeal and it is clear that Section 115 does not contemplate any form of cross-examination. What is contemplated is an objective attempt at determining facts which are really in dispute.

- **Prior conviction or acquittal**

Basic principle: No person shall be punished more than once for the same offence.

Section 35 of the Constitution - Arrested, detained and accused persons

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

(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;

Nemo debet bis vexari pro una et eadem causa (no person shall be harassed twice for the same cause) - no person shall be in jeopardy of being tried for or convicted of the same offence more than once. The onus of proving *autrefois acquit* or *autrefois convict* rests on the accused. Proof is usually rendered by producing the record of the previous trial and oral evidence that the accused is the same person that was previously tried.

Autrefois convict

Essentially the accused had previously been convicted -

→ of the same offence;

→ by a competent court.

In order to ascertain whether the offence is the same, the court will pay attention to the essence of the offence and not to technicalities. It is the *ratio decidendi* of the previous judgment which is binding – ***Manasewitz***. It is sufficient if the 2 offences are substantially the same.

The plea is also available if the offence with which the accused is now charged is a lesser one than that of which he was convicted and the current one is one of which he could have been convicted on the previous charge[17].

The plea will, however, not be available where it was impossible at the previous trial to preger the more serious charge now present. Thus if the victim of an assault dies after the accused has been convicted, the accused may now be indicted for murder or culpable homicide.

Autrefois acquit

Essentially the accused had previously been acquitted -

→ of the same offence with which he is now charged;

→ by a competent court; and

→ upon the merits.

[17] Example: If the accused had previously been convicted of murder, he cannot now be charged with culpable homicide. If previously charged with murder and convicted of assault, he can also not be charged with culpable homicide.

If these 3 factors are present, the accused is said to have stood in jeopardy, i.e. in danger of having been convicted. Thus, there must have been a trial or a prosecution followed by an acquittal. Regarding the concept of "a competent court", a conviction by a headman does not amount to a competent court - ***Mogatsi***. The remarks regarding "the same offence" above under *autrefois convict* also applies here.

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. Should he be acquitted, he may therefore plead *autrefois acquit* when subsequently charged on an amended charge. If the accused has previously been acquitted on an indictment for murder and is now indicted on the same set of fact and convicted of assault, he may avoid conviction with a plea of *autrefois acquit*. The reason being that on a charge or murder, he could have been convicted of assault. Even where the charge is not a competent verdict, but is substantially the same, the accused can still raise *autrefois acquit*.

Principle: 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.

Question: Would the evidence necessary to support the second indictment have been sufficient to procure a legal conviction upon the first indictment? – ***Kerr***. Even if the answer is no, the court has a discretion to prevent the second trial from proceeding on the basis that a trial should not proceed in piecemeal fashion to the prejudice of the accused. Thus, if the accused could have been charged with the 2 offences at the first trial, he should have been so charged and he should not be tried in 2 separate trials.

"on the merits" means that the court must have considered the merits of the case, whether in fact or in law, and must not have acquitted the accused because of some technical irregularity in the procedure. Where a trial proves abortive because of such irregularity, the accused may be brought to trial *de novo* and the plea of *autrefois acquit* cannot prevail. Even when a court errs in law in acquitting the accused, the acquittal is on the merits. It isn't always easy to decide whether an irregularity is merely technical or not. Whether the acquittal can be said to have been "on the merits", depends on the nature of the irregularity – ***Moodie*** and ***Naidoo***.

With regard to defective charge sheets, Section 88 also affects this plea. Prior to the enactment of the section, the accused couldn't be convicted where the charge was fatally defective. However, since the enactment, conviction can take place, unless the accused objects to the charge and it is not amended. If the accused is acquitted on the merits in these circumstances, the plea of *autrefois acquit* must be upheld. The plea can be sustained even where it is based on the judgment of a foreign court – ***Pokela***. It is even possible to raise this plea after the commencement of the trial, where the existence of a previous acquittal could be discovered during the course of the hearing and after the accused has pleaded.

Section 106(4) and the pleas of *autrefois acquit / convict*

Section 106(4) provides, *inter alia*, that an accused who has pleaded to a charge is entitled to demand that he be acquitted or convicted. This may happen if the accused has pleaded, there have been several postponements, the State witnesses are still not available and the court refuses a further postponement. This can only occur if the accused have been 'in jeopardy'[18].

- **Pardon by the President**

In terms of Section 106(e), an accused may plead that he has received a pardon from President for the offence charged. President derives such powers from Section 84 of Constitution.

- **Plea to the jurisdiction of the court**

Such a plea is based on an allegation that the offence was committed outside the area of jurisdiction of the court. A plea of diplomatic immunity also falls under this section.

If, during the trial, it appears that the accused is before a court without jurisdiction, he is not entitled to an acquittal, but at the request of the accused the court will direct that he be tried before a proper court. If the accused fails to request removal, the trial must proceed and the verdict and judgment are valid.

- **Discharge from prosecution**

Section 204 of the CPA - Incriminating evidence by witness for prosecution

(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor-

[18] Example: If an accused pleads not guilty in a Magistrate's Court in terms of Section 122A, is committed for trial in the Regional Court, but it is withdrawn from that court before plea and sent back for retrial in the Magistrate's Court, such plea will not succeed.

> (a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness -
>
> (i) that he is obliged to give evidence at the proceedings in question; …
>
> (iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

This is an exception to the rule that a witness may not be compelled to answer any question which may expose him to a criminal charge – Section 203.

- **Lack of authority of the prosecutor**

This plea relates to the *locus standi* of the prosecutor to act and mostly occurs with private prosecutions where a municipality must, for example, brief a prosecutor to act. The prescription of an offence may probably also be raised with this plea.

- ***Lis pendens***

There is another criminal case pending against the accused. This plea is not recognised in the Code, but generally the present case is postponed until the pending case is completed. If the other trial is completed and a plea of *autrefois acquit / convict* doesn't become effective, the fact that the other trial took place becomes irrelevant.

- **Pleas in the case of criminal defamation**

These pleas are the same as the defences in a civil case.

- **Plea as to an order of court on unreasonable delay in a trial**

Section 342A provides that a court before which criminal proceedings are pending must investigate any delay in the completion of proceedings which appear to be unreasonable and which could substantially 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 for the delay;

→ whether anybody is to blame;

→ the duration of the delay;

→ the effect of the delay on the administration of justice, the accused or the witnesses; and

→ the adverse effects if the prosecution is stopped or discontinued.

If the court finds the delay to be unreasonable, the court may order the matter to be struck off the roll where the accused has not yet pleaded and that the prosecution not be resumed without the written instruction of the DPP.

3.5. After pleading, accused entitled to verdict

> **Section 106 of the CPA - Pleas**
>
> (4) An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.

In the following instances, the accused will not be entitled to acquittal or conviction:

(i) The Magistate has recused himself from the trial – ***Punshon v Wise***; ***Sulliman***.

(ii) Where separation of trials takes place – Section 157.

(iii) Where a trial is referred to the Regional Court or converted into a preparatory examination – Section 116 and 123.

(iv) The Magistrate dies, resigns or is dismissed – ***Mhlanga***.

(v) Where is appear that the accused is before the wrong court.

(vi) Where the DPP applies in terms of Section 13 for a private prosecution to be stopped and that the accused be prosecuted *de novo* by the State.

(vii) Where a youth is referred to the Children's Court – Section 254.

(viii) Where an enquiry is held in terms of the Prevention and Treatment of Drug Dependency Act, 20 of 1992.

(ix) Where the accused isn't capable of understanding the proceedings so as to make a proper defence due to mental disorder, he will be detained in a mental institution.

(x) Where an accused has pleaded in terms of Section 119 – ***Hendrix***.

(xi) Where the prosecution was stopped without the consent of the DPP.

4. MISCELLANEOUS MATTERS CONCERNING THE TRIAL

Section 35 of the Constitution – 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;

(d) to have their trial begin and conclude without unreasonable delay;

4.1. Who may attend the trial?

Basic features of an "ordinary court"

The court must be **independent** and **impartial** and must be served by a presiding judicial officer within the legal structures of the judicial authority as provided for by the Constitution – ***Freedom of Expression Ins v President***.

Meaning of "public trial"

As a general rule, the public has access to and may attend it.

Section 153 - circumstances in which criminal proceedings shall not take place in open court

- All courts have the power to exclude the public whenever it appears to be in the interests of the security of the State, good order, public morals or the administration of justice – S153(1).
- A court can order a witness to testify behind closed doors if it feels there is a likelihood of his coming to harm as a result of his testifying. The public may be excluded to protect his identity. However, the court cannot withhold the identity of the witness from the defence – S153(2).
- The public may be excluded, at the request of an accused, where he is charged with committing or attempting to commit an indecent act or extortion. Judgment and sentence must, however, be given in open court – S153(3).
- Sections 153(4), (5) and (6) provide safeguards against young people being adversely affected by criminal trials. No person other than the accused, his parent / guardian / legal representative or person whose presence is necessary for the conduct of the trial may be present at the trial of the person under 18 without special authority from the presiding officer. Persons under 18 can't attend any criminal trial unless they are actually giving evidence (in which case the court will be cleared of all members of the public) or unless they are specially authorised to be present.

In terms of Sections 158(2) and (3), a court may order that a witness or accused give evidence by means of closed circuit television or similar electronic media, but only if these facilities are readily available or obtainable

4.2. Witnesses

- **Securing attendance of witnesses**

The attendance of witnesses may be secured in the following ways:

(i) The witness is summoned by *subpoena* to appear in court by the prosecutor or accused. Sometimes the court may also cause witnesses to be subpoenaed. If a witness fails to obey a subpoena, he may be arrested and brought before court.

(ii) The witness is warned by the police to come to court (unlike a *subpoena*, ignoring it has no legal consequences).

(iii) The witness is summoned under the provisions of Section 205 to appear before a judge or magistrate to testify before the judicial officer.

- This procedure is at the disposal of the prosecutor or DPP to compel a witness who does not want to make a witness statement to come to court.
- If the witness is willing to make a statement he is under no further obligation to appear before the judicial officer
- If the witness refuses to testify or be sworn in, he can be treated as a recalcitrant witness in terms of Section 189.

(iv) Witnesses in court are often warned in court by the presiding officer to appear in court on a particular day. If the witness ignores the warning, he is in contempt of court.

When a person is likely to give material evidence in criminal proceedings and there is reason to believe that he is about to abscond, he may be arrested and committed to prison. In terms of Section 185, whenever the DPP thinks there is any danger that a potential state witness may be tampered with, intimidated or may abscond etc, he may apply to a judge in chambers for an order that the witness be detained until the conclusion of the case. The witness can be detained until the conclusion of the case or 6 months after his arrest. These powers apply in respect of murder, arson, kidnapping, child stealing, robbery etc. In terms of the Witness Protection Act, 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 report to

the director or a witness protection officer to be voluntarily placed in protection. The director may allow or refuse the application.

- **Recalcitrant witness**

A **recalcitrant witness** is someone who refuses to take the oath or answer questions.

Section 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 imprisonment of 2 years or if the proceedings relate to an offence referred to in Part III of Schedule 2, to a maximum of 5 years. This may happen repeatedly, but a witness will not be sentenced unless the judicial officer is convinced that the furnishing of such evidence is material and necessary for the administration of justice. Appeal is possible. The following requirements have to be met before a witness may be sentenced to imprisonment:

(i) the witness must have refused to take the oath or testify;

(ii) a proper enquiry must have been held into the refusal;

(iii) there must have been no "just excuse" for his failure or refusal.

A witness' sympathy with an accused's political ideals or fear for his safety and that of his family is not just excuses. In ***Attorney-General, Transvaal v Kader*** 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.

Section 189 proceedings are not trials, but they are still judicial proceedings and the rules of justice must be complied with. Thus, the witness has the right to prepare for the proceedings and to have legal representation.

4.3. **Adjournment (postponement)**

If necessary, a court may adjourn or postpone a case till a later date – Sections 168 and 169. The court's powers to do so are regulated by Section 170. When the court considers any application for postponement, whether it be by the State or the defence, the following basic principles have to be considered:

- It is in the interests of society that guilty men should be convicted and not discharged due to error which could have been avoided had the case been adjourned; and
- That an accused is deemed to be innocent and therefore has the 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 judicially exercised. If a refusal to adjourn amounts to the exclusion of relevant evidence, the conviction will be set aside. If an accused's legal representative is absent and it isn't due to the fault of the accused, the case must be adjourned or a subsequent conviction will be set aside. If an accused fails to attend court 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.

4.4. **Speedy trial**

The Constitution stipulates that it is the right of every accused to have his trial commence and conclude without unreasonable delay. Unreasonable delay is determined by various factors:

- the nature of the prejudice suffered by the accused;
- the nature of the case;
- the length of the delay;
- the reasons assigned to justify the delay and systematic delay.

Pre-trial incarceration of 5 months for a crime which has a maximum sentence of 6 months clearly points in the direction of unreasonableness, but it will be difficult to establish prejudice if an accused has constantly consented to postponements.

Section 342A now regulates the issue of unreasonable delays in criminal proceedings and court is entitled to take a number of factors into consideration in establishing what is unreasonable:

- duration and reason for the delay;
- whether any person can be blamed for the delay;
- effect of the delay on the accused, witnesses, the administration of justice and the victim;
- seriousness of the charge;
- actual or potential prejudice caused to the State.

Appropriate remedy for an infringement of the right to a speedy trial is to be considered in the light of the circumstances of the case.

5. JOINDER AND SEPARATION OF TRIALS

The State is ***dominis litis***, that is in control of the prosecution, meaning that it decides whether several accused should be tried together in the same trial or separately. After the State has decided to charge several accused together, an accused can request that his trial be separated from the rest under certain circumstances. The court can also request such separation ***mero motu*** (of own will).

5.1. Introduction

The following persons may be charged jointly:

- persons charged with the same offence; or
- persons charged with separate offences alleged to have been committed at the same time and place or at the same place and about the same time.

Joinder may become a problem for the prosecutor as no person can be compelled to give evidence in the trial in which he appears. For example, in the trial against A, the prosecutor may require his co-accused B as a witness against A, but he cannot call B as a witness.

5.2. Separation of trials

- **The common-law position**

  Where persons were jointly charged, a separation of trials was incompetent once the State had joined issue with the accused. Where all accused had pleaded not guilty, the prosecutor could not apply for separation so as to call 1 as witness against the other. However, where one or more had pleaded guilty, the view was that the State had not joined issue with the accused. If the trial was separated and the verdict was given in the case of the accused who pleaded guilty, he could give evidence against his previous co-accused.

- **The position under the CPA**

  A change was brought about in the common-law position by the provisions of Section 157 of the CPA. The court may now, at any time during the trial, on the application of the prosecutor, any of the accused of *mero motu*, direct that separate trials take place. Such application may be repeated throughout the trial. The effect of a separation is:

  (i) the case goes on against the remaining accused;

  (ii) the court does not give judgment in respect of those accused now being tried separately;

  (iii) the trial of the separated accused starts completely afresh on a new charge sheet
  - new charges may be added;
  - the case may be withdrawn against the separated accused.

  (iv) previous accused may be called as witnesses at the trial of their previous co-accused, but only after conviction and preferably after sentence, because the accused may try to minimise his role in the hope of getting a lighter sentence - ***Demingo***.

  (v) If an accomplice turns state witness in terms of Section 204, he will be freed from all liability to prosecution for such offence. It is better that one accomplice evades liability and the others are convicted than all of them go free due to lack of evidence.

- **Grounds upon which separation may be applied for**

  Application for separation is usually made by the defence. Separate trials is undesirable if the only purpose is to call as witness a co-accused and if such procedure gives rise to injustice, prejudice or apparent injustice to an accused. If so, convictions made will be set aside except in the case of state witnesses.

  (i) General rule: Persons charged jointly should be tried jointly – ***Bagas***.

  (ii) The judicial officer has a discretion whether to grant the separation or not, which must be exercised in a judicial manner by taking into account all relevant facts (***Bagas***) and the interests of justice.

  (iii) The mere possibility of prejudice is not sufficient to justify separation and it must be established that the joint trial will probably do the accused an injustice – ***Nzuza***.

  (iv) The fact that evidence is adduced at a joint trial which is admissible against 1 accused but inadmissible against another and that this evidence may incriminate the latter (e.g. a confession by the former) is an important, but not the only, consideration in an application for separation - ***Witbooi***.

  (v) The State should not be unduly prejudiced in the presentation of its case. If a real danger exists that a separation will hinder the State to such an extent that a miscarriage of justice may result, this consideration is decisive – ***Kritzinger***.

  (vi) Evidence which an accused may give in his own defence at joint criminal proceedings shall not be inadmissible against a co-accused, by reason only that such accused is for

any reason not a competent witness for the prosecution against such co-accused – Section 196(2) and ***Groesbeek***.

