

- (1) you should identify the relevant question of law through a process of elimination
- (2) you should discuss the relevant legal principles according to the facts
- (3) you should apply the legal principles to the facts.

When discussing the relevant legal aspects you should stress conflicting legal principles and substantiate your views with authority.

Note that we use the following style of reference: when we refer to "the Handbook" or "Joubert", we meant Joubert (editor) *Criminal Procedure Handbook*, 5th edition (2001); "the Constitution", we meant the Constitution of the Republic of South Africa, Act No 108 of 1996; "the Act", we meant the Criminal Procedure Act No 51 of 1977.

Below you will find a separate commentary on some questions and in the case of others, where no explanation is necessary, you are simply referred to the relevant parts of the Handbook.

DISCUSSION OF QUESTIONS

Question 1(a)

(10)

Before 1959 the courts required indictments/charge sheets to disclose an offence, i.e. that they disclose facts which, if proved, would render the accused guilty of an offence. Where a material element of the crime was omitted, e.g. "on a public road", as in the question, the accused could not be found guilty, even though the evidence at the trial proved the element omitted in the charge.

Later on s 88 of the Act provides that where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence the defect shall be cured by evidence led at the trial proving the matter which should have been averred, unless the defect is brought to the notice of the court before judgment. If it is brought to the notice of the court and the court refuses an amendment, the accused cannot be found guilty on the defective charge.

The offence should, however, at least be named in the charge and the prosecutor should exercise caution in framing the charge because the accused may before pleading except to the charge.

The defect can be cured only by evidence proper and not by a presumption. Section 88 does not authorise the replacement of one offence by another offence proved by evidence.

Secondly, in terms of s 86(1) of the Act an indictment/charge may be amended where it is defective for want of an essential element; or where there is a variance between the averment in the charge and the evidence offered in proof of such averment; or where words have been omitted, or unnecessarily inserted, or any other error has been made.

An amendment will only be ordered if it will not prejudice the accused in his/her defence.

Section 86 does not make provision for an amendment of the charge and not for a replacement thereof by an altogether new charge.

4

Regarding superfluous words or any discrepancy between the averment in the charge and the evidence adduced and the charge has not been amended, it will not affect the validity of the proceedings if it would not have prejudiced the accused in his/her defence.

See *Joubert* 175-178. *cap. 12*

Question 1(b)

(15)

The rights and duties of assessors is a straightforward question and there is no need to repeat everything that is in your *Handbook*. See, therefore, *Joubert* 187-190.

OR

cap. 13

The rules and principles that apply in respect of an application for the recusal of the presiding judicial officer is once again a straightforward question and is not discussed here. You are referred to *Joubert* 196-198, and see also 192-194. *cap. 13*

Question 2(a)

material difference, *allegation* (13)

The prosecutor could have applied for an amendment of the charge - see s 86 of the Act. He/she could do so, *inter alia*, where there is a variance between the averment in the charge and the evidence offered in proof of such averment; or where words have been omitted, or unnecessarily inserted, or any other error is made. *allegation*

The test is whether the making of the amendment will not prejudice the accused in his/her defence.

There will be no prejudice if there is but a slight variance or where it is clear that the defence would have remained exactly the same had the state originally presented the charge in the amended form. *material difference*

Section 86 makes provision for an amendment of the charge and not the replacement thereof by an altogether new charge.

It is submitted that the amendment would have been granted as the shirts/trousers as such were not placed in dispute by the accused, but the fact that he bought them and did not steal them.

It is a deep seated principle of any civilised system of criminal law that no person shall be punished more than once for the same offence or be in jeopardy of being tried twice for the same offence. "No person shall be harassed twice for the same cause".

Autrefois acquit. *or Requirement*

The essentials of this plea are that (i) the accused has previously been acquitted (ii) of the same offence or substantially the same offence with which he/she is now charged (iii) by a competent court and (iv) upon the merits. X's plea will be sustained in respect of (i), (iii) and (iv) (that is quite obvious), but also in respect of (ii) because the new offence is substantially the same as the first one.

↓
of the case

amendment of a charge.

5

51-day

CMP102-4/102

See *Joubert* 177-178 and 217-222.**Question 2(b)**

(12)

This question is once again a straightforward one and you are just referred to *Joubert* 224-225.

OR

The same applies to this question and you are just referred to the *Joubert* 201-204.

