

ILLOVO PARALEGAL COLLEGE OF EDUCATION

CRIMINAL PROCEDURE
MODULE 1



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Criminal Procedure – Subject overview in question and answer format

What is the purpose of Criminal Procedure?

- Justifies substantial criminal goals
- Dispute resolution that is fair and economical
- Creates fair process and reliability of outcome

Discuss Crime Control in comparison to Due Process:

- Crime control is the idea that a criminal justice system will prevent crime
- Due process is focused on the aim of the criminal justice system. The focus is not so much on securing a conviction and sentence but rather that its properly achieved whilst taking into consideration the rights of the individual pre / during / post trial
 - Balance fair trial & crime control
 - Limits what people can do to each other and what the state can do to the suspect
 - Cant use the rights of the victim over that of the accused Section 35 rights
 - Fact finding which is regulated and controlled
 - Victims or society suffer due to criminals but state power over the accused is limited which results in a practical limitation on state power in detection, investigation, prosecution and punishment – it must be in line with the Constitution ¹



¹ Herein after referred to as the CON
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Pre-trial Procedure

Discuss the remedies for violations or threatened violations of fundamental rights

Suspect & Accused Rights – **WHAT** if rights are infringed?

The accused can use remedies if the state violates rights

- *Writ Habeas Corpus*
- Civil action for damages
- Criminal action for assault
- Informal remedies – escape
- Constitutional remedies – Section 38, CON damages, S172 of CON
- Exclusionary clause – evidence unconstitutionally obtained
- Interdict

What about the victim, discuss the role of the victim in our Criminal Justice system

- Prosecution done by the State
- It is a battle between the State and the Accused
- Victim is not involved in the proceedings and only becomes a witness for the State
- When dealing with serious crimes, the victim / victims family can make representation at parole / correctional supervision hearings
- Private Prosecution becomes possible IF the State declines to prosecute
- Witness protection – the Director of Public Prosecution ² may withhold a witness name and address in the indictment if the DPP feels that the witness might come to harm
- A witness can further also be allowed to testify behind close doors / CCTV if possibility of harm exist
- The witness can apply to be placed under witness protection

² Herein after referred to as DPP
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Guilt

Write an in-depth discussion on the meaning of an accused privilege against self-incrimination

RIGHT TO SILENCE *VERSUS* PRESUMPTION OF INNOCENCE:

- **WHY** does an accused have the right to silence – Privilege against self incrimination
- **FOR WHO** – Arrested person and accused
- Arrested / accused individuals **MUST** be informed of their rights
- **Common Law**³ - the accused silence can lead to an adverse inference
- **CON** – an adverse inference can not be drawn but should the accused fail to raise doubt becomes a problem if the state proves guilt beyond a reasonable doubt⁴
- The court must consider the possibility that the accused has a reason for his silence
 - Doesn't trust the system
 - Ignorant
 - Cast iron alibi
 - Believes the state has no case
- State institutes action against the accused **thus** S vs Botha
- Victim becomes a state witness
- An accused is innocent until proven guilty – **HOW** – BRD
- It must be legal guilt and not moral guilt
- **WHAT** must the accused do? – Raise doubt
- The accused right to a fair trial includes the right to:
 - Silence
 - Presume innocent
 - Legal representation
 - Not to testify

³ Herein after referred to as CL

⁴ Herein after referred to as BRD

Different courts and jurisdiction

Distinguish between the various courts jurisdiction when it comes to sentencing

HIGH COURT	REGIONAL COURT	DISTRICT COURT
<ul style="list-style-type: none">Any form of imprisonmentLife imprisonmentPeriodical imprisonment otherwise known as weekend imprisonmentDeclaration as an habitual criminalOrder committal to a treatment centerFine of any amountCorrectional supervisionImprisonment from which the accused is place under correctional supervision	<ul style="list-style-type: none">Imprisonment not exceeding 15 yearsFine not exceeding R300 000Periodical imprisonmentDeclaration as an habitual criminalOrder committal to a treatment centerCorrectional supervisionImprisonment from which the accused is place under correctional supervisionCan not hear matters of high treason	<ul style="list-style-type: none">Imprisonment not exceeding 3 yearsFine not exceeding R60 000Imprisonment from which the accused is place under correctional supervisionOrder committal to a treatment centerPeriodical imprisonmentCan not hear matters of rape, robbery with aggravating circumstances and murder