(vii) Where co-accused blame each other it is in the interests of justice to try them together to enable the court to hear all the evidence and allocate degrees of guilt – ***Solomon***.

(viii) If 1 of 2 or more accused have pleaded guilty, the best course is to separate trials and dispose of the trials of those who pleaded guilty first - ***Pietersen***. Where one accused pleads guilty and the other accused who pleaded not guilty needs him as a witness, their trials should be separated since the first accused cannot be compelled to testify as long as he remains a co-accused - ***Somciza***.

An application for the separation of trials in order to make a co-accused a compellable witness for the applicant, but where the co-accused is not willing to testify at the joint trial on behalf of the applicant, may be refused by the court as it would be unfair to compel the co-accused to testify at the applicant's trial after the separation – ***Lungile***.

5.3. Joinder of persons charged separately

At common law, it was not permissible to join the trials of persons who were charged separately and the consent of the accused did not change the position – they had to be tried separately.

Section 157(1) now provides that an accused may be joined with any other accused in the same criminal proceedings at any time before any evidence is lead in respect of the charge in question. This section permits joinder after arraignment, but before the prosecutor starts leading evidence. If evidence has been lead and joinder is desirable, the proceedings must start *de novo* – ***Kabele***. It the prosecutor objects to the joinder, his objection, as *dominus litis*, is final.

It has been held in ***Ngobeni*** that other accused may be joined after explanation of plea and questioning of an accused. The court must, however, fully inform the accused of all that has already taken place in court before asking him to plead.

6. THE PROCESS OF THE TRIAL

6.1. Introduction

The CPA 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 judicial officer must be obeyed by the parties, court staff and public, who are liable to be committed or fined for contempt of court for willful disobedience. As stated in **Sussex Justices**, it is of fundamental importance that justice must be done and be seen to be done. One facet of this is that witnesses and accused persons should be treated courteously by the court, the defence and the prosecution. The standards which a judicial officer should maintain in the questioning of witnesses and the accused have been summarized in ***Mabuza*** as follows:

- Court shouldn't conduct its questioning in such a manner that its impartiality can be questioned or doubted.
- Court shouldn't 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.
- Court shouldn't intimidate or upset a witness or the accused so that his answers are weakened or his credibility shaken.
- Court should control the trial in such a way that its impartiality, its open mindedness, its fairness and reasonableness is manifest to all who have an interest in the trial, in particular the accused.

A judicial officer can only properly fulfil his demanding and socially important duties if he guards against his own actions, is attentive to his own weaknesses, personal whims and opinions and continually restrains them.

6.2. The case for the prosecution

- **Opening the State's case**

Section 150 of the CPA - Prosecutor may address court and adduce evidence

(1) The prosecutor may at any trial, before any evidence is adduced, address the court for the purpose of explaining the charge and indicating, **without comment**, to the court what evidence he intends adducing in support of the charge.

This is called the opening statement and is heard after arraignment is complete. It only applies if the accused pleaded not guilty and the prosecutor intends to lead evidence. It is deemed unnecessary in simple cases, but can be very helpful to the court in complicated cases. 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. Any reference to inadmissible evidence or contentious matters, which may prejudice the case of the accused, should be avoided.

Evidence for the State

Language

Section 35(3)(k) of the Constitution provides that every accused has the right to be tried in a language which he understands or to have the proceedings interpreted to him. The accused must understand the language used by the witnesses. If the accused doesn't understand the language of the witness, an interpreter must be used. If the accused leads the court to believe he understands the witness, he will have difficulty appealing on the ground that he did not understand the proceedings. If the interpreter is not sworn in, it amounts to an irregularity which may render the trial abortive.

Evidence must be given *viva voce*

Evidence must be given orally, in open court, in the presence of the accused, except insofar as specific provision to the contrary is made by law:

(i) Section 212

Evidence of certain formal matters may be given on affidavit (eg pathology and fingerprint reports) subject to the right of the opposing party, either the accused or the State, to object against such evidence. The prosecutor shall read out such document in court, unless the accused has a copy or dispenses with the reading thereof. Statements made by witnesses at a preparatory examination may not be proved in this manner, even where the accused admits the facts in the record.

(ii) Section 213

A written statement made by a witness will, in certain circumstances, be admissible as evidence to the same extent as oral evidence given by such person. Such statement must be served on the opposing party, who may, at least 2 days before the commencement of the proceedings at which the statement is to be tendered object.

If the opposing party is the accused, the statement must be accompanied by a written notice stating that he has the right to object. If no objection is raised, the statement may be admitted as evidence "upon the mere production thereof". The court may, however, *mero motu* or at the request of either the State or the accused still call the witness. The accused himself cannot give a statement in terms of Section 213 instead of testifying.

(iii) Civil Aviation Offences Act, 10 of 1972

This Act relates to 'hi-jacking' and other offences in connection with aviation. A statement in writing made on oath outside the Republic by a person whose evidence is required and who cannot be found in the Republic, may be submitted as evidence. Such statement must have been made in the presence of the accused and to a competent judicial officer or consular officer.

Preparatory examination

State may read out the accused's evidence or statement made at a preparatory examination. If the accused wants to give evidence, he must give evidence *viva voce* from the witness box, where he is subject to cross-examination. Even where the accused gave no evidence at the trial, statements from the preparatory examination will form part of the record and must be considered by the court.

General rules relating to witnesses

(i) Prosecutor isn't obliged to call all witnesses who testified at the preparatory examination.

(ii) The prosecutor is also not obliged to call witnesses whom he believes to be untruthful, hostile to the prosecution or in league with the accused.

(iii) When a state witness gives evidence at variance with a statement in the possession of the prosecutor must, it the variance is a material one, immediately make the statement available to the defence or, where the accused is unrepresented, disclose the discrepancy to the court.

(iv) The prosecutor is free to call any witnesses, even if they did not give evidence at the preparatory examination or their names do not appear on the list which an attorney-general has to supply to an accused who is arraigned in a superior court. Where such a witness is to be called, the accused should be given notice and a copy of the witness's statement should be given to the defence. If notice is not given, a postponement will probably be granted to the accused to prepare on such new evidence.

(v) Once a State witness is testifying, the prosecutor may not interview the witness privately, at least not without first informing the court and explaining the reason.

(vi) Prosecutor must present to court (accused is unrepresented) any information favourable to the accused which may come to his notice or to the accused if he represented.

Right to cross-examination

The defence is entitled to cross-examine every state witness, including a co-accused who has elected to testify. An unrepresented and unsophisticated accused must be assisted with his cross-examination. All accused must be given sufficient opportunity to fully cross-examine each witness. There must be no suspicion that the defence was hampered in its cross-examination. Where the accused has more than 1 legal representative, only 1 may cross-examine. Undefended accused are usually unaware of the proper way in which to conduct their defence and court should treat them with careful patience. Court should assist a struggling undefended accused with his cross-examination

The accused can ask for a witness to be recalled for further cross-examination and should only be refused by the court is it is clearly a delaying tactic or frivolously made. Where an accused has already cross-examined the State witnesses and put his defence to them, he suffers no prejudice if the court refuses his request. Where the defence proposes to submit another version of any fact or event testified to by a State witness, there normally rests a duty on the defence to put its version to the State witness whose evidence it will contradict.

Even if the accused doesn't cross-examine a witness, he can still dispute the truth of that evidence. A decision not to cross-examine or put his version to a witness, is a dangerous one, because the failure implies an acceptance of the witness's version, and should, thus, only be taken after careful consideration.

Re-examination

After a witness has been cross-examined, the State may then re-examine these witness on any matter arising from cross-examination. The purpose is to clear up any misunderstanding which may have arisen during cross-examination. The purpose is not to lead new evidence. This can only be done with the leave of the court.

Close of State's case

After all the evidence for the State has been disposed of, the prosecutor must close the case. The presiding officer can't close the State's case. However, if the prosecutor's application for a postponement is refused and he refused to presents further evidence or to close the State's case, it is presumed that the State's case is closed. The judicial officer should continue with the proceedings as if the prosecutor has indeed closed the State's case - ***Magoda***.

6.3. Discharge of accused at the close of the State's case

Section 174 of the CPA - Accused may be discharged at close of case for prosecution

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.

The concept "no evidence" means no evidence on which a reasonable man could properly convict - ***Shein***. This includes only evidence which is led by the State and doesn't include admissions by the accused – ***Beckett***. Where the State's evidence is of such a poor quality that no reasonable man acting carefully could convict thereon, the accused has to be discharged – ***Schwartz***. When there are conflicting inferences to be drawn from the evidence, the judges doesn't at this stage make use of the rules of logic laid down in ***Blom***'s case. These rules are applied at the end of the trial to ascertain whether the accused is guilty beyond a reasonable doubt – ***Cooper***.

Test: Whether the reasonable man might convict.

There are 2 levels on which a judge exercises his discretion - ***Kritzinger***:

- The presiding officer must decide if there is sufficient evidence to place the accused on his defence;
- If the answer to the first is no, the presiding officer must decide whether he nevertheless intends putting the accused on his defence or not.

If the second part of the test affords the judicial officer a discretion, it must be exercised judicially. It would not be a judicial exercise of this discretion to refuse to discharge an accused person if the case against him depended solely upon the evidence of an accomplice. However, it would be unfair to subject the accused, against whom nothing has been proved, to a long and costly trial. In such case, the court would probably discharge the accused.

In ***Mathebula*** it was held that it would constitute a gross unfairness to the accused to take into account possible future evidence which may or may not be tendered against him by himself or others and for that reason decide not to set him free, after the State has failed to prove any evidence against him. It would deny the accused the right to silence, be presumed innocent and a fair trial.

In ***Makofane*** it was held that what the Constitution demands is that the accused be given a fair trial, and fairness is ultimately an issue which has to be decided by the presiding officer. In ***Ndlangamandla*** it was held that the provisions in the Constitution with regard to presumption of innocence, right to remain silent and right not to testify have at least 3 practical consequences on impacting on Section 174:

- The court has a duty *mero motu* to raise the issue of the possibility of discharge at the close of the State's case where it appears to the court that there may be no evidence that the accused committed the offence.
- Credibility, where it is of such a poor quality that no reasonable person could possibly accept it, should be taken into account at this stage.
- Whether there is a reasonable possibility that the defence evidence may supplement the State case where there is no evidence on which a reasonable man may convict, has no application.

Appeal and review

Refusal of the court to discharge the accused upon the conclusion of the State's case is not in itself a ground for appeal or review, except where the refusal amounts to an irregularity whereby the accused was prejudiced. An irregularity would be if the court exercised its discretion improperly. If there is only 1 accused, all he needs to do is close his case and not give incriminating evidence against himself. Where there is more that 1 accused, the possibility of prejudice is higher because co-accused may incriminate each other.

If an accused's application is granted, the DPP may appeal in terms of Section 310 and only on a question of law. If the appeal is upheld, the case is remitted to the court *a quo* and the trial is proceeded with.

Accused's rights

There is no rule of practice that the accused must be informed of his right to apply for discharge. The court may dismiss the accused *mero motu* and, where accused is undefended, should do so and failure to do so will be irregular – ***Zimmerie***; ***Legote***. The court has a duty to inform an unrepresented accused in a trial where there are multiple charges of his right to apply for his discharge in respect of a charge for which there is no evidence upon which the accused can be convicted – ***Manekwane***.

6.4. **The defence case**

- **Accused's rights to be explained**

  If the accused is not discharged at close of State's case, the procedure set out in Section 151(1) must be followed. The presiding officer must ask the accused if he intends leading evidence for the defence. In ***Vezi*** the rule was extended: Not only must an undefended accused be informed that he is entitled to call witness or to give evidence himself, but also that he has the right to remain silent. The purpose of the explanation, especially in the case of unsophisticated and undefended accused, is to counteract the accused's relative lack of skills in litigation – ***Zulu***. If the accused is not adequately informed of his rights and this is not properly recorded, the conviction may be set aside. It is the task of the presiding officer to explain the rights of an unrepresented accused and such duty cannot be delegated to an interpreter – ***Malatji***.

  In terms of Section 35(3)(h) of the Constitution, every accused has a right to a fair trial, which includes the right to remain silent and not to testify. Sections 35(3)(i) and (j) further stipulates that every accused has the right to adduce and challenge evidence and not to be compelled to give self-incriminating evidence. The concept of "a fair trial" embraces not only fairness to the accused, but also to society as a whole. It involves, *inter alia*, the right to be tried within a reasonable time, the right to legal representation, the right to be fully informed of the charge laid, the right to cross-examine witnesses, the right to call witnesses and the right to have evidence excluded in certain circumstances.

  If the accused experiences difficulty during cross-examination, the court must assist him in clarifying the issues, formulating the questions etc. Where he fails to cross-examine a witness due to ignorance, the presiding officer should question the witness to reduce the risk of a failure of justice. If the accused intends to testify, he must be called as a witness before any other witness for the defence unless good cause has been shown. If he only decides to give evidence after some of his witnesses have testified, the court may draw such inferences from his conduct as may be reasonable in the circumstances. The accused must also be informed that he can give evidence from the dock – ***Mhalati***. It is very rare that the defence makes an opening statement, as the accused's version will in any event be presented to the court.

- **Witnesses for the defence**

  It is undesirable that a witness be present in court before he gives evidence, as this may affect the weight of his evidence – ***Manaka***. Once the accused has placed his case in the hands of

counsel, the latter has complete control. If counsel persuades him not to give evidence, the accused may not challenge the correctness of the verdict on this ground on appeal. If the accused insists on going into the witness-box in spite of his counsel's advice not to do so, counsel should withdraw from the case.

Where an accused is not intellectually developed and is unrepresented, the court must be very careful in refusing a request to call a witness and must make sure that such witness cannot possibly adduce relevant evidence. Court should, thus, not refuse an undefended accused's request to call witnesses even if the court believes the accused is adopting delaying tactics.

The prosecution will be entitled to cross-examine each witness called by the accused and the accused, if he himself testifies. The prosecutor should act courteously towards the accused and without prejudice. He should not behave in an intimidating, offensive, or mocking manner. Questions should be asked in such a way as to afford the accused full opportunity to answer them. A presiding officer is entitled to question witnesses for the defence in order to clarify unclear aspects of the case, but he may not cross-examine them. Important here is the manner of questioning and the presiding officer should not descend into the arena.

- **The accused's right to silence**

  The accused can't be compelled to give evidence on his own behalf. An adverse inference may, in appropriate circumstances, be drawn against the accused, if he fails to give evidence on his own behalf - ***Dube***. Such circumstance would be if the exercise of this right leaves the *prima facie* evidence of the State uncontested when it will be said that the State has proved its case beyond a reasonable doubt and the accused has to be found guilty.

  However, no adverse inference can be made against the accused merely by virtue of his exercise of his right to remain silent and any finding that an accused's silence constitutes evidence of guilt will be directly in conflict with the Constitution. Where there is direct evidence implicating the accused, his failure to give evidence tends to strengthen the State case, because there is nothing to gainsay it.

- **Unsworn statement by the accused**

  Until 1977 an accused as entitled to make an unsworn statement from the dock instead of giving evidence under oath. The right has now been abolished and an accused must either testify under oath or not at all.

- **Formal admission by the accused**

  An accused or his counsel may admit any fact placed in issue. This absolves the State of the duty of proving such fact.

- **Re-examination of witnesses**

  After every witness has been cross-examined by the other party, the party who called the witness may re-examine the witness on any matter raised during the cross-examination of that witness.

6.5. **Rebutting evidence by the State**

If the defence, during the course of its case, introduces new matter which the prosecution could not reasonably have been expected to foresee, the State may be permitted, after the close of the defence case, to present rebutting evidence in respect of such matter - ***Lipschitz***. Where, however, the defence gave an indication of the matter while cross-examining State witnesses or otherwise, the court will generally not allow the State to lead rebutting evidence after the close of the defence case - ***Lukas***. If the prosecution reasonably requires a postponement in order to obtain evidence dealing with the matter or to cause investigations to be made, the prosecutor should not close his case, but apply for the postponement. If the application is reasonable, the postponement will be granted and the necessity for leading rebuttal evidence can be obviated.

6.6. **Calling or recalling witnesses by court an questioning by court**

Principle: An accused who is in reality guilty should not be discharged because of some defect in the State's case, nor should an innocent man be convicted because of some omission, mistake or technicality.