Question 3(a)

(15)

The defence case after the close of the state's case

- (1) The court must ask the accused or his/her representative if he/she intends leading evidence for the defence. - S.151
- (2) If the accused answers in the affirmative, he/she may address the court for the purpose of indicating to the court, without comment, what evidence he/she intends adducing on behalf of the defence.
- (3) The accused must also be informed that he/she is entitled to call witnesses or give evidence him/herself, but also that he/she may remain silent.
- (4) If the accused answers in the affirmative, he/she shall except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence; or
- (5) If the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence him/herself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.
- (6) The accused has a right to silence and not to give any evidence, but no inference may be drawn from the fact that he/she has exercised his/her right to silence. The exercise of this right has, however, certain consequences, for instance that it leaves the *prima facie* evidence of the state uncontested. The accused must be informed about this.
- (7) The court must assist the unrepresented accused in presenting his/her case and in the questioning of his/her defence witnesses.
- (8) The court must be careful not lightly to refuse a request to call a witness on behalf of the unrepresented accused.
- (9) The court must not be guilty of judicial harassment by descending into the arena of conflict.
- (10) The accused may not make an unsworn statement. - it has been abolished.
- (11) The accused may make formal admissions in respect of aspects that he/she does not dispute.

- (12) The accused has the right to re-examine his/her witnesses after they have been cross-examined by the state on any matter raised during cross-examination - s 166.

See *Joubert* 245-248.

Question 3(b)

(10)

This question deals with the facts where X is charged in a **lower court** with **armed robbery** and found guilty by a magistrate who has held the substantive rank of magistrate for ten years. X is sentenced to a fine of R60 000 or 14 months' imprisonment, plus a further 2 years' imprisonment suspended for 5 years on condition that he behaves himself properly during the period of suspension.

$14 + 2 \text{ months} + 2 \text{ yrs} = 3 \text{ yrs} + 2 \text{ months}$

The aspects relevant to this question and which are discussed below, are as follows:

- (1) the jurisdiction of the court in respect of (a) the sentence and (b) the offence committed. *or punishment* *crime comm*
- (2) the ^{*suspension*} correctness of the sentence. ①
- (3) the automatic reviewability of the sentence.

(1)(a) Jurisdiction in respect offences

In order to impose a valid sentence a court must have jurisdiction to try the relevant offence. Please note that a lower court consists of either a **magistrate's court** (district court) or a **regional court**.

- (i) ^{*district*} A magistrate's court may try all cases except murder, treason and rape (see s 89 of the Magistrates' Court Act, 32 of 1944). This court may, therefore, in principle try "armed robbery". ✓
- (ii) A regional court may try all cases except treason (see s 89 of the Magistrates' Court Act, 32 of 1944.) It is, therefore, also competent to try "armed robbery". ✓ ①

Please note that in order to answer this question and any question dealing with the regularity of a sentence, you have to be able to state the jurisdiction of the courts irrespective of whether the contents of such falls within the second module. The most important, naturally, is the jurisdiction in respect of punishment and it is mentioned in both modules - see *Joubert* 40-42, 272-274 and 277-279. Although jurisdiction in respect of offences is only mentioned in the first module - see *Joubert* 34-35 - it is knowledge that is assumed and accepted in module two. See, further, *Joubert* 285-287 and 301-305.

(1)(b) Jurisdiction in respect of punishment

- (i) A district court may sentence to a ^{*100 000*} fine of R60 000 and/or 3 years' imprisonment per charge. *mag-court*
- 5.300 CPA

- (ii) A regional court may sentence to a fine of ~~R300 000~~ ^{500 000} and/or 15 years' imprisonment per charge.
- (iii) The jurisdiction in respect of punishment may expressly be increased by law, but it is not relevant in this question. The fine of R60 000 is, therefore, regular in both courts.
- (iv) The alternative imprisonment of 14 months is added to the suspended imprisonment of two years. It is, therefore, 3 years and 2 months. The sentence is, therefore, regular in the regional court, but irregular in the district court, as the latter's jurisdiction is exceeded with 2 months.
- (2) **The suspended sentence** ^{(Period) 5 yrs.}
- (a) A sentence may in the discretion of the court be suspended for a maximum period of five years, as in this case.
- (b) The conditions must be relevant to the offence, be reasonable and they must be stated clearly and unambiguously, which is not the case here. ^{of the suspension}
- (3) **Automatic reviewability**
- (a) Only certain sentences of district courts are subject to automatic review, while sentences of regional courts are not, (except) in cases of contempt *in facie curiae*. ^{punishments}
- (b) The following sentences are subject to 'automatic review.' - s. 302 CPA
- (i) sentences of imprisonment for a period exceeding 3 months or a fine exceeding R2 500 if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for seven years
- (ii) sentences of imprisonment for a period exceeding 6 months or a fine exceeding R6 000 if imposed by a judicial officer who has held the substantive rank of magistrate or higher for seven years or longer.
- (iii) in both instances only if the accused was not assisted by a legal adviser during the trial and at the time of sentence.

This sentence is, therefore, subject to automatic review if imposed by a district court.

OR

The various forms (or terms) of imprisonment.

It is fully discussed in *Joubert* 272-276 and it serves no purpose to repeat everything here.