Fully discuss the extension of district and regional court jurisdiction and the application thereof

General rule: Regional and District Courts have jurisdiction to hear trials of offences committed within 4km of the district or regional division

- Extension of S90
 - 4km beyond the boundary
 - on vessel or in a car – part performed in division or within 4km
 - on board vessel within territorial waters
 - begun or end in division

Discuss when a court in South Africa will be able to have jurisdiction over an offence that was committed outside of South Africa ⁵.

General rule: Our courts will only exercise jurisdiction over offences committed in SA

Exceptions:

- High treason: SA citizen residing in a foreign country and joins the enemy army during war
- Theft committed in another country but the accused has the stolen property in SA – **WHY** – theft is a continuing crime
- Offences on ships: territorial waters are part of the relevant state / country to which the waters are adjacent, if the offence was committed on the open water / high seas (no state / country has jurisdiction) the courts need to look at the effects and property involved
- Offences committed outside SA on a non-SA plane and the plane lands in SA with the offender on board or the principal place of business or permanent residence of the lessee of the plane is in SA or the offender is present in SA.
- Offences committed on territory subsequently annexed by SA
- Offences committed on an SA plane wherever it is (Civil Aviation Act)
- Offences committed by a SA citizen in Antarctica, the Cape Town Magisterial District will have jurisdiction of the matter
- Offences deemed to be committed wherever the accused happens to be
- Embassies – diplomats will always remain subject to the jurisdiction of their home state

Prosecution

- State is represented by the Public Prosecutor ⁶ and the accused by a legal representative
- S179 of CON confirms we have a single national prosecuting authority which consists of a National Director of Public Prosecution, ⁷ Deputy National Director of Public Prosecution, ⁸ DPP, Deputy Director of Public Prosecution, ⁹ and PP

What qualifications does the NDPP need in order to qualify for appointment?

⁵ Herein after referred to as SA

⁶ Herein after referred to as PP

⁷ Herein after referred to as NDPP

⁸ Herein after referred to as DNDPP

⁹ Herein after referred to as DDPP

- The NDPP and DNDPP needs the proper or relevant qualifications, they must also be fit and proper

Who appoints the NDPP and for what term?

- The NDPP is appointed by the President for a non renewable office term of 10 years or until the age of 65

When can the NDPP be suspended or removed from office?

- The NDPP can be suspended for misconduct, continued ill health, incapacity to perform duties, being incompetent or no longer being fit and proper
- The DPP is also appointed by the President after consulting with the Minister of Justice and the NDPP, The DPP can also serve up to the age of 65

Briefly list the powers and duties of the NDPP:

- Has authority over the exercising of all powers and performance of all duties
- Determines our prosecution policy
- Must intervene when his directives are not complied with
- Can review a decision made to prosecute or not prosecute
- Direct he submission of and receive reports from the DPP's
- Always maintain close liaisons with the DNDPP and DPP's
- Conduct any investigation he deems necessary in respect of the prosecution process
- Prepare reports in respect of the operation of the prosecuting authority

Explain the relationship that exists between the prosecuting authority and the judiciary

- Courts rarely interfere with the prosecuting authority's decision to prosecute but have expressed their disapproval in the past
- In principle courts can not interfere with a *bona fide*¹⁰ decision by the prosecuting authority
- The courts can at most give a lenient sentence to reflect their disapproval. The court can also acquit an accused
- Courts are hesitant to interfere with the *bona fide* decision to prosecute because the accused will be afforded the chance to put his defence to the court

¹⁰ Act conducted in good faith

- BUT the fact remains that if the discretion granted to the prosecuting authority is *male fide*¹¹ or improperly used the courts can intervene

S92 of the Child Justice Act¹² states that should it come to the attention of the court or the probation officer that a child had been used by an adult to commit an offence (Schedule 1 or 2), the court must report it to the South African Police Service,¹³ when considering prosecution of the child, the adults involvement must be considered.