A duty is cast on the court by Section 167 to subpoena and examine or recall and re-examine any person if his evidence appears to the court to be essential to the just decision of the case. Thus, the court has a discretion as to whether it will call such a witness. However, this power should be used sparingly, because it is generally not the function of the court to build up a case which a lax prosecutor has neglected to establish. Even such a prosecutor can, with the consent of DPP, convert a trial into a preparatory examination, if the State's case is going badly. If the judge exercises his discretion improperly, this would constitute an irregularity, which may result in the conviction being set aside. If the court does call a witness in terms of Section 167, the party

adversely affected by his evidence should be given an opportunity of rebuttal and any party desiring to cross-examine such a witness should normally be allowed to do so – ***Chili***; ***Soni***.

Our courts have interpreted Section 167 in a way that leaves no doubt that our legal system is accusatorial. The presiding officer is entitled to ask questions to clarify an issue, but it is undesirable that he should "descend into the arena". Where an accused is unrepresented, however, the presiding officer may take some part in the questioning of witnesses. Lenghty questioning of defence witnesses *per se* does not amount to an irregularity. Questioning of an accused by the court, leading to self-incrimination or aggravation of punishment, is irregular unless the accused chose to testify. However, for the purpose of sentence, the presiding officer may endeavour to elicit information favourable to the accused.

6.7. Recording of evidence

The presiding officer has the duty to ensure that the evidence and all proceedings are faithfully recorded. It often happens that a witness demonstrates an incident in court and it is the duty of the presiding officer and of counsel to ensure that the demonstration is described in detail in the record. Where the age of the accused is important, the presiding officer should properly record same so that the method of age determination appears adequately from the record. If the presiding officer has made a mistake in the recording of the evidence, he can't correct the mistake after sentence as he is ***functus officio*** (no longer in office). The High Court alone can correct mistakes.

6.8. Address by prosecutor and defence

Section 175 of CPA - Prosecution and defence may address court at conclusion of evidence

(1) After all the evidence has been adduced, the prosecutor may address the court, and thereafter the accused may address the court.

Such an address by the accused is not obligatory, but should be made. If the accused is deprived of his opportunity to address the court by the conduct of the judicial officer, it will be a fatal irregularity, unless it is clear he has not been prejudiced. Where an accused refuses to address the court, he abandons such right – ***Vermaas***.

7. THE VERDICT

7.1. Introduction

After the prosecutor and the accused have addressed the court, the court must found him guilty or not, which is no easy task. Understandably, the trial is sometimes postponed so that the judicial officer can analyse all evidence placed before court before reaching a decision. Once it has been reached, the verdict will be delivered on whether the State has proved the guilt of the accused beyond a reasonable doubt and if so, court will indicate the offence(s) of which he had been found guilty. It need not necessarily be the same offences he was charged with.

A **verdict** is a verbal explanation of the court's finding and the reasons for it.

7.2. Competent verdict

General Rules

Section 270 of the CPA - Offences not specified in this Chapter

If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so 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.

All the essential elements of the lesser offence must be included in the offence actually charged and must be proved. An accused can't be convicted of a lesser offence as a sort of consolation prize to the State, where he has not been shown to have committed it. To avoid prejudice to the accused, he should be informed of the competent verdicts which can be brought against him. An undefended accused should in some manner be forewarned of the pitfalls of a competent verdict – ***Jasat***.

The right to be informed with sufficient detail of the charge in terms of Section 35(3)(a) of the Constitution includes the right to be informed of competent verdicts on a charge. A failure to inform an accused of a competent verdict amounts to a violation of Section 35 and is a fatal irregularity - ***Chauke***. In ***Fielies***, ***Masita*** and ***Mwali***, however, it was held not to be a fatal irregularity. The primary investigation is whether the accused had a fair trial in the particular circumstances.

Specific provisions

(i) Verdict of guilty of attempt or being an accessory after the fact

In terms of Section 256, any person charged with an offence may be found guilty of attempt to commit that 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[19]. After having been tried on a charge of having committed any offence, a person may not be retried for having attempted to commit such an offence as he has already been in jeopardy of being convicted of such attempt.

(ii) Competent verdicts on a charge of murder and attempted murder – Section 258

- Culpable homicide;
- assault with intent to do grievous bodily harm;
- common assault;
- robbery;
- public violence;
- pointing a firearm, air-gun or air-pistol;
- exposing an infant; and
- disposing of the body of a child with intent to conceal the fact of its birth.

(iii) Competent verdicts on a charge of rape or attempted rape – Section 261

- Assault with intent to do grievous bodily harm;
- indecent assault;
- common assault;
- incest;
- the statutory offence of unlawful carnal intercourse, or of committing any immoral or indecent act, or the soliciting or enticing of an immoral or indecent act with a girl under a specified age; and
- the statutory offence of unlawful carnal intercourse, or of committing any immoral or indecent act, or the soliciting or enticing of an immoral or indecent act with a female idiot or imbecile.

(iv) Competent verdicts on a charge of robbery – Section 260

- Assault with intent to do grievous bodily harm;
- common assault
- pointing a firearm, air-gun or air-pistol in contravention of any law;
- theft;
- receiving stolen property knowing it to have been stolen;
- possession of goods without being able to give a satisfactory account of such possession; and
- acquiring or receiving stolen property without having reasonable cause to believe that the person disposing of the property is the owner of duly authorised by the owner.

In each of the above cases, the evidence necessary to constitute the lesser offence must be before the court, since the provisions in question are not intended to empower the court to convict the accused without the necessary proof of his guilt on the lesser offence.

7.3. **Amendment of verdict**

When by mistake, a wrong judgment or sentence is delivered or passed, the court may, before or immediately after it is recorded, amend the judgment or sentence – Sections 176 and 298. These sections are only applicable when the mistake made by the court is one inherent in the judgment or sentence[20]. Where incorrect facts have been placed before a court upon which the court has imposed as proper sentence, the court may not correct such sentence as being a wrong sentence in terms of section 289 when the truth is later discovered – ***Swartz***.

“Immediately after” indicate a reasonable period depending on the circumstances. The amendment of a judgment on the day after it was delivered is, however, not an amendment within the ambit of this section - ***Mitondo***.

After a reasonable time has elapsed, the judicial officer is *functus officio* and he no longer has the power to amend the mistake. He ought to report the position to the High Court and request review. The Magistrate is not authorised *mero motu* to set aside a wrong conviction – ***Malesa***. However, he is permitted to effect linguistic or other minor corrections to his pronounced judgement without changing the substance thereof.

[19] For example: on a charge of rape, he may be convicted of attempted indecent assault.

[20] For example: where the court has no jurisdiction or if the judgment is unrelated to the merits of the case

8. THE SENTENCE

8.1. 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 factors. The judicial officer has to make a value judgment and determine how much weight every factor should be afforded, which must then be converted into a sentence.

8.2. Concepts

- **Sentence**

  The sentence is any measure applied by a court to the person convicted of a crime and which finalises the case, except where specific provision is made for reconsideration of that measure. A caution amounts to a sentence.

- **Punishment**

  Punishment is something which is unpleasant to experience except that it is limited to measures imposed by a court after conviction. Some sentences don't constitute punishment (e.g. suspended sentences and a caution) and some forms of punishment aren't sentences (e.g. community service imposed as condition for the suspension of sentence).

- **Sentencing**

  Sentencing is the imposition of a sentence by the court on a particular offender.

- **Offender / criminal / accused**

  The person who is accused or convicted of having committed the crime.

- **Offence / crime**

  The action which caused the offender to be tried and sentenced in court.

8.3. The sentence discretion

A court has wide ranging powers to impose sentences and the court exercises a discretion in deciding how to exercise these powers. The sentencing discretion may not be exercised arbitrarily, but rather reasonable and judicially - ***Pieters***. The advantage of a wide discretion is that the court can adapt their sentence to provide for the slightest differences between cases. The disadvantage is that, should the same case be hear by two different judicial officer, there may be a wide difference in the sentences that are imposed. This creates conflict with people's right to equality before the law and this inconsistency was described in ***Marx*** as unjust. In exercising its discretion, the court must be merciful and must take a number of factors into account:

- the jurisdiction of the court;
- the kind of punishment;
- the maximum or minimum penalty that may be imposed by law for a particular offence;
- the personal circumstances of the accused (e.g. first offender, youthfulness etc);
- the interests of the community (how frequently the offence is committed); and
- the crime itself (e.g. how serious it is, the circumstances under which is was committed).

8.4. General principles with regard to sentencing

In a nutshell as set out in ***Rabie***, the punishment must fit the criminal as well as the crime and be fair to society with a measure of mercy, according to the circumstances. The process which should ensure this is known as personalisation or individualisation of punishment.

All sentences should take into account the main purposes of punishment, namely retribution, deterrence, prevention, and rehabilitation.

8.5. Penalty Clauses

Most statutory offences are enacted with an attendant penalty clause. Imprisonment may normally be imposed for these crimes only if specifically provided for. The same goes for a fine. If a penalty clause provides for a fine or imprisonment, the court has a discretion to impose either but not both.

- **The Adjustment of Fines Act**

  All penalty clauses providing for a fine must be read together with the provisions of the Adjustment of Fines Act 1991 ("AFA"). The ratio between fine and imprisonment is determined by the standard jurisdiction of the Magistrates Court which at present is R 60,000 for 3 year's imprisonment. A penal provision allowing for a penalty of "not more than R 1,000 or 6 months' imprisonment" should be read with the AFA as providing for "not more than R 10,000 or 6 months' imprisonment.

Minimum Sentences

Statutes that prescribe minimum sentences have been few and far between, but the position has changed with the passing of Section 51 of the Criminal Law Amendment Act 1997 ("CLA"). This provision provides for the imposition of minimum sentences for a wide range of the more serious crimes, e.g. for premeditated murder and rape where aggravating factors are involved, life imprisonment is prescribed. Specific minimum terms are prescribed for a wide range of other crimes, especially when committed by gangs or crime syndicates or law enforcement officers. Only High Courts and Regional Courts may impose these sentences. The sentencing courts are also not allowed to suspend any portion of the minimum sentence.

If the sentencing court is satisfied that there are "substantial and compelling circumstances" justifying a lesser sentence than that prescribed, it may impose such lesser sentence. In the case of ***Malgas***, the court decided that "substantial and compelling circumstances" should be interpreted to have the following effect: the sentencing court should consider the sentences prescribed in the CLA as a point of departure, which should normally be imposed and not be departed from lightly.

If the cumulative effect of all the mitigating factors justifies a departure the court should consider doing so. Also, if the imposition of the prescribed sentence would amount to an injustice, the court should intervene and impose a lesser, appropriate sentence.

The prescribed minimum sentences are not applicable to an offender of under 16 years when the offence was committed. If the court decides to impose such a sentence on an offender between 16 and 17 years old, it will have to record its reasons for doing so. This discourages the courts from imposing the minimum sentences on children - ***Brandt***. In Dodo the court held that, as the courts are allowed to deviate from the prescribed sentences in the presence of substantial and compelling circumstances, it prevents the punishment being disproportional to an offence and, therefore, Section 51 is not unconstitutional.

8.6. **The pre-sentence investigation**

Section provides for the court to allow evidence which will assist the court in determining a proper sentence. Traditionally the State and the accused supply this information.

Previous convictions

After conviction, the State will indicate whether the accused has any previous convictions. This is usually proved by handing in the accused's fingerprint record (the so-called SAP69), which, according to Section 272, is *prima facie* proof of previous convictions.

Certain previous convictions fall away after 10 years, if the offender has not committed a fairly serious crime within that period. The convictions that fall away are those for:

(i) less serious crimes (where more than 6 months imprisonment without a fine may not be imposed); and

(ii) any offence for which the passing of sentence was postponed or the accused merely cautioned and discharged.

The accused on sentence

The accused is given the opportunity to supply evidence in mitigation of sentence. After all the evidence on behalf of the accused has been led, the State will normally also be allowed to lead evidence and address the court on sentence.

The duty to supply information

In ***Khambule*** and ***Njikaza*** it was considered a serious irregularity for court to ask the accused whether he had any previous convictions, if State doesn't produce a list of previous convictions. The court cannot exercise its discretion properly if all the information necessary to make such a decision is not at the court's disposal.

8.7. **Absence of judicial officer**

Criminal proceedings are often postponed after conviction and before sentencing to allow the State to obtain a list of the accused's previous convictions. Section 275 provides that any judicial officer of the same court may pass sentence after consideration of the evidence where the judicial officer is absent. The judicial officer must be "materially absent" – ***Lukele***.

8.8. **Mitigating and aggravating factors**

The court must take mitigating and aggravating factors into consideration. A large number of such factors have already been accepted by our courts, such as pre-meditation, abuse of trust, presence of remorse, whether the offender is married or employed, etc.

Youth as a mitigating factor

Generally, juvenile offenders are sentenced more leniently than adults. 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 - ***Solani***.

- **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. It is believed that the heavier the penalty is, the more likely it is to deter the offender from committing more crimes.

8.9. **The unconstitutionality of the Death Penalty**

In ***Makwanyane*** the court found the death penalty to be unconstitutional. The decision revolves around the interpretation of Sections 8(1) (equality before the law and equal protection of the law), 9 (right to life) and 10 (right to dignity) of the Constitution. Court found that any punishment should meet the requirements of these provisions which, in turn, would give meaning to the prohibition in Section 11(2) against cruel, inhuman and degrading treatment or punishment.

The court looked at the extent to which the death penalty is still in force internationally. The death penalty is not prohibited by public international law, but has been abolished in many countries around the world. The court found the death penalty to be cruel, inhuman and degrading and, therefore, unconstitutional. ←

8.10. **The forms of punishment which may be imposed**

Section 276 lists the sentences which may generally be passed:

- Imprisonment;
- committal to a treatment centre;
- a fine; and
- correctional supervision.

Two further requirements that should be added to the list:

- Section 290 - the various ways in which a juvenile may be treated;
- Section 297 –
  - (i) the suspension of a sentence on various conditions;
  - (ii) the conditional / unconditional postponement of the imposition of a sentence; and
  - (iii) a caution and discharge.

Below follows a detailed discussion.

- **Imprisonment**

  Primary decision: Whether to remove the offender from society or whether to punish him within the community, i.e. alternatives to imprisonment. .

  The decision not to imprison is often based on the presence of one or more mitigating factor such as:

  (i) youthfulness; and
  (ii) no criminal record.

  Juveniles and first offenders are not readily imprisoned. It is felt they should be given a second chance to show they can live a life without crime. This doesn't mean that they can't be imprisoned however.

  Aggravating factors calling for imprisonment include:

  (i) the seriousness of the particular offence;
  (ii) any previous convictions; and
  (iii) the dangerous nature of the criminal.

  The decision to imprison a person results in the particularly drastic outcome of taking away a person's liberty and our law provides little guidance in the making of the decision.

  The various forms of imprisonment

  The various forms are really descriptions of different terms of imprisonment and whether any of these forms may be imposed in a particular instance depends on the statutory provisions, applicable to the crime, which regulate the imposition thereof.

  (i) Ordinary imprisonment for a term determined by the court

  As 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 by penalty clauses for the particular crime. In the case of common law crimes, only the general jurisdiction applies:

  - Regional Courts → Limited to 15 years;
  - District Courts → Limited to 3 years;
  - Superior Courts → Any term, subject to the minimum terms of imprisonment.

For statutory crimes, general jurisdiction also applies subject to the penalty clause in the statute. Quite a number of these provisions empower the lower courts to impose terms exceeding the general jurisdiction[21].

Section 284 of the CPA - Minimum period of imprisonment four days

No person shall be sentenced by any court to imprisonment for a period of less than four days unless the sentence is that the person concerned be detained until the rising of the court.

In ***Msimango*** it was held that a court 'rises' as soon as it has disposed of a case and the offender is released before the next case is called – to call this 'imprisonment' is a fiction.

After the abolition of the death sentence, sentences of up to 40 years are quite readily imposed for a very serious crime where it rarely imposed more than 25 years'. Some courts overdo it though, by imposing sentences that are obviously longer than the offender could possibly be expected to live. Thus, in ***Nkosi*** the court stated that when a sentence longer than the life expectancy of the prisoner is imposed, the prisoner will have no chance of being released on the expiry of the sentence and thus, the sentence will be cruel, inhuman and degrading.

Prisoners with sentences of more than 1 year may only be considered for release on parole after having served half their sentences. 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 or correctional supervision.

The court may also now determine a 'non-parole period', which is a period fixed as part of the sentence during which the offender may not be placed on parole by the Department of Correctional Services. Only sentences of 2 years or more qualify and non-parole periods are limited to two-thirds of the sentence.

(ii) Imprisonment for life – Section 276

It can only be imposed by the High Courts. With the abolition of the death sentence, life imprisonment is the most severe sentence the courts can impose (used to be considered as a valuable alternative to the death sentence). Where an accused is required to be removed permanently from society, life imprisonment is the appropriate remedy.

Life imprisonment is an indeterminate sentence, because it is unknown for how long the offender will be imprisoned when it is imposed. In terms of the Correctional Services Act 1998 ("CSA") a prisoner must serve at least 25 years in prison, after which he may be considered for parole or on reaching 65 if at least 15 years have already been served. It is the possibility of parole that saves life sentences from being unconstitutional.

(iii) Declaration as a dangerous criminal – Section 286A

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 may not exceed the court's general jurisdiction.

The sentence may only be imposed if the court is satisfied that the person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, e.g. psychopaths.

The Case Management Committee dealing with the prisoner's case must submit a report to the Parole Board. The report must deal with the conduct of the prisoner, his adaptation, training, mental state and possibility of relapse into crime. The Board then recommend to the court how the matter should be dealt with, which court considers when the prisoner reappears in court along with the original sentence and any other evidence which may be adduced at the hearing. The court then decides whether to order the continued incarceration or the release of the offender. The release may be conditional and the sentence can be converted into correctional supervision.

(iv) Declaration as an habitual criminal – Section 286

A Superior or Regional Court may declare an offender to be an habitual criminal only if the court is satisfied that:

- the person habitually commits offences; and
- the community should be protected against him.

Both requirements must be met

[21] For example: Section 64(1) of the Drugs and Drug Trafficking Act, 140 of 1992, allowing sentences of up to 25 years' imprisonment for some offences.

Last condition prevents a person who repeatedly commits petty offences from being declared a habitual criminal. Court has no discretion to impose this form of imprisonment if:

- the offender is under the age of 18 years; and
- the court is of the opinion that the offender deserves imprisonment for a period exceeding 15 years.

It is a rule of practice not to declare an offender an habitual criminal unless he has been previously warned that such a sentence may be imposed on a further conviction - ***Mache***. A person, who is so declared, is kept in prison for at least 7 years after which he may be considered for parole. Such a prisoner should not be detained for more than 15 years.

(v) Periodical imprisonment – Section 285(1)

Prisoners are imprisoned for short periods only (between 24 and 48 hours at a time). After each period of incarceration, they are released to continue their normal existence. Sometimes called "week-end imprisonment", it can be imposed at any time and also during the week. The prisoner may not be held for long periods at a time in order to complete the total sentence quickly. Periodical imprisonment may be imposed on conviction for an offence other than an offence for which a minimum punishment is prescribed. It is imposed for a period expressed in hours and may not exceed 2,000 hours, but may also not be less than 100 hours[22].

(vi) Imprisonment from which the prisoner may be released on correctional supervision – Section 267(1)(i)

The Commissioner of Correctional Services is empowered to release any prisoner who has been imprisoned on correctional supervision for the remainder of his sentence. The sentencing court must make it clear that the imprisonment is imposed in terms of this provision to bestow this discretion on the Commissioner. This applies only if a maximum term of 5 years' imprisonment is appropriate for the offender's crime. The maximum term of this form of punishment is also restricted to 5 years.

After sentencing, the prisoner is evaluated immediately as he starts his prison term. The Correctional Supervision and Parole Board have to decide on the advisability of releasing the prisoner on correctional supervision. The prisoner has to serve at least one-sixth of his total sentence before he can be released. Previously, if the probationer didn't comply with the condition of his correctional supervision, he may be arrested and imprisoned to complete the rest of his prison sentence. The position under the current CSA is not clear.

(vii) Further provisions on imprisonment

Some statutes still provide for brief maximum periods of imprisonment, e.g. 1 month. Section 281(b) provides that any reference in a statute to a maximum period of imprisonment of less than 3 months must be construed as a reference to a period of 3 months in order to bring about uniformity.

Section 282 of the CPA – Antedating sentence of imprisonment

Whenever any sentence of imprisonment, imposed on any person on conviction for an offence, is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction, or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction, be antedated by the court to a specified date, which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified.

Courts have stopped short of simply subtracting such time from the sentence imposed because a simple subtraction will often results in an odd period of time which will almost invariably include days[23]. The reason for this unsatisfactory situation lies in the wording of Section 32(1) of the Correctional Services Act, 8 of 1959, which provides for a sentence of imprisonment to take effect on the day it is passed, and which prevents the sentence being ante-dated in any way – ***S v Hawthorne en 'n Ander***. In short, it is the backdating of a sentence.

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[22] For example: In a recent case, a Magistrate sentenced the accused to 1,440 hours periodical imprisonment for failure to pay maintenance. He also permitted the prison authorities to reduce the sentence by 15 hours for every R 500 of the arrears being paid.

[23] For example: If an appropriate sentence were 20 years and an accused had spent 1 year, 2 months and 7 days of such period awaiting trial he would have to be sentenced to 18 years, 9 months and 23 or 24 days if effect were given to simple subtraction. Such a sentence would fall strangely on the public ear and would indeed appear absurd.

(viii) Reduction of sentence

Once an offender has been sentenced and the questions for review or appeal has been finalised, the matter is out of the hands of the court and the sentence can be modified only by the administrative action of the Department of Correctional Services.

(ix) The value of imprisonment

The advantage of imprisonment is that it enables the court to remove a person who constitutes a danger to society, from the community. The disadvantages are:

- it is very expensive (cost of imprisonment and support of next of kin);
- many of the people with whom the offender is incarcerated are hardened criminals (reduces prospects of rehabilitation);
- a prison environment isn't conducive to preparing the prisoner to live in a free society.

Fine

The sentence most commonly imposed in our courts for less serious offences.

(i) When are fines imposed

Courts exercise a wide discretion to impose fines. If a particular statute does not mention a fine in its penalty clause, the court may not impose it. The following factors are decisive for the decision whether to impose a fine or not:

- the crime should not be so serious that imprisonment is called for;
- the offender must have some financial means to pay the fine;
- with crimes committed for financial gain, a fine will indicate that crime does not pay.

(ii) The amount of the fine

The amount is usually left in the court's discretion depending on any relevant statutory provisions and the court's jurisdiction.

- District Courts → R 60,000
- Regional Courts → R 300,000

In assessing the quantum, the court should be guided by the accused's means. If the intention is to keep the accused out of prison, it would serve no purpose to impose a fine completely beyond his means - ***Ncobo***. However, his lack of means doesn't warrant so moderate a fine that it doesn't reflect the gravity of the offence in question - ***Bhembe***. The fine punishes every man differently according to his financial ability. If the accused doesn't have the means to pay a fine, an additional form of punishment should be imposed. 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. The exception is crimes for illegal gain, where the offender's real financial ability is usually unknown and the seriousness of the crime would be reflected in the amount of the fine – ***Ntakatsane***.

(iii) Determining the means of the offender

The court has to make purposeful inquiries to determine the means of the accused. If necessary, the accused will have to sell or pledge his assets to obtain the necessary funds – ***De Beer***. "Means" consists of cash, savings, monthly income and other possessions. 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 be taken into consideration – ***Nxumalo*** and ***Bhembe***.

(iv) Recovery of the fine

Various measures are imposed to recover the fine once it has been imposed:

- Imprisonment in default of payment

  Almost all fines are imposed with an alternative period of imprisonment already added to the sentence ("alternative imprisonment"). The period of imprisonment imposed may never exceed the limits of the court's jurisdiction. The ratio between the fine and the alternative imprisonment should always be rational – ***Tsatsinyana***. If the court imposes a period of direct imprisonment plus a fine plus, in the event of failure to pay the fine, alternative imprisonment, the total period of imprisonment may not exceed the maximum period that may be imposed by the court.

- Deferment of payment of the fine

  In terms of Section 297(5), court may defer payment of the fine or order its payment in instalments, but not for longer than 5 years after the imposition of the sentence.

- Further relief after the start of the prison term

  If an offender has started serving the alternative imprisonment, the court may release him earlier if he agrees to pay the rest of the fine. A prisoner undergoing alternative imprisonment may be released to correctional supervision.

- Other methods of recovery

  Section 287(2), 288 and 289 provide further methods: attachment and sale of movable property, deductions from salary, etc., but it is hardly ever utilised.

- To whom does the fine go?

  To the State, except in the case where statutory authority exists for a portion of the fine to go to the complainant.

Correctional supervision

A new form of punishment introduced in 1991, which entails the supervision of the offender with the view of correcting the wrongdoer and the wrongdoing.

(i) The nature of correctional supervision

It is a community-based form of punishment and is executed in the community where the offender works and lives. The standard measures of correctional supervision include:

- House arrest: Confinement at home. Exceptions would be to allow the probationer to go to work, do shopping and attend religious gatherings.
- Community service: Service rendered in interests of the community without receiving remuneration, e.g. cleaning parks, working in a hospital etc. - 16 hours service per month would typically required.
- Monitoring: Some state official checking whether the probationer actually complies with the conditions of sentence.
- Various other measures 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.

(ii) The various forms of correctional supervision

The various options in imposing correctional supervision:

- As a sentence by itself, but now without a report by a probation or correctional officer and it may not exceed 3 years.
- It can be imposed as a condition to a suspended sentence or to postponement of sentencing.
- Imprisonment followed by correctional supervision.
- When the Commissioner of Correctional Services is of the opinion that a prisoner is a suitable candidate to be released on community service in lieu of the remaining period of imprisonment.

(iii) The penal value of correctional supervision

Correctional supervision shouldn't be seen as a soft option, as it has a high penal content because of its various components. Penal content can be increased by increasing the number of hours for community service and reducing the hours the probationer is allowed outside the home. Thus it is not surprising that it has already been imposed for crimes such as murder and rape. However, because the sentence cannot exceed 3 years, it is not a sentence that readily lends itself to serious crimes - ***Ingram***. This decision was followed by a distinct move away from correctional supervision, but the pendulum might be swinging back slowly.

(iv) Factors influencing the imposition of correctional supervision

It may be imposed for any offence, including any statutory offence, and in conjunction with any other form of punishment. It is the type of person who committed the crime that will determine whether correctional supervision should be imposed and not so much the nature of the crime. There are 2 types of offenders:

- those that should be removed from society through imprisonment; and
- those that should be punished, but not removed from society.

Courts have stressed the rehabilitative value. When imposing correctional supervision, our courts must determine the composition of the sentence and the conditions may not be left to the discretion of the Department of Correctional Services.

(v) The execution of correctional supervision

It is executed by the personnel of the Department of Correctional Services in terms of the provisions of the CSA. If the probationer proves not to be a suitable candidate for community service, the Commissioner or probation officer should advise the court. If the court agrees, it may impose any other proper sentence.

Committal to a treatment centre

In terms of Section 296, an offender may be committed to a treatment centre in addition to or instead of any other sentence. The court must be satisfied that the accused is someone who manifest any of deviations, such as dependency on alcohol in consequence of which his own or his family's welfare is harmed, and an investigation is carried out to establish this. 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 Welfare.

Juveniles

(i) Introduction

Child offenders → Under 18 years

The recommendations of the **South African Law Commission's Report: Juvenile Justice** has to a large extent been accepted and included in the Child Justice Act, 75 of 2008 ("CJA"), which will come into operation no later than 1 April 2010.

(ii) Current general principles

Juvenile offenders → Under 21 years

Children → Under 18 years

Such offenders should not be punished as harshly as adult offenders would be. They should not be detained except "as a measure of last resort" and then for the shortest time possible. Child's best interest = paramount

(iii) Section 290

Section 290 of the CPA makes provisions for different methods of dealing with juvenile offender and, in the case of someone below the age of 21, the court may order that:

- he is placed under the supervision of a probation / correctional officer; or
- he be sent to a reformatory.

If he is younger than 18, he may also be placed in the custody of another suitable person. In addition, fines can also be imposed. No other combination of sentences is possible. Being sent to a reformatory or reform school is a severe punishment, which resembles imprisonment, and shouldn't be imposed without first obtaining a probation report on the offender and, generally, also not if the offender is a first offender. A court may order that the person, who is sent to a reform school in terms of this Section, be detained in a place of safety until the order can be put into effect.

(iv) New developments

Not prosecuted in criminal court

Child offender: Subjected to a number of conditions of diversion

Aim: Emphasising restorative justice and other community based measures.

Effect: Child offender will not have a criminal record.

Sentencing: Takes place in a Child Justice Court when the prosecution that a criminal trial is required for some appropriate reasons.

Section 68 of the CJA - Child to be sentenced in terms of this Chapter

A child justice court must, after convicting a child, impose a sentence in accordance with Chapter 10.

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.

(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.

Section 70 of the CJA - 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 of the CJA - 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.

(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)(i) 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 of the CJA - 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.

Section 73 of the CJA - 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.

Section 74 of the CJA - 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

(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.

Section 75 of the CJA - Sentences involving correctional supervision

A child justice court that convicts a child of an offence may impose a sentence involving correctional supervision -

(a) in the case of a child who is 14 years or older, in terms of section 276(1)(h) or (i) of the Criminal Procedure Act; or

(b) in the case of a child who is under the age of 14 years, in terms of section 276(1)(h) of the Criminal Procedure Act.

Section 76 of the CJA - 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 40 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 50 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. 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.

(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 No. 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 reappearance 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.

Section 77 of the CJA – 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.

(2) Notwithstanding any provision in this or any other law, a child who was 16 years or older at the time of the commission of an offence referred to in Schedule 2 to the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997) must, if convicted, be dealt with in accordance with the provisions of section 51 of that Act.

(3) A child who is 14 years or older at the time of being sentenced for the offence, and in respect of whom subsection (2) does not apply, 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; or

(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 for a period not exceeding 25 years.

(5) A child justice court imposing a sentence of imprisonment must antedate the term of imprisonment by the number of days that the child has spent in prison or 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.

Section 78 of the CJA - Postponement or suspension of passing of sentence

(1) Subject to section 77(2), 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.

Section 79 of the CJA - 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.

- **Caution and discharge**

  In terms of Section 279(1)(c), a court may discharge any offender with a mere caution. This is the lightest sentence the law permits, but it will be recorded as a previous conviction.

8.11. **Suspended and postponed sentences**

A **suspended sentence** are imposed in full but, subject to certain conditions, not executed. A sentence **wholly suspended** is not executed, unless the conditions for its suspension have been broken by the offender. On a **partly suspended** sentence, the unsuspended portion of the sentence is executed and the suspended portion is not, unless the conditions for its suspension have been broken by the offender. On a **postponed sentence**, the offender is released, but may be ordered to appear before the court at some later date.

- **Exclusionary provisions**

  In terms of Section 297, any court may postpone sentencing or suspend any sentence for any offence, except an offence for which a minimum penalty is prescribed.

- **Postponement of passing of sentence**

  The court may postpone the passing of sentence for up to 5 years and release the offender unconditionally or on one or more conditions. The offender may 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, of 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.

- **Suspension of sentence**

  Suspended sentences have 2 main functions:

  (i) to serve as alternatives to imprisonment, where the offender cannot afford a fine and where other forms of punishment are improper; and

  (ii) to serve as individual deterrent to the offender as it hangs like a sword over his head.

  The maximum term for which a sentence may be suspended is 5 years. Where part of the 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 the date of imposition of the sentence. A suspended sentence is inextricably linked to conditions and without it, it would not be a legally enforceable form of sentencing.

- **The conditions**

  Negative conditions require the offender not to repeat the crimes specified. Positive conditions require positive action by the offender in order to fulfil the conditions of suspension. Any condition of suspension has to conform to 3 basic requirements:

  (i) It must be related to the committed offence[24].

  (ii) It must be stated clearly and unambiguously so that the accused will know exactly what is expected of him.

  (iii) It must be reasonable.

  Examples of positive conditions include compensation, community service, correctional supervision, submission to a treatment centre etc.

- **Breaching the conditions**

  The *audi alteram partem* rule is applied and the offender is given an opportunity to explain the breach. If an offender fails to give a reasonable explanation, the suspended sentence may be put into operation or suspended further on appropriate conditions. The court's decision is subject to review, but not appeal.

8.12. **Sentences for more than one crime**

Often an offender is convicted of more than one offence in a trial. The court retains full sentencing jurisdiction for every separate crime the accused has been convicted of. It easily happens that, although the individual sentences are suitable, the total punishment becomes unduly severe. Then the court has to reduce the "cumulative effect" of the various sentences in some way:

- This is usually done by ordering that some of the sentences run concurrently.
- Every sentence may be reduced so that the total is not excessive, but then the sentence for any one of the offences will seem too light, if viewed in isolation.
- Some or all of the counts can be taken together for purposes of sentencing. The problem is that difficulties may arise on review or appeal, if some of the convictions are set aside.

In terms of Section 280, all sentences are executed in the order in which they are imposed.