Discuss private prosecution as an option to the victim if the state declines to prosecute:

- The police investigate crime and has no discretion to prosecute
- Not all matters ends up on the PP's desk
- The DPP has the final say thus decides yes or no to prosecution
- The PP considers all the facts and evidence
- The court can not interfere with the PP decision to prosecute, the court can give lighter sentence or acquittal
- Must prosecute if a **reasonable** prospect of success exist
- Good grounds to decline to prosecute:
 - Triviality of the offence
 - Advance age of the accused
 - Young age of the accused
 - Tragic personal circumstances of the accused
- Private Prosecution becomes possible if the prosecuting authority declines to prosecute. The DPP signs certificate *nolle prosequi* stating in it that he has examined the facts and declines to prosecute. The individual instituting private prosecution must show *locus standi*, pay the relevant deposit.
- The DPP can later apply for the private prosecution to be stopped and for the state to continue with the prosecution

CJA – Private prosecution is not possible against a child if the matter was diverted in terms of the CJA

¹¹ Act conducted in bad faith

¹² Herein after referred to as CJA

¹³ the SAPS

Distinguish between withdrawing a charge and stopping a charge

Withdrawing a charge *versus* stopping a charge:

- | | |
|--|---|
| <ul style="list-style-type: none"> • Can withdraw a charge before the accused has pleaded • Accused is not entitled to acquittal • The PP can withdraw without the consent of the DPP • The accused can be recharged at a later date | <ul style="list-style-type: none"> • Can stop a charge after plea by the accused but before conviction • Only done with the consent of the DPP • The accused is entitled to acquittal • The accused can raise <i>autrefois acquit</i>¹⁴ if recharged |
|--|---|



Right to legal assistance

Discuss the accused right to legal representation in full:

WHEN does an accused have this right?

- During all pretrial and trial proceedings

WHO informs the person of this right?

- An arrested person will be informed by the Police
- An accused person will be informed by the Judicial Officer
- Arrested or accused must be informed at every stage that the persons co-operation is required
- A failure to inform by the Judicial Officer can lead to a complete failure of justice
- The accused must be afforded with the opportunity to get legal representation

¹⁴ Previous acquittal as a plea
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- If you can not afford legal representation you can apply to the state for free assistance

Failure to inform

- Common law ¹⁵ the *Radebe* case
- CON the *Dyanti* case

CJA and legal representation

A child has equal rights to an adult when it comes to S35 rights

- The parent, guardian or appropriate adult can assist a child in proceedings and participates in decisions that affect the child
- The legal representative must if possible allow the child to give independent instructions
- Always explain to the child all the relevant rights and duties
- The legal representative must promote diversion but can not influence the child

Accused presence as a party

According to the CON the accused has a right to presence as a party during all stages of his trial, there are however some exceptions to this right. Discuss them

General rule: The trial must take place in the presence of the accused (applies during all stages of the trial)

Exceptions:

- Trial in absence of the accused on account of misbehavior
- Absence of accused where there is more than one accused
- Evidence by means of CCTV or similar electronic media
- Payment of a fine without appearance in court (admission of guilt)

Discuss and compare payment of a fine without appearing in court and compounding of minor offences

- If the clerk of the court has the believe that the accused will not be convicted of paying a fine of more than R5000 when he / she issues he summons, the clerk can endorse the summons that will allow the

¹⁵ Herein after referred to as CL

accused to admit guilt relating to the offence and pay the fine without appearing in court

- The PP can also give the accused a similar endorsement after the accused 1st appearance but before pleadings
- Can pay the clerk, the Magistrate or the police before the stipulated date
- The amount can be reduced if good cause is shown (for statutory offences such as traffic violations)
- Payment of an admission of guilt amounts to a conviction and sentence and is seen as a previous conviction

Compounding of minor offences (S341) versus admission of guilt:

- The offender pays an amount not to be prosecuted thus pays the amount in order to avoid going to court
- Paying the amount does not mean the offender has a previous conviction behind his name
- Parking ticket
- Offender pays amount in summons or written notice to appear instead of going to court
- By signing and paying the accused is convicted and sentenced which results in the accused having a previous conviction



Exercise of powers and limitations of individual rights

What are the guidelines to establish whether or not a suspicion is a reasonable one based on reasonable grounds?