8.13. **Compensation and restitution**

In terms of Section 300, any convicted person who has caused damage to or loss of property of another through his crime may, in certain circumstances, be ordered to compensate the victim. Such an order has the effect of a civil judgment. The amount of compensation in:

- High Courts → Unlimited
- Regional Courts → R 500,000
- District Courts → R 100,000

A court may act in terms of Section 300 only when requested to do so by the injured party or the prosecutor acting on the instructions of the injured person. What follows thereafter is a separate enquire into the amount of damages, which is civil in nature. Court should explain to the parties (including the victim) what is taking place and afford them the opportunity to lead evidence and to present argument. The compensation order may be given only in respect of direct loss or damage. An order to pay compensation is inappropriate where the accused is sent to prison for a substantial period of time and he has no assets. Within 60 days of the award being made, the victim can renounce or accept the award. If he accepts, he cannot sue in the civil courts. A sentence of imprisonment in default of payment cannot be imposed.

Section 301 provides that the court may order, at the request of a *bona fide* buyer, that he be compensated out of money taken from the convicted thief when the latter was arrested, provided the buyer returns the goods to the owner thereof.

FORMS OF PUNISHMENT RELEVANT TO THE POWER OF LOWE AND HIGHER COURT	
High Courts	
□ Imprisonment	• Life imprisonment • Ordinary imprisonment • Periodic imprisonment • Declaration to habitual criminal • Declaration to dangerous criminal • Imprisonment that may be commuted to correctional supervision by the court on request (Section 276(1)(i) • (also impose minimum sentences)
□ Fine	
□ Correctional supervision	

[24] For example: On a conviction of assault, only suspended on condition he doesn't commit assault again.

Lower Courts	
Regional Courts	
Imprisonment □ Fine □ Correctional supervision	• Ordinary imprisonment • Periodic imprisonment • Declaration to habitual criminal • Declaration to dangerous criminal • Imprisonment that may be commuted to correctional supervision by the court on request (Section 276(1)(i) • (also impose minimum sentences)
District Court	
□ Imprisonment □ Fine □ Correctional supervision	□ Ordinary imprisonment □ Periodic imprisonment □ Imprisonment that may be commuted to correctional supervision by the court on request (Section 276(1)(i)

9. REVIEW

9.1. Introduction

Section 35 of the Constitution – 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;

The entrenchment of the right to review or appeal to a court of a higher instance has strengthened the capacity of the court to enforce standards of fairness and due process of law. The emphasis is now on whether there was a fair trial and not whether there was a failure of justice. The result being that criminal proceedings must be conducted not only in compliance with previous standards or requirements, but also conform to these expanded notions of substantive fairness and justice.

An accused person, who is dissatisfied with the outcome of his criminal trial in a lower court, may bring the matter before a High Court by way of appeal or review. If an accused challenges the correctness of his conviction and sentence, he should appeal. Where an irregularity is involved, the accused should seek review.

Categories of review procedures

As pointed out in ***Johannesburg Consolidated Investment Company v Johannesburg Town Council***, the distinct categories of review procedures are:

(i) Review proceedings that are statutorily enacted

By means of which proceedings of lower courts are brought before High Courts as court of higher instance for re-examination of irregularities or illegalities of the proceedings in the court *a quo*. These are contemplated by Section 24 of the SCA and the CPA. Section 24 of the SCA regulates the grounds on which review procedure may be instituted:

- Absence of jurisdiction by the court;
- Interest in the cause, bias, malice or corruption of the judicial presiding officer;
- Gross irregularity in proceedings; and/or
- Admission of inadmissible or incompetent evidence, or rejection of admissible or competent evidence.

This review procedure is strictly formal and expensive. The CPA provides for various ways in which the High Courts may review criminal proceedings in lower courts, and by whom such review procedure may be instituted. The following review procedures, which are less expensive, are provided for under the CPA:

- Automatic review in terms of Section 302;
- Extraordinary review in terms of Section 304(4);
- Review of proceedings before sentencing in terms of Section 304A;
- Set down of case for argument in terms of Section 306.

(ii) Common law review

This includes the High Court's common law inherent jurisdiction to review proceedings of lower courts, acknowledged by Section 173 of the Constitution. This inherent power must be used sparingly and may not be used to correct mistakes made by any one of the parties or to rectify a failure of the prosecution to lead important evidence. The Supreme

Court of Appeal has no common law jurisdiction to review the proceedings of any superior court. The Supreme Court of Appeal only has jurisdiction by way of appeal.

(iii) Reviews provided for by other legislation

The jurisdiction to review conferred through such legislation is a power of review which is far wider than the powers which it possesses under either of the review procedures and is wide enough to embrace reviews pertaining to constitutional infringements. The grounds for such review will differ from all others. The following courts are entrusted with the power of Constitutional review: the Constitutional Court, the Supreme Court of Appeal and the High Courts.

Judicial review in terms of the Constitution

The Constitution binds all people and organs of State. Supremacy of the Constitution implies that whenever a rule is in conflict with the Constitution, it will be invalid to the extent of its inconsistency. It, however, doesn't lapse automatically and continues to exist until such time as it is declared unconstitutional. The power of constitutional review is seen as necessary to protect individual rights. If the High Court or Supreme Court of Appeal makes a decision about unconstitutionality of an Act of Parliament or a provincial Act, the order must first be confirmed by the Constitutional Court.

(i) Limitation of constitutional rights and the approach thereto

No rights, whether entrenched or not, are absolute and unqualified. Section 7(3) of the Constitution recognises that the rights of others and the needs of society may restrict these rights. It is the task of the courts to determine the meaning of rights within the ambit of the limitation clause. A two-stage approach is followed when an infringement is alleged in determining its constitutional validity:

- 1st: Determine whether the right has been infringed and, if so, then 2nd step;
- 2nd: Determine to what extent is the infringement reasonable and justifiable in terms of the limitations clause.

The onus of proving the limitation on a balance of probabilities rests on the party alleging the applicant's right is limited. The final determination will then hinge on the limitation clause and not the provisions which entrenched the right.

Section 36(1) of the Constitution - Limitation of rights

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.

(ii) *Locus standi* and remedies in constitutional matters

It was held in ***Basson*** that a constitutional matter will receive the attention of the Constitutional Court if the court is satisfied that it is in the interests of justice to do so. In ***Friedman*** the court stated that the court retains the discretion to refuse to entertain a constitutional challenge, which discretion will only be exercised in exceptional cases after taking the following factors into consideration:

- prospects of success of the constitutional challenge;
- possible length of the delay of the trial; and
- possible prejudice to accused, if the constitutional challenge isn't decided immediately.

Section 38 of the Constitution - 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.

The relief available to any such applicant is:

- an order of constitutional invalidity of a law;
- the suspension of such order for a period to allow for rectification in the law;
- to adjourn constitutional proceedings pending a decision of the Constitutional Court;
- the exclusion of unconstitutionally obtained evidence;
- A temporary interdict or other temporary relief.

(iii) Access to competent courts relating to constitutional matters

- Constitutional Court
  - By means of an appeal from a court of a status higher than a lower court;
  - A referral by a High Court, high court of appeal or the Supreme Court of Appeal; or
  - By direct access on application or appeal from any court if the interest of justice requires it.
- High Court

  By means of review or appeal procedure or on an application for relief.
- Supreme Court of Appeal

  Only by means of an appeal, unless an issue was specifically referred to this court by legislation.

9.2. **The difference between appeal and review procedures**

Both inherently aimed at setting aside a conviction or sentence → correct procedure must be used.

Appeal	Review
Concerned with the substantive correctness of the decision based on the facts or merits of the case on the record and the relevant law[25]. This is the correct way to challenge a conviction or sentence or both.	Concerned with the validity of the proceedings and an irregularities in the proceedings doesn't necessarily mean the decision was wrong, but that the accused's side hadn't been fully and fairly determined[26].
May be brought against the findings of a lower court on any point of law or fact	Can only be brought on the ground of specific procedural irregularities.
The parties are confined to what is on the record	The parties aren't restricted to the record and can prove any of the grounds of review by affidavit[27].
Must be brought within a certain time. Application for condonation for late filing can be applied for.	No time limit, but it must be brought within a reasonable time
Amounts to a retrial on the record	Facts can be brought to the notice of the court by means of an affidavit in order to prove the irregularity. Enquiry is whether proceedings have been in accordance with justice and if the accused had been prejudiced.
A court's powers on appeal are statutorily limited – no inherent appellate jurisdiction.	Only the High Court enjoys inherent review jurisdiction.
Lodged by way of a notice of appeal	Sought by way of notice of motion, whereby the Respondent is called upon to show cause why the decision or proceedings shouldn't be reviewed, corrected or set aside.

[25] Example: The judicial officer finds the accused guilty when it has clearly not been probed.
[26] Example: The judicial officer allows inadmissible evidence into the trial.
[27] Example: You can't show on the record that the judge had an interest in the matter.

9.3. **Review in terms of the CPA**

Automatic review

Certain sentences of Magistrates' Courts must be reviewed by the provincial or local division of the High Courts in the ordinary course of events, without the accused requesting it. This is called automatic review and ensures that the High Courts constantly control the administration of justice in the Magistrates' Courts. Process of automatic review is based on 2 fundamental principles namely:

→ judicial experience

The premise is that the less judicial experience the presiding officer has, the more restricted his proficiency and skill will be and the greater the danger of incorrect conduct and sentences will be.

→ the extent of the sentence

In district courts experience in sentencing above a certain limit is restricted by the limited extent of cases adjudicated in such courts. No provision is made for automatic review of sentences imposed by High Courts, as in case of sentences imposed by regional courts.

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.

(i) District courts' sentences subject to automatic review

The following sentences are subject to automatic review:

- Imprisonment
  - for a period exceeding 3 months if imposed by a judicial officer who has not held the substantive rank as a magistrate or higher for 7 years; or
  - for a period exceeding 6 months if imposed by a judicial officer who has held substantive rank as a magistrate or higher for more than 7 years.

    This includes detention in a reformatory and a rehabilitation centre. Direct and any suspended imprisonment must be added together to determine the reviewability of the sentence. Also, a suspended period is subject to automatic review if it exceeds the prescribed period.
- Fine
  - exceeding R 3,000 if imposed by a judicial officer who has not held the substantive rank as a magistrate or higher for 7 years; or
  - exceeding R 6,000 if imposed by a judicial officer who has held substantive rank as a magistrate or higher for more than 7 years.

To determine if a sentence is subject to automatic review, each sentence on each separate count must be considered a separate sentence. The fact that the aggregate imposed exceeds the period or amount doesn't render it subject to automatic review. Automatic review is heard by a local or provincial division of the High Court or by one of the judges thereof in chambers.

In general, a sentence isn't subject to automatic review if the accused were assisted by a legal adviser. However, if the legal adviser is absent at any stage during the trial for such a period that his absence could have made a difference to the outcome of the trial, automatic review is appropriate.

(ii) Procedure on review

After a reviewable sentence has been passed, clerk of the court must transmit the record to the Registrar of the provincial or local division having jurisdiction, not later than 1 week after determination of the case. Unreasonable delays in submitting the record reflect on the accused's right to a fair and speedy trial and might in itself be sufficient to exclude confirmation of the court of review that proceedings of the trial court were in accordance with justice. The magistrate may append such remarks as he deems desirable onto the record.

The accused is entitled to supply any written statement in support of his case to clerk of the court to be transmitted to the Registrar with the record within 3 days after conviction. The Registrar submits the record to a judge in chambers for his consideration. The judge must certify on the record that the proceedings are in order and, in his opinion, were in accordance with justice. If the judge is uncertain whether the legal rules were complied with, 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. If the judge has no further doubts, he signs the certificate. If, however, he is still in doubt or is uncertain or it

appears that the proceedings were not in accordance with justice, 2 judges must consider the proceedings and deliver judgment.

The **test** that a court of review applies is whether justice has been done. If it has, the sentence will be confirmed even though there were technical irregularities. If the record of the case is mislaid, the court of review may order that the clerk of the court submits the best secondary evidence obtainable or that the case be sent back to the court to hear evidence in order to reconstruct the record. If no record exists and the record cannot be reconstructed, the conviction and sentence must be set aside.

(iii) Automatic review and the right to appeal

Section 302(1)(b): Automatic review is suspended in respect of an accused who:

- has noted an appeal and has been granted leave to appeal against a conviction and/or sentence; or
- has an automatic right of appeal and has not abandoned such appeal

If the accused abandons his appeal, the sentence will nevertheless be reviewed. Once judgment has been given on appeal, no automatic review can take place. A judge can 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.

Extraordinary review

In terms of Section 304(4) of the CPA, if it is brought to the attention of the provincial or local division, or to a judge thereof that criminal proceedings were not in accordance with justice, the judge has the same powers as laid down for automatic review. These provisions apply where the criminal proceedings are not subject to automatic review. The provisions of this subsection enable the DPP, the Magistrate or the accused to bring irregularities in the proceedings under review by bringing it to the notice of a judge in chambers. However, a matter that has been finally disposed of on appeal may not be brought on review in terms of Section 304(4). The question that the court must consider is whether there are considerations of equity and fair dealing that compel the court to intervene to prevent a failure of justice. No time limit is set by Section 304(4) and cases have been reviewed even after a lapse of 4 years since conviction - ***Fouché***. In ***McIntyre*** this procedure was used by the accused to enforce the review of the court's decision on a special plea before any evidence was led by the state.

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 are not in accordance with justice, he shall, without sentencing the accused, submit the record and the reasons for his opinion for review by a judge in chambers – Section 304A. This applies irrespective of whether conviction has been entered by himself or someone else. The case is postponed pending the outcome of the review proceedings. If a conviction has not been entered or a judicial officer is without a doubt of the opinion that the proceedings are in accordance with justice, the provisions of Section 304A is not available. The possibility that grave injustice would result must be likely before the High Court will exercise its inherent power. This section has brought an end to the problem where a magistrate, who has doubts as to the correctness of a conviction, should first impose sentence although he knows it would be set aside on review.

Set down of case for argument

In terms of Section 306, an accused may, after he has been convicted, bring the magistrate's court proceedings under review by setting down for argument his case before a High Court with jurisdiction. This type of review is restricted to those cases that are automatically reviewable and provides an alternative to Section 303, namely the submission of a written statement. The accused cannot use this form of review if he has submitted a written statement or argument for consideration in terms of Section 303. The Section 306 procedure is much simpler than the procedure set down in the SCA. Here the accused enrols the case before the record of the proceedings has been submitted to the High Court for automatic review.

Review in person and the constitutional invalidity of a review by virtue of a judge's certificate

Before December 1996, no person convicted by a lower court and undergoing imprisonment, was entitled to prosecute in person any proceedings for review, unless a judge had certified that reasonable grounds existed for the review – Section 305. The judge's certificate was a necessary prerequisite for the prisoner to conduct his case on review. Prisoners assisted by legal counsel were not subject to these restrictions and had an automatic right of appeal or review, which led to unequal treatment of prisoners.

The validity of this position was referred to the Constitutional Court in 1996 in ***Minister of Justice v Ntuli***. The question was whether it violated Section 35(3)(o), which provides for a right of review or appeal, and Section 9, being the equality clause. The Constitutional Court held that the provision, requiring prisoners to first get a judge's certificate, is inconsistent with constitutional rights and thus is unconstitutional and invalid. The current position is that any sentenced prisoner may, without legal assistance, appeal to or have his conviction and/or sentence by a lower court reviewed by a High court.

9.4. **Review in terms of the Supreme Court Act**

Review at the instance of the accused

Apart from the proceedings in paragraph 9.3 above, the CPA doesn't provide for review of lower court proceedings at the instance of the accused. The High Court's power to review lower courts' proceedings is regulated in terms of Section 19(1)(a)(ii) of the SCA. The authority to review is vested in the provincial divisions and the Witwatersrand Local Division of the High Court. However, the power to review is limited to the grounds set out in Section 24(1), which deal exclusively with irregularity of proceedings, and these grounds of review are:

- → absence of jurisdiction (e.g. an offence which cannot be tried by the court or punished because it is beyond the jurisdiction of the court);
- → interest in the cause, bias, malice or corruption;
- → gross irregularity in the proceedings; and
- → the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

A matter must be brought under review within a reasonable time, which differs from case to case. The onus of establishing an unreasonable delay is on the part of the party alleging it. The court has a discretion to either condone the delay or refuse to entertain the application for review. The procedure for bringing a matter under review is by way of notice of motion directed and delivered to the presiding officer and all the parties affected. The applicant calls upon the other parties to:

- → show cause why lower court's decision shouldn't be reviewed, corrected or set aside and
- → despatch, within 15 days after receipt of the notice of motion, to the Registrar of the High Court, the record of the proceedings, with such reasons as he is by law required or wants to give, and to notify the applicant that he has done so.

The notice of motion must be supported by an affidavit setting out the facts on which the applicant relies. The respondent may oppose the granting of the order prayed for.

Review at the instance of the prosecution

Although it isn't expressly provided for in the SCA or CPA, there is nothing preventing review at the instance of the prosecution. In ***Attorney-General v Magistrate, Regional Division, Natal*** the DPP successfully brought an application for review of proceedings of a regional court which 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 DPP for trial to the said court.

9.5. **Functions and powers of a court of review**

For all types of review, the function of the court is solely to decide whether the proceedings were in accord with the demands of justice. The interests of the convicted person and those of the State are considered. To decide whether the proceedings were according to justice must be decided according to the circumstances which prevailed when the proceedings took place. Thus, a decision is right or wrong according to the facts in existence at the time it is given, not according to new circumstances coming into existence.

Powers of court in terms of Section 304

In terms of Section 304, the court:

(i) may confirm, alter or quash the conviction;

(ii) may confirm, reduce, alter or set aside the sentence or any order of a magistrate's court[28];

(iii) may, when quashing the conviction, convict on an alternative count if the accused was convicted on one of two or more alternative counts;

[28] The court has no jurisdiction to increase a sentence (but can on appeal). Court of review can impose the proper sentence, but would normally refer the matter back to the lower court for the imposition of a suitable sentence. Note: On review, the court can impose a more serious conviction, but then the accused must be given prior notice.

(iv) may set aside, correct the proceedings, give such judgment or impose such sentence or make such order as the magistrate could or should have given, imposed or made[29];

(v) 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;

(vi) may make such order affecting the suspension of the execution of a sentence as will promote the ends of justice;

(vii) may hear any evidence and for that purpose summon any person to appear and to give evidence or to produce any document or article[30];

(viii) may direct that the question be argued by the DPP and such counsel as the court may appoint if the court desires to have a question of law or fact argued.

- **Powers of court in terms of Section 312**

  A conviction and sentence may be set aside on review on the ground that any provision of Sections 112(1)(b), 112(2) or 113 wasn't complied with.

- **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.

- **Powers of judicial review and the Constitution**

  Section 173 of the Constitution had broadened the inherent jurisdiction of the Constitutional Court, Supreme Court of Appeal and the High Court, which promotes the interests of justice within the context of the values of the Constitution. The Constitution demands a fair trial for any accused and the judicial officer must ensure the trial is conducted fairly. Fairness is an issue that has to be decided on the facts of each case.

  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. The court of review may exclude such evidence if the presiding officer has exercised his discretion in allowing the evidence in an irregular manner which affected the fairness of the trial. The exclusion of evidence improperly obtained is within the powers of all courts and not only within the jurisdiction of courts of review or appeal.

9.6. **Execution of the sentence pending review**

The execution of any sentence brought under review isn't suspended pending the review, unless the magistrate grants bail or the convicted person is released on a warning to surrender himself for sentence at a later stage.

9.7. **Retrial where conviction is set aside**

Whenever conviction and sentence of a lower court are set aside on review on the ground that:

- the court that convicted the accused wasn't competent to do so; or
- the charge sheet on which the accused was convicted was invalid or defective; or
- there has been a technical irregularity or defect in the procedure,

proceedings in respect of the same offence to which the conviction and sentence referred may be instituted *de novo*. The new trial could be on the original charge, suitably amended, or upon any other charge (as if the accused had not been previously tried and convicted). The proceedings must be instituted before a different judicial officer. Where the irregularity constitutes such a gross departure from established rules of procedure that the accused hasn't been properly tried, it is *per se* a failure of justice. Public policy is an important consideration here.

9.8. **Declaratory order**

Legal rights can be decided in the interim by means of a declaratory order. Section 19 of the SCA provides that the Supreme 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 people cannot claim relief consequential upon the determination. The interested party can be the accused or the prosecuting authority. A declaratory order can also be granted although there is no existing dispute, but the parties must be alive. The courts won't deal with 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.

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[29] In terms of this provision the court can amend the charge sheet to a more serious conviction on another charge.

[30] Further evidence is not readily allowed, except on good cause shown. There are 2 requisites that the court has to consider:
(a) the applicant must produce reasonably sufficient reasons why such evidence was not led at the trial;
(b) the evidence sought to be adduced must be of material interest in the case.

10. APPEAL

After the decision of ***Minister of Justice v Ntuli***, all convicted persons (whether represented or in prison) had an unlimited or absolute right of appeal. However, the position was drastically changed by the Criminal Procedure Amendment Act of 1997 whereby there is only a limited right of appeal. The amendment intended to bring the position in the lower courts in line with the High Courts. Such appeals were no longer as of right and leave to appeal had to be obtained. According to the Department of Justice the reasons for the amendment were that the unlimited right to appeal caused the backlog in the hearing of appeals by the already overburdened High Courts and placed too heavy a burden on state funds.

In ***Steyn*** 2001 the constitutionality of the requirement for leave to appeal was considered and declared unconstitutional and invalid. The invalidity order was suspended for 6 month in order to afford the legislator time to amend the Act, but his failure to cure the constitutional defect caused the order to become effective as from 28 May 2001. However, the unlimited right of appeal was again restricted in 2003 with certain amendments. The amendments also brought about that certain juvenile offenders now enjoy an unlimited right of appeal and persons other than the specifically provided for juvenile offenders now have to apply for leave to appeal from the courts who tried their cases originally. In ***Shinga*** the court held that the leave to appeal requirement was consistent with Section 35(3)(o) of Constitution and also a desirable procedure as it prevents unmeritorious appeals.

Generally, no rights are absolute and restrictions are therefore set. Section 36 of the Constitution states that constitutional rights may be limited by a law of general application and on certain constitutionally recognised grounds. The limitation must, however, be reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.

10.1. Access to the High Courts in respect of appeals against decisions and orders of lower courts and constitutional issues

Any conviction, sentence or order of a lower court is subject to leave to appeal. With regard to certain juvenile offenders, leave to appeal is not required. When leave is denied by the lower court, the applicant still has recourse to the High Court by means of petition.

Constitutional issues

If it's alleged in a lower court that a law is invalid because it is inconsistent with the Constitution, the jurisdiction of the lower court to decide on constitutionality should be determined be having regard to Sections 170 and 171 of the Constitution read with Section 110 of the Magistrate's Court Act ("MCA"). In terms of Section 171 all courts function in terms of national legislation and Section 170 provides that lower courts are not competent to decide the constitutional validity of any legislation. Constitutional issues that may arise in the lower courts can be divided into 5 groups:

(i) Constitutionality of legislation promulgated by a province or parliament or the conduct of the President is disputed;

(ii) Constitutionality of any municipal bylaw is disputed;

(iii) Constitutionality of regulations other than those mentioned in (i) and (ii) is disputed;

(iv) Constitutionality of common law is disputed;

(v) Constitutionality of the conduct of a person or organ of state is challenged.

Section 170 provides that lower courts do not have jurisdiction to decide the issues in (i) and (ii) above. The High Court does, however, have jurisdiction to hear matters of constitutionality mentioned in (i) and (ii) and it must make a ruling and decide the issue. With regard to the validity of an Act, the High Court is not obliged to make a ruling and the issue may be referred to the Constitutional Court. Section 117 of the CPA also prohibits lower courts from giving judgment on the validity of any provincial ordinance or proclamation issued by the President.

Whenever the High Court does make a ruling on constitutionality, it lacks validity until confirmed by the Constitutional Court. The position with regard to (iii), (iv) and (v) is more complex. One may argue that in terms of Section 170, lower courts are competent to decide any such issue. Such interpretation would be contrary to the MCA. It is inconceivable that the framers of the Constitution intended to confer this authority on lower courts.

10.2. Access to the Supreme Court of Appeal and to the Full Courts in respect of appeals against the decisions and orders of the High Courts

There is no absolute right of appeal against the decision of the High Courts as a court of first instance, except in the case of certain juveniles of specific age groups. In all other instances, leave to appeal must be sought in terms of Sections 315(4) and 316. The High Court hearing the application decides on certain grounds whether the Full Court or the Supreme Court of Appeal shall decide the appeal. If leave to appeal is refused, the appellant has recourse to the Supreme Court of Appeal by means of petition or to refer the hearing of the appeal to the Full Court. The main

consideration is whether the applicant has a reasonable prospect of success on appeal. In terms of Section 166(c) of the Constitution, a Full Court is also a provincial division of the High courts and instituted specifically by the CPA with powers to hear appeals from High Courts. Special leave to appeal against the judgment of this court has to be requested directly from the Supreme Court of Appeal.

- **Constitutional issues**

  Section 35(3)(o) of the Constitution guarantees a specific right to appeal to, or to have a matter reviewed, by a higher court. The question was investigated in our case law whether the accused had an absolute right to appeal or whether this right could be limited and culminated in ***Rens***. In this case it was held that the judge is not required to say that his judgment was wrong, but only that another court may reasonably come to another decision. The 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. Further, the procedure laid down in Section 316 is fair, in that it affords the accused a double opportunity of recourse, namely either with the leave of the trial court or with leave to appeal by the President of the Supreme Court of Appeal by way of a petition. In ***Twala***, Section 316 read with Section 315(4) was held to be consistent with the provisions of Section 35(3)(o) and that the requirement of leave to appeal was constitution.

- **Access to the Constitutional Court**

  The Constitutional Court is the highest court on all constitutional issues and has the inherent power to protect and provide for its own process and to develop the common law in the interests of justice – Section 173. It must also confirm all judgments by the Supreme Court of Appeal or the High Court on issues of constitutionality before they will have force and it gives final judgment on whether an Act of Parliament, a provincial Act or the conduct of the President is constitutionally valid – Section 172(2)(a). Section 38 of the Constitution (see page 3 above) determines who has *locus standi in iudico* to approach the Constitutional Court for relief if any right entrenched in the Bill of Rights is infringed or threatened. Furthermore, an *amicus curiae* (e.g. a person interested in any matter before the Constitutional Court who's been admitted as such) has *locus standi* if he has the written consent of the parties in the matter or that of the Chief Justice of the Court to be admitted as *amicus curiae*, as well as any person or organ of state with sufficient interest may appeal 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 the conduct of the President.

- **Way of access to the Constitutional Court**

  (i) Direct access

  In terms of Section 167(6)(a) of the Constitution, direct access by a member of the public will be allowed in exceptional circumstances only and it must be in the interests of justice – ***Zuma***. It will be in the interests of justice only if there are compelling reasons that it should be done. 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. Such application must be brought by notice of motion supported by affidavit, which must set out the grounds on which direct access is sought. In terms of Sections 79, 80, 121, 122, 142 and 144(2) of Constitution, direct access is permitted in the following instances:

  - Referral of a Bill of Parliament or provincial legislature;
  - When constitutionality of the whole or part of an Act is challenged.
  - When certification by the Constitutional Court of a provincial constitution is requested.

  An order of constitutional invalidity by a court as contemplated in Section 172 of the Constitution is directed directly to the Constitutional Court for confirmation. This is where a state organ or person may directly approach the Constitutional Court in the case where any competent court has declared legislation promulgated by parliament, a province or the conduct of the President unconstitutional and invalid. A person or state organ who wishes to appeal such an order or have it confirmed by the Constitutional Court must, within 15 days after the order, lodge a notice of appeal or application for confirmation with the Registrar of the Constitutional Court.

  (ii) Access 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 this court against a decision on a constitutional matter given by any court including the Supreme Court of Appeal. The appellant must apply to the Registrar of the Constitutional Court for leave to appeal within 15 days of the judgment. The decision whether to grant or refuse leave to appeal is a matter of discretion of the Constitutional Court and it may:

- decide to deal with the application summarily without receiving oral or written argument other than that contained in the application itself;
- order that the application 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 whether the merits of the dispute will be looked at; or
- hear further evidence, but considerations for a successful application in the Constitutional Court aren't necessarily the same as for other appeals.

10.3. **No appeal before conviction**

General rule: An appeal shouldn't be decided piecemeal.

Thus, usually the court of appeal will exercise its powers only after termination of the criminal trial. However, in exceptional cases, the court of appeal will exercise its inherent power to prevent irregularities in lower courts, even before the termination of the trial[31]. The power should be used sparingly, but the High Court will not hesitate to interfere when a grave injustice might otherwise result or where justice might not by other means be attained. The High Court's inherent power to regulate and protect its own process is confirmed by Section 173 of the Constitution. Whenever the High Court is approached to exercise its inherent powers to prevent irregularities in lower courts, the court may grant a *mandamus* or an interdict. If, however, the magistrate performs his functions in a proper way procedurally, but comes to a wrong conclusion on the merits, no application may be made to the court of appeal before conviction.

10.4. **Appeal against sentence**

Although an appeal court has jurisdiction to reduce a sentence, it doesn't have a general discretion to correct sentences of trial courts. It is the trial court that has the discretion to impose a proper sentence. The mere fact that the court of appeal would have imposed a lighter sentence is not sufficient reason for it to intervene. A court of appeal cannot interfere with a sentence unless the trial court hasn't exercised its discretion in a proper and reasonable manner. This will be the case:

- when the sentence is vitiated by an irregularity and it appears to the court of appeal that a failure of justice has resulted from such irregularity or defect[32];
- when the trial court misdirects itself by, for example, taking irrelevant factors into account;
- when the sentence is so severe that no reasonable court would have imposed it[33].

Unless the appeal is based solely upon a question of law, a court of appeal shall have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence – Section 309(3) of the CPA. However, once a sentence is set aside on appeal on the ground of 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. All High Courts with criminal appeal jurisdiction have the power to increase any sentence on appeal, unless the appeal is based solely on a question of law and a court may increase the sentence even though the appeal is against the conviction only. This power is conferred to see that justice is done.

Where the prosecution requests it or the court *mero motu* considers increasing the sentence, notice should be given to the accused, especially if there is a prospect that such increase may eventuate. Appeal court will increase a sentence only if the trial court has exercised its discretion unreasonably, improperly or misdirected itself. In considering any appeal on sentence, the offence, the offender and the interests of society are integral.

10.5. **Appeal on the facts**

A court of appeal is usually unwilling to interfere with the findings of the trial court on questions of fact as the trial court is in a better position than the court of appeal in that it sees and hears the witnesses in the atmosphere of the court. Therefore, the trial court can better assess the manner, appearance and personality of the witnesses. The appeal court will only interfere if it is convinced the finding of the trial court is wrong. Although demeanour is often the deciding factor, it is never the only factor that plays a part. The trial court must place on record in what respect the demeanour of a witness is unsatisfactory and the reason/s given must be the view of the majority (assessors and presiding officer) and not the presiding officer alone. If the question is whether the

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[31] Example: The Magistrate unreasonably denies the accused the opportunity to obtain legal representation.

[32] Example: Where a magistrate imposes a sentence beyond his jurisdiction.

[33] The court would consider whether the sentences appealed against induces a sense of shock; it is startlingly inappropriate; no reasonable court would have imposed the sentence which was imposed by the trial court; or could the trial court have reasonably imposed the sentence that it did? The court of appeal will interfere with sentence only if it is satisfied that the trial court exercised its discretion improperly or unreasonably. If the appeal is on the basis that the sentence is disturbingly inappropriate, the appeal court must compare that sentence with other lesser sentences where the circumstances where substantially the same. However, if the lighter sentences appear to be unreasonable and inappropriate, the heavier sentence is more appropriate and will be left intact.

trial court has drawn the correct inference, the court of appeal is in as favourable a position as the trial court. The question whether there was corroborative evidence can be determined just as well by the appeal court.

10.6. **Difference between an appeal on facts and an appeal on a question of law**

It isn't always easy to distinguish between an appeal on a question of fact and one on law.

Fact: It is the duty of the court of appeal to retry the case on the record before the court, together with any other evidential material as it may have decided to admit and then decide for itself whether there is guilt beyond a reasonable doubt.

Law: The question isn't whether the court of appeal would've made the same finding, but whether the trial court could have made such a finding. It arises only when the facts upon which the trial court based its judgment could have another legal consequence than that which the trial court had found. Thus, it is irrelevant whether the trial court's factual findings are right or wrong.

10.7. **Appearance of the appellant**

If the appellant fails to appear, the court of appeal may do the following:

- summarily dismiss the appeal;
- strike the appeal off the roll[34];
- postpone the appeal if there is reason to believe that the appellant has been prevented from appearing through no fault of his own but, if the appeal has no prospect of success, the court will not grant a postponement;
- hear the appeal.

10.8. **Withdrawal of appeal**

Generally, an accused must have a right to withdraw his appeal at any time on notice to the court and the Director of Public Prosecutions. However, where an increase of sentence is being considered, leave of the court to withdraw is required. Certain time limits are set within which the appellant may withdraw and, 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, the appellant may not withdraw the appeal without the leave of the court. The court, in its discretion, may choose to dispose of the case.