Requirements for Reasonableness:

- Reasonable grounds ¹⁶ based on a reasonable suspicion ¹⁷ by a reasonable person ¹⁸ who belief or suspect facts exist
- RG from which an inference can be drawn
- RP will only have RG to believe or suspect something or that certain action is necessary if:
 - He really “believes” or “suspects” it
 - His belief or suspicion is based on grounds
 - In the circumstances and in view of these grounds a RP will come to the same belief or suspicion
- Grounds are facts, facts that must be objectively determined by a persons five senses
- Once facts are established; evaluate and make an inference from those facts with regards to the existence or otherwise of other facts, which he is at the time for whatever reason unable to establish
- After inference from other facts that exist it can be said that the person himself “believes” or “suspects” that such facts exist
- Fact that certain person believes or suspects’ facts exist is not sufficient to regard belief as based on RG, it will only be the case if any RP would have the same belief or suspicion in the circumstances. The RP is any person with the same background and knowledge as the person who actually entertains the belief or suspicion

This is an objective question that must be answered with reference to the factual circumstances at hand which means that a person can have RG to belief or suspect facts exist and a RP will draw the same conclusion

¹⁶ Herein after referred to as RG

¹⁷ Herein after referred to as RS

¹⁸ Herein after referred to as RP

Securing attendance of the accused at trial

Distinguish between summons and indictment as methods to secure attendance of an accused at trial

- Summons
 - Is drawn up by the PP and issued by the clerk of the court
 - Contains
 - Date and place of the crime
 - Particulars of the accused
 - The charge
- Written Notice
- Indictment
 - Used in trial in superior court, drawn up in the name of DPP
 - Contains:
 - The charge
 - Date and place of the crime
 - Particulars of the accused
 - Summary of Facts
 - List of names and addresses of state witnesses unless the DPP feels this information
 - In lower court the indictment is called a charge sheet
- Arrest: lawful arrest requirements:
 - Must be properly **authorised**
 - Arrestor must exercise **physical control**
 - **Inform** the arrestee of **reasons** for the arrest
 - Take the arrestee to the **authorities as soon as possible**
- Arrest with a warrant
- Arrest without a warrant



Name at least 8 instances when it is justified for a peace officer to arrest a suspect without a warrant

S40:

- Anyone who commits or attempts to commit any offence in his presence
- Anyone he reasonably suspects of having committed a Schedule 1 offence
- Anyone escaping or attempting to escape from lawful custody
- Anyone who deserts the South African Defence Force
- Anyone found with a housebreaking implement and can't explain why he has it
- An illegal immigrant
- Anyone believed to be in unlawful possession of stock or produce
- Anyone gambling illegally
- Anyone who has failed to pay a fine or is suspected to have failed to pay
- Anyone who obstructs a police officer from performing his duties

S41: Obtaining the name and address

A police officer can ask any person:

- Who he has the power to arrest
- Who he reasonably suspects of having committed an offence
- Who may be able to give evidence relating to an offence

To furnish his name and address

Should such a person fail to provide his details or the police officer has a RS that the details provided are false, the police officer can arrest him and detain him for 12

hours to authenticate the details provided. Failure to give details or false details is an offence, which is punishable by a fine or imprisonment

Discuss when a private person has the powers to arrest a suspect

S42:

A private person can arrest someone without a warrant if:

- A person commits or attempts to commit a Schedule 1 offence in his presence, the RP test must pass
- Has a reasonable belief that a person committed an offence and is escaping from the authorities
- Stock theft
- Someone engages in a fight
- Any owner, lawful occupier, person in charge of property which a person is found committing an offence

Use this power sparingly; always alert the authorities as soon as possible after the arrest they will re-arrest the person and inform him of his rights