10.9. **Publication of proceedings**

Since an appeal is a continuation of the trial, the provisions of Sections 153 and 154 concerning the exclusion of the public and prohibition of publication also apply to appeals.

10.10. **Inspection *in loco***

A court of appeal may hold an inspection *in loco* – ***Carelse***.

10.11. **Aspect first raised on appeal**

Section 88 of the CPA - Defect in charge cured by evidence

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 judgement, be cured by evidence at the trial proving the matter which should have been averred.

The trial court has the power to amend a charge, even if it disclosed no crime, but its power is limited by the possibility of prejudice to the accused. Thus, if the accused objects to a defective charge during trial which is consequently altered without prejudice, the accused cannot rely on the fact that the charge was defective on appeal.

10.12. **Record of the proceedings**

It is important that the record of the trial court proceedings be reliable. If there is an error in the record, the accused or prosecutor may apply to court to correct the error. If the time limit has expired, application may be brought to the High Court. If essential evidence has been omitted from the record and cannot be supplemented, the accused's appeal must succeed.

10.13. **Appeals to provincial and local divisions of the High Court**

- **To which division?**

  The provincial or local division in whose area of jurisdiction the lower court trial was held, has jurisdiction, irrespective of where the offence was committed. However, where a conviction by a regional court takes place within the area of jurisdiction of one provincial division and the order or sentence is passed in another, the appeal against the conviction or sentence shall be heard by the last mentioned provincial division. In terms of Section 13(2)(a)(i) of the SCA, an appeal against a judgment or sentence of a lower court to the provincial or local division must be heard

[34] Example: Where the accused is a fugitive from justice - such an appellant has no right to be heard on appeal.

by not less than 2 judges. In the case of an appeal from a lower court on a bail application, it will be heard by a single judge irrespective of who lodged the appeal.

- **When may an accused appeal?**

General rule: Any person convicted of any offence by any lower court may appeal, with leave from the trial court, against such conviction and resultant sentence.

Exceptions:

(i) A fugitive convicted person as he had put himself beyond the jurisdiction of the court by his flight.

(ii) A third party who has an interest in a verdict of guilty or in a subsequent order has no *locus standi* to appeal.

(iii) A finding of not guilty because the accused lacked criminal capacity isn't an appealable verdict where finding was made in consequence of an allegation made by the accused.

(iv) An accused may not appeal against the putting into operation of a suspended sentence.

(v) An appeal may not continue after the death of the accused because all appeal proceedings then lapse.

- **Who has to apply for leave to appeal?**

Section 309(1)(a) of the CPA provides that an appeal to the High Court is subject to leave to appeal, except in the following instances where appeal may be noted without having to apply for leave to appeal:

Where the convicted person was, at the time of commission of the offence -

(i) below 14 years old; or

(ii) at least 14 but below 16 years and was not assisted by a legal representative at the time of conviction in a regional court; and

(iii) was sentenced to any form of imprisonment as contemplated in Section 276(1) that was not wholly suspended.

Such an accused or an accused who was unrepresented at the time he was convicted and sentenced must be informed by the presiding officer of his rights in respect of appeal and legal representation and the correct procedures to give effect to these rights. The presiding officer must also refer the accused to the Legal Aid Board to give him an opportunity to request legal representation to assist him with an application of leave to appeal or petition. When leave to appeal has been denied, the court must explain to such an accused any further recourse he has in terms of an appeal to a higher court.

- **Application for leave to appeal in the lower court**

In terms of Section 309B, anyone other than the persons listed above, must apply to the court of first instance for leave to appeal against the conviction or sentence and such application must be made within:

(i) 14 days after the passing of the sentence or order following on the conviction; or

(ii) such extended periods as the court may, on application and for good cause shown, allow.

The application must be heard by the Magistrate whose conviction or sentence is the subject of prospective appeal or, if he is not available, by a Magistrate whom is assigned the application. Notice of the date fixed for the hearing must be given to the Director of Public Prosecutions and the accused. The application must set forth clearly and specifically the grounds upon which the accused desires to appeal. As held in ***Horne***, when the Magistrate knows what the issues are which are challenged so that he can deal with them in his reasons for judgment, it will be regarded as clear and specific grounds.

A convicted person may amend his application for leave to appeal within the prescribed time and notice must be given to the prosecutor. Any amendment beyond the prescribed time is allowed with leave of the trial magistrate on application for condonation. Where the accused has appealed against the sentence and received leave to appeal, the court doesn't have power to order an amendment of the grounds of appeal to include an appeal against the conviction and the only remedy is to apply for condonation for late application for leave to appeal.

If leave to appeal is granted, the clerk of the court must transmit copies of the record to the Registrar of the High Court concerned. If leave to appeal or any other application is denied, the Magistrate must immediately record his reasons for such refusal and the accused must be informed of his rights in respect of the proceedings contemplated in Section 309C (petition) and legal representation and the correct procedures to give effect to these rights.

- **Application for condonation**

  An appeal must be noted in writing within the prescribed time limit after date of conviction or sentence. If an appeal is not noted within these time limits, condonation for late noting should be applied for. The grounds on which the courts will condone the late noting are in the discretion of the court. In criminal cases the courts are more accommodating about granting condonation than in civil cases. In ***Mohlathe*** it was held that, in exercising its discretion, the court will look at the merits of the case, the degree of lateness, the prospects of success, the importance of the case when it considers an application for condonation.

- **Application to adduce further evidence**

  In terms of Section 309B(5) an application for leave to appeal may be accompanied by an application to adduce further evidence relating to the conviction or sentence in respect of which the appeal is sought. Such application must be supported by an affidavit stating that:

  

  (i) further evidence is available;

  (ii) if accepted, the evidence could lead to a different decision; and

  (iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

  A court granting an application for further evidence must receive that evidence and further evidence rendered necessarily thereby and records its findings. Such further evidence shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial.

- **Refusal of application: Petition procedure**

  If any application for –

  (i) condonation;

  (ii) further evidence; or

  (iii) leave to appeal,

  is refused by a lower court, the accused may apply to the Judge President of the High Court having jurisdiction by petition, which must be made within 21 days after the application in question was refused. An accused who submits a petition must also give notice to the clerk of the lower court, who must without delay submit to the Registrar of the High Court copies of the refused application, the magistrate's reasons for refusal and the record of the proceedings.

  The petition is considered in chambers by 2 judge designated by the Judge President. If these 2 judges differ in opinion, it must also be considered by the Judge President or ant other designated judge and the decision of the majority of judges shall be deemed to be the decision of all 3. Judges considering a petition may in terms of Section 309C(8):

  (i) call for further information;

  (ii) order that the petition be argued before them at a time and place determined by them, in exceptional circumstances;

  (iii) grant or refuse any application;

  (iv) if an application for condonation is granted, they may direct that an application for leave to appeal be made within a period fixed by them to the court of first instance or to any other assigned magistrate of the court concerned in the trial magistrate is not available;

  (v) grant or refuse the application for leave to appeal on a petition, subject to their decision on the application of further evidence;

  (vi) grant or refuse an application for further evidence and, if granted, remit the matter to the magistrate's court concerned in order for further evidence to be received.

- **Hearing of appeal in provincial or local division as court of appeal**

  An appeal brought under Section 309 must be disposed of by a High Court and the parties must be allowed the opportunity to present oral argument in open court. The hearing of the appeal in chambers was declared unconstitutional in ***Shinga***.

- **When may the prosecution appeal?**

  

  (i) Appeal against a bail decision

  The prosecution may not appeal against an acquittal on the facts of the case. Exception: 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. The right to appeal is subject to leave to appeal granted by a judge in chambers in terms of Section 310A. The appeal may be heard by a single judge of a local division. The prosecution may, as far as lower courts' and High Courts' proceedings are concerned, appeal against questions of law decided by a court and against a sentences imposed by

a court only, except for an appeal against a bail decision which right of appeal is only available to the Director of Public Prosecutions.

(ii) Appeal restricted to a question of law

The Director of Public Prosecutions or any prosecutor may appeal against a decision by a lower court in favour of the accused on a question of law. The legal competency of a court in terms of Section 174 is a legal question. Section 310 provides that when a lower court has 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 court of appeal, setting forth the question of law and his decision thereon. The Director of Public Prosecutions or other prosecutor may then appeal against the lower court's decision. As a general rule, the court of appeal will confine itself to the findings of fact as reflected in the case stated by the judicial officer in deciding the appeal, but it is not a hard and fast rule.

Where the prosecution appeals the decision, the accused must be notified of the appeal. 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. The purpose of the prosecution's appeal isn't only to clarify a legal question, but to ensure that justice is done. Sometimes it is very difficult to distinguish between a question of law and one of fact. 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. 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 and deal with it. If the appeal is not upheld, the prosecution may, with the leave of the provincial or local division appeal to the Supreme Court of Appeal.

(iii) Appeal against sentence

Section 310A provides that the Director of Public Prosecutions may appeal against a sentence imposed upon an accused in a criminal case in a lower court. The Act doesn't mention any other prosecutor and it can be inferred that the right to appeal a sentence is not available to him. He is, however, permitted to appeal a sentence when leave to appeal has been granted by a judge in chambers. A written notice of such an application together with the grounds for the application must be lodged with the Registrar of the High Court within 30 days of the passing of the sentence. Condonation may be granted on just cause if the time limits haven't been complied with. The accused may lodge a written submission to the judge hearing the application. If the appeal is unsuccessful, the State may be ordered to pay the accused's costs. This section allows for the Director of Public Prosecution's powers to be widened in connection with the increase of a sentence and not to restrict them. Once the appeal has been dismissed, the Director of Public Prosecutions doesn't have a further right of appeal to the Supreme Court of Appeal and the judge's decision would be final.

- **Powers of the court of appeal**

The powers of the provincial or local divisions of the High Court sitting as courts of appeal are:

(i) The court may hear further evidence either orally or on deposition or remit the case to the court *a quo* for further hearing. The court of appeal may exercise this power on its own initiative or at the request of the appellant. This request must be made simultaneously with the appeal, not afterwards. The court may summon any person to appear and give evidence or produce a document. 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.

(ii) The court may confirm, alter or quash the conviction.

(iii) The court may confirm, reduce, alter or set aside the sentence or order.

(iv) The court may correct the proceedings of the lower court.

(v) 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.

(vi) The court may remit the case to the magistrate's court with instructions to deal with any such matter in such manner as the court of appeal may think fit.

(vii) The court may make an order affecting the suspension of the execution of a sentence to promote the ends of justice.

(viii) Sentences may be increased on appeal if it is an appeal purely on conviction, but the court of appeal can't increase it if the appeal is purely on a question of law. The approach

of the court when considering an increase is to compare the sentence it would have imposed with that actually imposed by the court *a quo*. The court can't increase the sentence beyond the jurisdiction of the trial court.

(ix) The court of appeal has the power to give any judgment or make any order which the circumstances may require (the court can substitute a more serious offence for the offence of which the accused was convicted).

(x) The court of appeal's inherent power does not extend to an assumption of jurisdiction that is not conferred on it by statute.

- **Execution of a sentence pending appeal**

The execution of any sentence isn't suspended pending appeal unless the court which imposed the sentence sees fit to release the convicted person on bail.

- **Remission of a new sentence**

When a case is remitted on appeal to that lower court which originally tried the matter for an altered sentence, such sentences need not be passed by the judicial officer who originally passed the sentence.

- **Fresh trial**

Proceedings may be instituted again when a conviction of a lower court is set aside on any of the following grounds:

(i) the court was not competent to convict;

(ii) the charge sheet was invalid or defective; or

(iii) there was a technical irregularity in the proceedings.

When a trial is instituted afresh on any of these grounds, a plea of *autrefois acquit* will be of no avail. No conviction may be reversed or altered unless it appears that a failure of justice has resulted. If the proceedings were void *ab initio* the court of appeal will not hesitate to intervene and set the proceedings aside.

10.14. **Appeals to the Full Court and the Supreme Court of Appeal**

Appeals to these courts aren't as of right, but allowed only if leave to appeal has been granted except for certain young offenders.

- **Jurisdiction and constitution of -**

(i) The Supreme Court of Appeal

It consists of a President, Deputy President, and a number of judges of appeal and acting judges of appeal and may decide any appeal of whatever nature, even constitutional. It is the highest court of appeal except in constitutional matters and may decide only:

- appeals;
- issues connected with appeals; and
- any other matter that may be referred to it as defined by an Act of Parliament

A quorum in criminal matters shall be 5 judges, except where the President or, in his absence, the senior available judge, directs that it be heard before 3 judges. However, in constitutional matters, quorum shall be 5 judges. Appeals and questions of law reserved in connection with criminal cases heard by a High Court, the Supreme Court of Appeal shall be the court of appeal, except insofar as the provisions regarding appeals to the Full Courts provide otherwise – Section 315(1)(a). Any appeal or question of law reserved in connection with criminal cases heard by a High Court, must be disposed of in chambers on written argument of the parties, unless the President is of the opinion that the interests of justice require that oral argument must be submitted regarding the appeal.

(ii) The Full Court

Full court means a court of a provincial division, or the Witwatersrand Local Division of the High Court, sitting as court of appeal and constituted before 3 judges.

It's a court of appeal, not a court of first instance, and criminal trials cannot be conducted before this court. If the court *a quo* is a provincial or local division, then 'court of appeal' means a Full Court or the Supreme Court of Appeal. An appeal which is to be heard by a Full Court shall be heard:

- in the case of an appeal in a criminal case heard by a single judge of a provincial division, by the Full Court of the provincial division concerned;
- in the case of an appeal in a criminal case heard by a single judge of a local division other than the Witwatersrand Local Division, by the Full Court of the provincial division

which exercises concurrent jurisdiction in the area of jurisdiction of the local division concerned;

- in the case of an appeal in a criminal case heard by a single judge of the Witwatersrand Local Division:
  - by the Full Court of the Transvaal Provincial Division, unless a direction by the President of that division applies;
  - by the Full Court of the said local division if the President has so directed in the particular instance.

Full bench means that whenever it appears to the President or, in his absence, the senior available judge of any division, that any matter which is being heard before a court of that division, ought, in view of its importance to be heard before a court consisting of a larger number of judges, he may direct that the hearing is discontinued and commenced anew before a court consisting of so many judges as he may determine.

Don't confuse with Full court

A Full Court will hear an appeal when:

- Appeals from decisions given by a trial judge of the High court:
  - When an application for leave to appeal is heard by a single judge of a High Court and t leave to appeal is granted, the judge granting it may direct that the appeal be heard by a Full Court, if the matter doesn't require the attention of the Supreme Court of Appeal.
- Appeals from decisions handed down by a High Court sitting as a court of appeal:
  - The CPA doesn't give the Full Court jurisdiction to hear unsuccessful appeals that originated from lower courts and were heard by a provincial or local division of a High Court as a court of appeal.
  - Only matters heard by a High Court as a court of first instance may be adjudicated by a full court.
- A full court has no jurisdiction to hear an appeal in the following instances:
  - Where is has been directed by the court hearing the application for leave to appeal that it requires the attention of the Supreme Court of Appeal.
  - Where leave to appeal on special entry of irregularity has been granted
  - Where a question of law has been reserved by a High Court.
  - Where an appeal is brought against the judgment or order of a provincial or local division of the High Court on appeal.

Any appeal or question of law reserved must be disposed of in chambers on the written argument of the parties or their legal representatives, unless the President is of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument regarding the appeal or question of law.

Right of appeal to the Supreme Court of Appeal or the Full Court

Section 315(4) provides that appeals with regard to proceedings that originated in a High Court, cannot, as of right, go to the Supreme Court of Appeal as leave to appeal must first be obtained. Also there is no appeal to the Supreme Court of Appeal on a decision given by any provincial or local division on an appeal, unless the leave of the court against whose decision the appeal is made is obtained. No appeal lies against the order of a Full Court unless the special leave of the Supreme Court of Appeal is obtained. An automatic right of appeal to the Full Court or Supreme Court of Appeal exists only if an accused was convicted of any offence by a High Court and that accused was, at the time of the commission of the offence:

(i) below the age of 14 years; or

(ii) at least 14 but below 16 years and was not assisted by a legal representative at the time of conviction; and

(iii) was sentenced to any form of imprisonment, as contemplated in section 276(1) that was not wholly suspended,

he may note an appeal without having to apply to the High Court for leave to appeal. A criminal matter may be taken on appeal to the Supreme Court of Appeal in the following manner:

(i) In cases tried in lower courts and taken on appeal to a provincial or local division of the High Courts, a further appeal to the Supreme Court of Appeal is possible only with the leave of the provincial or local division concerned or, if refused, with the leave of the Supreme Court of Appeal itself.