Compare and fully discuss the procedure after arrest to be followed in case of an adult and in case of a child

Procedure after arrest:

- Take to police station a.s.a.p. **WHY** because of the 48hour rule
- Two periods of custody exist:
 - Prior to the arrival at the police station
 - After arrival at the police station
- Once arrived at the station, an accused may not be detained for more than 48hrs (General rule which can be extended)
- Release because no charges are brought or
- Brought before a lower court within 48hours for the accused's 1st appearance

CJA and the procedure after arrest

Children under 10:

- No criminal capacity thus can not be prosecuted
- Should a child under 10 commit an offence, must hand the child over to the parent, guardian or appropriate adult and if they are not suitable to a child youth care centre

- Inform the probation officer who must assess the child a.s.a.p. but not later than 7 days

After the assessment

- Refer the child to the child justice court, counseling, therapy, a program that is age appropriate, arrange support services and meet with the parents and / or guardian

Child over the age of 10 but under the age of 18:

- They have a right not to be detained and may only be detained as a last resort and then for the briefest period possible
- Always separate adults from children as well as boys from girls
- Protect them against neglect, abuse and bad treatment
- Never endanger the child's physical or mental health or the child's well being in general
- May not arrest for a Schedule 1 offence unless compelling reasons are present
- Should a child be arrested, release into the care of a parent or guardian and hand the child a written notice to appear
- If the child is not released before the preliminary inquiry, further detention in a child youth care centre (if available) must be considered alternatively a police-cell or lock-up facility
- Should the child remain in detention after the preliminary inquiry, the probation officer must furnish the inquiry magistrate with reasons why the child should not be released

Discuss the validity or not when the state have detained a suspect for longer than 48hours and denying bail

In this question you will discuss

- The 48 hour rule along with remedies (*Writ Habeas Corpus* and escape) the accused has if he is kept longer than legal
- Then discuss police bail and if police bail is refused state that the accused can reapply for bail at his 1st appearance
- THIS WILL ALWAYS BE IN A PROBLEM TYPE QUESTION – read the facts carefully and if bail is refused for a trivial offence like stealing a chocolate or something the refusal of bail will not be justified

Discuss the legality of the use of force in order to arrest a suspect

General rule: May not use force in order to affect an arrest – **WHY** – arrest is a method to secure attendance at a trial and not to punish the accused thus may only use force when it is reasonably necessary to overcome resistance



S49 sets out when use of force is reasonable:

- Force must be immediately necessary
- Risk that suspect will cause death or grievous bodily harm ¹⁹ if the arrest is delayed
- Offence is in progress, its of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood exist that it will cause GBH
- The use of firearm to arrest must be resorted to with great caution
- *Walters* and *Basson* cases are relevant
- The RP test is relevant

Discuss extradition

- Agreements between countries to extradite criminals to state where the crime was committed
- Double criminality ²⁰
- Death sentence *versus* no death sentence ²¹

¹⁹ Herein after referred to as GBH

²⁰ Must be a crime in both countries

²¹ In SA for example you won't be extradited to a country that will impose the death penalty if convicted because in SA we have the right to life and we do not impose the death penalty

- Only extradite and tried for crime “agreed”, further agreement must be reached for any additional crimes
- Recent example: The *Dewani* case

Interrogation and Interception

Discuss the general power of the police when it comes to interrogation of any person regardless if it is a possible witness or someone who might be suspected of committing the crime

General power of the police to interrogate

- They don not need an special powers to interrogate anyone as long as they have access to the person they wish to interrogate
- Special powers are only needed when the person they wish to interrogate doesn't want to grant the police access or refuse to respond to the police by not answering questions or answers the questions but doesn't want to give personal information that will allow the police to subpoena him to testify