(ii) In cases tried in High Courts, appeals to the Supreme Court of Appeal are possible only:

- where leave to appeal against conviction and sentence was granted by the trial court;;
- where application for appeal on grounds of special entry was granted by the trial court based on an alleged irregularity or illegality;
- where a question of law is reserved by the trial court *mero motu* or at the request of the prosecution or the accused
- where the state has been given leave to appeal against the sentence; and
- where a matter is brought to the Supreme Court of Appeal by the Minister for decision concerning a question of law, where the Minister is doubtful as to the correctness of the decision.

(iii) Matters decided on appeal by a Full Court may only be brought to the Supreme Court of Appeal with leave from the Supreme Court of Appeal.

Appeals to the SCA in cases that originated in a lower court

An appeal against a judgment of a provincial or local division in a matter originating from an appeal from a lower court is regulated by Sections 20 and 21 of the SCA, which provides that there is no further appeal to the Supreme Court of Appeal unless the provincial or local division grants leave to appeal. Every application for leave to appeal must set out clearly the grounds upon which the accused desires to appeal and these grounds to the Supreme Court of Appeal need not coincide with the grounds of appeal to the provincial or local division.

Where leave to appeal is not applied for timeously, an application for condonation of delay in applying for leave must accompany the application for leave to appeal. If a High Court refuses leave to appeal, the accused may submit his application for leave to appeal to the Supreme Court of Appeal by way of petition addressed to the President of the Supreme Court of Appeal. The petition is considered by 2 judges, who may –

(i) grant or refuse the application; or

(ii) refer it to the Supreme Court of Appeal for consideration, who may then grant or refuse it.

The decision of the majority of the judges or of the Supreme Court of Appeal is final. Notice of the date fixed and the place of hearing is given to the parties by the Registrar of the Supreme Court of Appeal. Where a provincial division refuses to grant an order condoning the late filing of the application, the only remedy is a petition to the Supreme Court of Appeal against refusal. If the Supreme Court of Appeal then condones the late filing, the matter must be sent back to the provincial division for the hearing of the application for leave to appeal as it doesn't have the power to hear the appeal on the merits. No provision is made for an appeal directly to the Supreme Court of Appeal against a conviction by a lower court.

National or Director of Public Prosecutions or other prosecutor may appeal against a decision given on appeal by a provincial or local division in 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 obtaining leave to appeal. If leave is refused, Director can petition Supreme Court of Appeal for leave.

Appeals to the Full Court or Supreme Court of Appeal against superior court judgments

(i) By whom, when and against what must an application for leave to appeal be made?

- Any accused, other than the juvenile offenders mentioned, convicted in a High Court must apply within 14 days of the sentence and conviction for leave to appeal.
- Leave to appeal against a judgment given on appeal by a court of a provincial or local division must be applied for by the appellant within 15 days after judgment was given.
- Accused who was found not guilty by reason of mental disorder may appeal against such finding if the mental disorder was not raised by him at the trial.
- Leave to appeal before termination of the trial is generally not allowed.
- The Director of Public Prosecutions may apply within 14 days of the passing of a decision of a High Court to release the accused on bail, but may not appeal against the imposition of bail conditions.

(ii) To whom must the application be made?

- The judge who presided at the trial and, if he is not available, to another judge of the division concerned.
- If leave to appeal is sought against any judgment of the provincial or local division given on appeal, application is to be made to the court against whose judgment the appeal is to be made.

(iii) Grounds of Appeal

An application for leave to appeal must set forth clearly the grounds upon which the accused or Director of Public Prosecutions desires to appeal. If a party applies verbally

for leave immediately after passing of sentence by a High court, he must state the grounds and they will be taken down in writing and form part of the record. When leave is granted, it may be granted with specific limitation to particular grounds. When leave is granted generally, all issues may be canvassed on appeal – ***Jantjies***. Where leave 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 may grant leave to appeal on wider grounds than those allowed by the trial judge, but a local or provincial division doesn't have the power to grant leave for extension. If an accused appeals against his sentence only, the court of appeal cannot interfere with the conviction. If the trial court has granted leave to appeal to the Supreme Court of Appeal against conviction, the latter court may interfere with the sentence.

(iv) When leave to appeal should be granted

When deciding to grant an application, the most important factor is whether the applicant has a reasonable prospect of success on appeal. The fact that the appeal is "arguable" is insufficient. It's somewhat undesirable for a judge to have to determine whether a judgment which he himself has given may be considered by a higher court to be wrong, but it's the duty imposed by legislation and he must exercise his power judicially and objectively to determine whether there is a reasonable prospect of success. The mere possibility that another court might come to a different conclusion is not sufficient to justify the granting of leave to appeal.

However, leave to appeal may 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 the result may be different. If the application is refused, the judge must furnish his reasons for refusal.

(v) Application for leave to lead further evidence

In terms of Section 316(5)(a), when applying for leave to appeal, accused may also apply for leave to lead further evidence. It's in the interests of justice that finality is reached in criminal cases and thus, once decided, the case will not lightly be reopened and further evidence will be allowed in exceptional circumstances only. The court would 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 – ***Ford***; ***Ndweni***. An application for further evidence must be supported by an affidavit stating:

- that further evidence which would presumably be accepted as true, is available;
- that if accepted, the evidence could reasonably lead to a different verdict or sentence;
- that there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.

The onus of satisfying these 3 rests on the appellant and the courts normally demand that all 3 are to be fulfilled. Such an application can only be made in conjunction with a competent application of leave to appeal. If leave to appeal is refused, it is impossible to acquire leave to lead further evidence. If leave to appeal is granted, but application to lead further evidence is refused, the accused can petition. If an accused discovers further evidence after the trial court has already refused an application for leave to appeal, the remedy is exhausted. If leave to appeal was granted but leave to lead further evidence refused, an accused may approach the Supreme Court of Appeal, which may grant leave to lead further evidence.

(vi) Application for condonation

Leave to appeal must be applied for within the prescribed time, unless condonation is obtained for late filing. The court won't grant condonation where the appellant has no reasonable prospect of success on appeal. If the application for condonation is refused, the accused may petition the President of the Supreme Court of Appeal within 21 days of the refusal. Where an application –

- for leave to appeal against a judgment of a High Court;
- to lead further evidence; and/or
- for condonation,

is refused, the accused may 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 a longer period is allowed on good cause shown. The petition is addressed to the President of the Supreme Court of Appeal and is considered in chambers by 2 judges of that court. If their opinion differs, the application is considered by the President of the Supreme

Court of Appeal or any other judge appointed and the majority decision shall be considered the decision of all 3. The judges considering the application may:

- call for further information, including a copy of the record that was not required to be submitted;
- in exceptional circumstances, order that the application be argued before them at a time and place determined by them;
- in the case of an application for leave to appeal, grant or refuse the application;
- in the case of application for condonation, grant or refuse the application and if it is granted, direct that an application for leave to appeal be made to the High Court or submit it as if refused by the High Court if they deem it expedient;
- in the case of application for further evidence, grant or refuse the application and if granted, the case can be remitted to the High Court; or
- in exceptional circumstances refer the petition to the Supreme Court of Appeal for consideration, whether upon argument or otherwise.

Appeal on special entry of irregularity or illegality

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 trials in a High Court, but the CPA makes provision for a so-called special entry where 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 cannot take it on appeal. With a special entry, the accused may request during or after the trial, that the irregularity be entered on the record. The trial judge will have to consider the application based on the alleged irregularity and 2 types of irregularity are possible:

(i) those relating to the trial, for example, where an assessor gains extra-curial information that could be detrimental to the accused; and

(ii) those that arise during the trial, for example, the refusal of a judge to allow proper cross-examination.

If the irregularity appears clearly from the record, it is unnecessary for a special entry to be made. Section 317(1) provides that if an accused thinks that the proceedings in the High Court are irregular, he may, during the trial or within 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 unlawful. The court is bound to make the entry, unless the judge is of the opinion that the application is frivolous or absurd or not made *bona fide* or the granting of the application will be an abuse of the process of the court. Special entries only deal with procedural irregularities and not questions of law. If a special entry is made on the record and the accused is convicted, he may appeal to the Supreme Court of Appeal against conviction on the ground of the irregularity, within 21 days after the entry was made. If the application for a special entry is refused, the accused may petition the President of the Supreme Court of Appeal within 21 days of refusal for a special entry to be made on the record. The accused's conviction and sentence are not to be set aside by reason of the irregularity, unless it appears that a failure of justice has in fact resulted from the irregularity. The question then is whether the irregularity is of the kind that *per se* vitiates the proceedings – ***Moodie***.

Reservations of questions of law

In the course of a trial in a High Court, a question of law relative to the particular case may arise and the court itself may be uncertain about the law regarding the particular point, for example, whether certain evidence is admissible. If the question of law arises during trial in a High Court, the court may, *mero motu* or at the request of the prosecution or the accused, reserve the question for the consideration of the Supreme Court of Appeal. Court then states the question reserved and directs that it be specially entered in the record and that a copy be transmitted to the Registrar of the Supreme Court of Appeal. Refusal of a judge to recuse himself is a question of law which may be reserved, as well as the refusal of the trial court to permit a bail record to be admitted as evidence. The requirements for reserving a question of law are:

(i) only a question of law may be reserved;

(ii) the question of law must arise 'on trial' in a High Court, meaning that the legal point must be apparent from the record;

(iii) the question must be raised by the court of its own motion or at the request of the prosecutor or the accused;

(iv) the judge must accurately express the legal point he had in mind;

(v) a request for reservation must be made after the conclusion of the trial;

(vi) there must have been an actual trial.

There is no time limit within which to bring the application, but the application must be brought as soon as possible after the judgment or within a reasonable time. If the court refuses to reserve a question of law at the request of the accused or the state, they may by petition to the President submit an application to the Supreme Court of Appeal. A question of law can only be reserved by the prosecutor in the following instances:

(i) where there has been an acquittal;

(ii) a court's quashing of an indictment allows the State a right of appeal pursuant to its duty to prosecute;

(iii) where there has been a conviction and the question of law may be to the advantage of the accused;

(iv) where the question may have a bearing on the validity of the sentence imposed.

Appeal by the prosecution to the Supreme Court of Appeal

(i) Appeal against decisions by a High Court on bail

Generally the prosecution cannot appeal against a decision on the facts of the case, only the accused can do so. However, Section 65A of the CPA allows the Director of Public Prosecutions to appeal to the Supreme Court of Appeal against the decision of a High Court to release the accused on bail, but he may not appeal against the imposition of certain bail conditions. He has to apply for leave to appeal in terms of Section 316.

(ii) Appeal limited to questions of law

Like an accused, the prosecution may apply for the reservation of a question of law for decision by the Supreme Court of Appeal. Should the provincial or local division give a decision in favour of the accused on the facts not the law; the Supreme Court of Appeal will strike the appeal off the roll. The Director of Public Prosecutions may appeal to the Supreme Court of Appeal on a point of law in terms of Section 311 against a decision decided in favour of a convicted accused on an appeal originating from a lower court. Leave to appeal will have to be obtained from the appropriate court.

The prosecution will have to make out a case, stating what the legal questions are that are to be argued. If the Supreme Court of Appeal decides in favour of the prosecution, it may order that a prosecution be instituted *de novo* against the accused, but it cannot substitute a conviction for an acquittal. The powers which the Supreme Court of Appeal has depend on whether it was the Director of Public Prosecutions or other prosecutor or the accused who originally appealed.

If the accused had successfully appealed against the lower court's decision and the prosecution then succeeded with an appeal to the Supreme Court of Appeal in terms of Section 311, it may restore the conviction and sentence of the lower court. If the prosecution originally appealed to the provincial division, which appeal was rejected, but succeeded on a subsequent appeal to the Supreme Court of Appeal, the Supreme Court of Appeal must give such decision as the provincial division ought to have given.

(iii) Appeal against a sentence of a High Court

The prosecution may also apply for leave to appeal against sentence and leave to appeal must be obtained. The provisions of Section 316 of the CPA are applicable.

Powers of the Supreme Court of Appeal

(i) In respect of appeals in matters originating in a lower court, the Supreme Court of Appeal has the same powers as the provincial division.

(ii) In the case of an appeal against conviction or a question of law reserved, the Supreme Court of Appeal has the following additional powers:

- allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of wrong decision of any question of law or that on any ground there was a failure of justice;
- give such judgment or impose such sentence as ought to have been given at the trial;
- make such other order as justice may require .

(iii) Impose a punishment more severe than that imposed by the court *a quo*.

(iv) Remit the case for the hearing of further evidence (it is only in very rare instances that the Supreme Court of Appeal will hear evidence on appeal and the usual course is to set aside the conviction and remit the case to the trial court). For the Supreme Court of Appeal to hear further evidence, there must, generally speaking, be a possibility that a

miscarriage of justice will take place unless the additional evidence is led. The requirements in terms of Section 316(5) are:

- There should be some reasonably sufficient explanation why the evidence was not led at the trial.
- There should be a *prima facie* likelihood of the truth of the evidence.
- The evidence must be materially relevant to the outcome of the trial.

Statutory limitations on the powers of the Supreme Court of Appeal

The Supreme Court of Appeal isn't bound or competent to simply set aside or alter a conviction or sentence by reason of any irregularity. This may be done only where it appears to the court of appeal that a failure of justice has in fact resulted. In ***Moodie*** the following rules were formulated:

(v) The general rule with regard to irregularities is that the court will be satisfied that there has been a failure of justice if it cannot hold that a reasonable trial court would have convicted had there been no irregularity.

(vi) In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not properly been tried, this is a failure of justice *per se* and it is not necessary to apply the test of enquiring whether a reasonable trial court would inevitably have convicted had there been no irregularity.

(vii) Whether a case falls within (i) or (ii) depends on the nature and degree of the irregularity.

A distinction must be drawn between irregularities that are *per se* fatal and less serious irregularities. In the case of less serious irregularities, the remaining evidence is considered and weighed up by the appeal court, while if the irregularity is fatal, the conviction is set aside. Where the conviction and sentence are set aside by the appeal court, the court of appeal may remit the matter to the trial court, with instructions to deal with any matter.

Execution of a sentence pending appeal

The execution of a sentence imposed by a High Court isn't 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 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.

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:

The court which convicted the accused wasn't competent to do so;

The indictment on which the accused was convicted was invalid; or

There was some other technical irregularity or defect in the procedure.

11. MERCY, INDEMNITY AND FREE PARDON

11.1. General

Section 84(2)(j) of the Constitution empowers the President to pardon or reprieve offenders and remit fines, penalties or forfeitures. Section 325 of the CPA affirms ***ex adundanti cautela*** (to make double sure) the President's prerogative by providing that nothing contained in the CPA will affect the powers of the President to extend mercy on any person. President has a wide discretion when exercising these powers, only limitation being that he may not act contrary to the Constitution – ***President of the RSA v Hugo***. Nothing prevents the President from granting mercy *mero motu*, but generally he is petitioned for mercy by the convicted person or by someone on his behalf.

Convicted persons have no right to be pardoned or reprieved and also have no right to be heard in that respect, but may only hope for the indulgence of the President – ***Rapholo v State President***. The prerogative of commuting any punishment is, therefore, that of the President. In practice however, he won't exercise his prerogative of mercy without considering a report from the Minister of Justice containing the recommendations of the CPP, the presiding officer of the trial court and 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. It does, however, remain subject to judicial review.

11.2. Reopening of case and powers of the president

Since the courts are created by statute, the powers and functions of the High Courts and Supreme Court of Appeal with regard to the reopening of a criminal matter and the hearing of further evidence are governed by the CPA and the SCA. Not even the Supreme Court of Appeal has an extraordinary jurisdiction to reopen a case after it has been finalised by the Supreme Court of Appeal – ***Sefatsa v Attorney-General, Transvaal***.

Section 327 provides that if a person is convicted of any offence in any court and 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 affidavit and may permit the examination of witnesses in connection with the further evidence as if it were a normal criminal trial and assesses the value of such evidence. The findings of the court regarding the evidence don't 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:

- Direct that the conviction be expunged, effectively giving the accused a free pardon; or
- 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 Section 327. Similarly no appeal, review or proceedings lie against the refusal by the Minister to issue a direction to the trial court or the President to act upon the findings or advise of the court.

12. APPEALS AND AUTOMATIC REVIEW OF CERTAIN CONVICTIONS AND SENTENCES

Section 84 of the CJA - 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.

Section 85 of the CJA - 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 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, 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 the duration of the sentence.

(2) The provisions of subsection (1) don't apply if an appeal has been noted in terms of section 84.

Section 86 of the CJA - Release on bail pending ~view 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.

13. RECORDS OF CONVICTION AND SENTENCE

Section 87 of the CJA - 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 5 criminal record of that child must, subject to subsections (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 15 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 20 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 25 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 (l)(a)(i); or

(b) the period of 10 years, referred to in subsection (l)(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 50 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.