Powers relating to possible witnesses

- A high court judge or magistrate may require the attendance of any individual who is likely to provide material or such relevant information to any offence regardless of the fact that the suspect is known or not
- If the person provides everything needed before the relevant date, the person doesn't have to appear
- The examination of the person may be held anywhere named by the judicial officer and doesn't have to be held in court. This can be on an informal basis
- S205
 - Compel someone to reveal his knowledge. This section provides for the examination of the person and not cross examination by the PP
 - The witness / person can have legal representation
- S189
 - Court can enquire into a witness refusal to answer
 - “Just excuse” must be shown
- S203
 - No witness is obliged to answer self incriminating questions

Discuss the powers of the police to gain entry to premises in order to interrogate

Entry to interrogate

- S26 – police official can enter w/out a warrant to interrogate BUT cant enter private dwelling w/out consent of the occupier
- S27 – may use force reasonably necessary to overcome resistance – break window / knock down door BUT must 1st audibly demand admission to the premises

Discuss how you would obtain bodily features of s suspect and or accused

Regulated by S37, which states how finger, palm and footprints may be obtained as well as how identity parades may be held. It further also deals with ascertaining bodily features, blood samples and photos

- Only suspects may be subjected to S37
- Only qualified medical or nursing staff may take blood samples
- Should the accused be acquitted, all data obtained must be destroyed



Search and Seizure

Discuss which articles the police may seize during a search and seizure operation

S20:

- Articles used in the commission of the crime or reasonably suspected of being used
- Articles that may be used as evidence of the commission of an offence
- Articles which are intended to be used in the commission of an offence
- Exception: privileged documents such as documents addressed to a persons attorney

Discuss the principles of search without a warrant

S22

- Police can search to seize S20 articles if the person consents to it
- Use of force to search:
 - S27 regulates this
 - No knock clause exist – **WHY** – the element of surprise may prohibit a person from destroying articles

The above 2 questions can be combined in a problem type question. Read the facts carefully, discuss the law and then apply to the facts.

Bail

WHAT effect does bail have?

The accused is released when bail (whichever form) is granted. The accused will only be released if he pays the amount of money (or gives a guarantee) determined for his bail. He will always be notified when and where he must appear for trial. It continues until the end of the trial unless it is cancelled for a valid reason (accused hasn't complied with the bail conditions).

Discuss the accused constitutional right to bail

HOW does the CON affect bail?

Section 12 – everyone one has the right to freedom and security of person, which includes the right not to be deprived arbitrarily or without just cause

- Bail shouldn't punish the accused because bail remains non-penal in character
- This character should not take away from the fact that the accused committed a wrong prior to the bail being granted
- If the prosecution causes *bona fide* delays of the trial, it doesn't give cause for the accused to be released on bail

Section 35 – everyone arrested for an alleged offence has the right to be released from detention if the interests of justice permits it, such release can and will be subject to reasonable conditions

Distinguish between the three forms of bail:

Police bail:

- The accused can be released on bail by a police official on or above the rank of non-commissioned after consulting with the Investigating Officer
- The accused must deposit at the station a sum of money
- CASH only!
- This is always before the 1st appearance in court
- No conditions may be imposed
- Notice given to the accused must reflect the amount paid, offence along with the date and time of the trial
- Hand copy to clerk of the court

Prosecutorial bail:

- DPP in consult with the Investigating Officer after which he may release the accused on bail
- Cash or a guarantee is acceptable
- Can impose conditions
 - Restrict from area or a person
 - Restrict from contacting state witnesses
 - Place to serve documents
 - If it is in the administration of justice, can take the accused's passport
- Record application in full
- Only lasts until 1st appearance in court after which the court then decides if bail will continue or not

Court / Formal bail:

- Can release the accused on bail at any stage prior to conviction
- Cant postpone application for more than 7 days at a time
- Can impose conditions

When refusal of bail will be in the interest of justice:

- Endangering public safety
- Attempt to evade his trial
- Jeopardize the proper functioning of the criminal justice system
- Disturb public peace and order

Exceptional circumstances – S60 (11)(A):

Which makes release in the interest of justice

- No exact guidelines exist and each case will thus be debated in court
- UNISA is of the opinion that:
“Ordinary circumstances present to an exceptional degree”
CAN satisfy the burden in this regard

Discuss the burden and standard of proof when it comes to previous convictions and bail applications

- May be proved by the state during the course of a bail application
- The accused or his legal representative on the other hand are compelled to tell the court of any previous convictions, pending charges or if the accused is currently out on bail for those pending charges
- If the legal representative does so on the accused’s behalf, the accused must affirm this or not
- If the accused fails to, submit false documents or refuses to comply; he commits an offence which is punishable with a fine or imprisonment

What does it mean when one says; “we have a free system of evidence” that applies during bail applications

- The strict rules of evidence are relaxed during bail applications, hearsay evidence are received more willingly than at the actual trial
- Oral statements made by the defence or the prosecution may be received
- Bail applications may be brought on affidavit and if the state would like to oppose the application, they can file an answering affidavit and adduce oral

evidence regardless of the fact that affidavits carry more weight than any oral statement

- May rely on the opinion of an investigating officer but may never simply accept the *ipse dixit*²²
- The DPP's personal opinion is more relevant than those of his prosecutors due to his experience and the position he holds
- Consideration should be granted to evidence that the accused has no intention to abscond

Pre-trial examinations

Discuss a plea by the accused in Magistrate Court on a charge justifiable in a Regional Court

S122

- The accused appears in Magistrate Court on an offence that may be tried by a Regional Court and not a Magistrate Court
- The prosecutor must inform the court of this and that the offence will further merit punishment in excess of the current courts jurisdiction
- The magistrate will ask the accused to plea

Guilty plea in terms of S112	Not guilty plea in terms of S115
<ul style="list-style-type: none">○ The magistrate must question the accused to see if the accused is guilty○ If the magistrate is happy that the accused is guilty – refer the accused to the regional court for sentencing○ If the magistrate is not happy, he will enter a plea of not guilty and submit the accused to a summary trial in the regional court	<ul style="list-style-type: none">○ The magistrate will question the accused to see what he admits – this is done to try and reduce the number of issues between the state and the accused○ If the accused consents that what he admits can be recorded – it becomes a formal admission placed on record○ If the accused says no – it becomes an informal admission which is not

²² An unsupported statement that rests solely on the authority of the individual who makes it
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	<p>recorded</p> <ul style="list-style-type: none"> ○ Submit the accused to a summary trial in the regional court
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Discuss the accused's plea in Magistrate court on a charge justiciable in the High court

- This is a mini-preparatory exam – **WHY** – to ease the workload of the High court
- It is a sifting process which can sometimes result in the elimination of a case entirely
- Plea bargaining can be done at this stage
- The charges can be reduced
- It shows co-operation from the accused at an early stage
- The accused will again be asked to plea in terms of S112 and S115

Guilty	Not guilty
<ul style="list-style-type: none"> ○ Magistrate question the accused ○ The accused admits allegations ○ If the magistrate is satisfied <ul style="list-style-type: none"> ▪ Stop proceedings pending the decision of the DPP ▪ DPP arraign the accused for sentencing before a superior court 	<ul style="list-style-type: none"> ○ Magistrate questions the accused ○ Indicate the basis of the accused's defence ○ Court puts any questions they have to the accused ○ Magistrate stops proceedings <ul style="list-style-type: none"> ▪ Adjourn pending the decision of the DPP, who will either arraign the accused or institute a preparatory examination

Explain what a preparatory examination entails

- It is like a trial
- The judge must remain objective
- Sited as a trial – State *versus* Accused
- Investigation to see if there is enough evidence to take the accused to court

- It doesn't start with pleadings like a normal trial, the accused only pleads at the end
- The DPP decides which evidence is to be presented
- At the end, charge the suspect and then the accused pleads
- The PP has the discretion to prosecute, he can either at this stage stop the charges against the accused or he can withdraw them



The CJA:

The CJA changed the way in which courts will deal with children when they have committed an offence. Children will no longer be tried in the children's court but in a Child Justice Court.

The CJA applies to children who was under the age of 18 at the time of the offence

- Children under the age of 10 have no criminal capacity
- Children that are 10 but not yet 14 are presumed to lack criminal capacity
- Children that are 14 but not yet 18 are criminally responsible and will be dealt with in accordance with the CJA
- Persons between the ages of 18 and 21 can be dealt with in terms of the CJA if the offence was committed when the child was under 18

WHAT is the aim of the CJA?

- The main focus is on restorative justice
- It's a separate justice system for children
- Diversion away from the formal court procedure is possible

- Should a child and adult be charged jointly, the courts will deal with the child in terms of the CJA and the adult in terms of the Criminal Procedure Act

HOW do you secure attendance of a child at a preliminary inquiry?

- Written Notice
- Summons
- Arrest

Discuss methods of securing attendance of a child at the preliminary inquiry

A police official must obtain prior advice from the DPP regarding the correct method to be used.

Written notice:

- Schedule 1 offences only
- A written notice for a child to appear may never give an option for the child to pay an admission of guilt fine
- The notice must be handed to the child in the presence of the parent, guardian or appropriate adult. Both the child and adult must sign the notice or make a mark to acknowledge receipt
- If the parent is not present or available, hand the notice to the child and to the parent as soon as possible
- The officer handing the notice over must inform the child of all his rights, the procedure that must follow and of the allegations against the child.
- The child must be warned or informed to appear at the preliminary inquiry on a certain date and time. The parent **MUST** bring the child
- The probation officer must be notified in writing that the notice was handed to the child

Summons:

- Serve on the child in presence of his parent, guardian or appropriate adult who must both sign or make a mark to acknowledge receipt
- If the parent is not present or available, serve on the child and on the parent as soon as possible
- The officer handing the notice over must inform the child of all his rights, the procedure that must follow and of the allegations against the child.
- The child must be warned or informed to appear at the preliminary inquiry on a certain date and time. The parent **MUST** bring the child

- The probation officer must be notified in writing that the notice was handed to the child

Arrest:

- May not arrest a child for a schedule 1 offence but should reasonable grounds to belief that the child will continue with the wrongdoing exist, the child is a danger to itself or others, is caught in the act or can't provide a fixed address.
- Absolute reasons must exist before arresting a child for a Schedule 1
- After the arrest the child must be brought before the probation officer within 24 hours and should the child be kept in custody it may never be longer than 48 hours

Discuss the stages of diversion in terms of the CJA

Three stages exist when diversion can be ordered:

1. Prosecutorial diversion

This is diversion prior to the preliminary inquiry for Schedule 1 offence only. Even though its not in court, it must still be made an order of court by the Magistrate in chambers

2. Diversion by preliminary inquiry Magistrate

This is during the actual preliminary inquiry and is done on the recommendation of the PP. It is used for Schedule 1, 2 as well as Schedule 3 matters which may be diverted in exceptional circumstances only after the DPP recommended the diversion in writing.

3. Diversion by the child justice court

This is done during actual trial for any Scheduled offence but again Schedule 3 matters may only be diverted if exceptional circumstances exist and if the DPP has made a recommendation in writing for the diversion

Different levels of diversion exist

- Level 1 which applies to Schedule 1
- Level 2 which applies to Schedule 2 and 3
- The level of diversion is a representation of the length of time for which the diversion may be ordered

Diversion options:

- There is an actual task that must be completed by the child offender for a specific length of time
- The task will vary depending on the Schedule of offence and the level of diversion granted
- It is not necessarily a soft option and the tasks range from very mild to severe
- If the diversion is completed successfully the matter is finalized and the child has no criminal record
- REMEMBER if a child is granted diversion, private prosecution is not an option

What is a preliminary inquiry?

- Is a procedure that is provided for in the CJA
- It is only available to child offenders and not adults
- Should a child be suspected of having committed an offence, the child will first have to appear at a preliminary inquiry
- The reason for this is to consider all the options of diversion and to decide to perhaps divert the matter away from the sometimes very formal criminal justice procedure
- It is an informal pretrial procedure which introduces an inquisitorial element to our normal accusatorial system because the inquiry magistrate is actively involved in the proceedings
- It is not necessarily held in court, it can be held in court or any other suitable place
- If the matter is not diverted at this stage a summary trial can follow or the matter will be referred to the child justice court