Question 4(a)

(12)

(i) Who has *locus standi* in respect of constitutional matters.

The question is fully discussed in *Joubert* 291 and 326-327.

(ii) **Forms of remedies or legal aid that a competent court may grant in constitutional matters.**

The question is directly discussed in *Joubert* 297-299 and is not repeated here.

Question 4(b)

(13)

Reservation of questions of law

Once again this question is directly discussed, and without it being necessary to be repeated, in *Joubert* 362-364.

OR

Application for leave to appeal against a decision or order by a High Court.

As this question is once again fully discussed in *Joubert* 355, it serves no purpose to repeat everything again and you are just referred to the reference in the *Handbook* where you can find the answer. You can also refer to *Joubert* 338-340 where the negative aspect of the discussion is discussed, viz. the exceptions to the general rule that an accused may appeal with leave. These exceptions are applicable to all courts.

(3) CORRECTION : THE PARTS OF THE PRESCRIBED HANDBOOK THAT YOU NEED NOT STUDY FOR EXAMINATION PURPOSES

In tutorial letter 101/2003 the following is stated on p 5 paragraph 5.3 :

"Please note that only chapters 12-22 of this Handbook are prescribed for the course Criminal Procedure CMP 102-4.

In the course of the year you will receive a tutorial letter indicating (*inter alia*) those parts of the prescribed study material that may be omitted for examination purposes."

The latter is not applicable any more. The tutorial letter referred to is this one, but the correction is that no parts of the Handbook, included in chapters 12-22, may be omitted for examination purposes. The examination will, therefore, cover all material in chapters 12-22.

For the sake of absolute clarity we emphasise once more that you have to study the following for examination purposes:

- (1) your handbook chapters 12-22 and study guide ;
- (2) all other tutorial letters sent to you in the course of this year.

Should you experience any problems in understanding any section of the work you are most welcome to contact any of us either by e-mail, telephonically or in person.

1000/15
5000
10000
50000

ANNEXURE

EXAM PAPER - CRIMINAL PROCEDURE (CMP102-4)

January/February 2000

QUESTION 1

CHP-12

- (a) X is charged with the reckless driving of a motor vehicle. At his trial it appears that the prosecutor neglected to include an important element of the offence (viz that it was committed on a public road) in the charge sheet. In what way or ways may the prosecutor remedy this defect? Discuss. — S. 86, 88, 123 - Bham's case (10)
- (b) Discuss the rights and duties of assessors. — CHP 13 - NB

OR

Discuss the rules and principles that apply in respect of an application for the recusal of the presiding judicial officer. — CHP 13 (15) [25]

QUESTION 2

The charge was defective - needed amendment S. 86, 86

- (a) X is charged in a lower court with the theft of two shirts. He pleads not guilty. When cross-examining a state witness, X puts it to him that it was not two shirts that he (X) "bought", but two pairs of trousers. The state closes its case and X is found not guilty. The prosecutor decides to charge X again with the theft of two pairs of trousers. Did the prosecutor follow the correct procedure and what are the chances of X getting convicted on the last-mentioned charge? Discuss. — autrefais acquit. (13)
- (b) Once an accused has pleaded, he/she is entitled to an acquittal or conviction. Discuss the exceptions to this rule of the law of Criminal Procedure. verdict NB

OR

Write brief notes on those instances when a plea by an accused may be dispensed with. (12) [25]

QUESTION 3

- (a) If an accused is not discharged at the close of the state's case, discuss what the procedure, rules and principles are that apply in respect of the defence's (accused's) case. (15)
- (b) X is charged in a lower court with robbery with aggravating circumstances (the so-called "armed robbery"). He is convicted by the magistrate who has held the substantive rank of magistrate for ten years and is sentenced as follows: a fine of sixty thousand rand (R60 000) or fourteen months' (14) imprisonment, plus a further two years' imprisonment suspended for five years on condition that he behaves himself properly during the period of suspension.

CHP 20 ← 1 yr + 2 months + 2 yrs = 3 7/12 + 2 mon

Discuss the regularity or otherwise of this sentence and explain the post-trial procedure relevant to this matter. - Chp 20 Review

OR

Write brief notes on the various forms (or terms) of imprisonment. - Chp 19 (10) [25]

QUESTION 4

- (a) (i) Who has locus standi in respect of constitutional matters? Discuss. S. 32, 172(2)(d) of constitution
- (ii) Name the forms of remedies or legal aid that a competent court may grant in constitutional matters. - Review, appeal, mercy, indemnity + Free pardon by the President (12)
- (b) Write notes on the reservation of questions of law as provided for in section 319 of the Criminal Procedure Act. - NB Chp 21

OR

Discuss the application for leave to appeal against a decision or order by a High Court with reference to when, by whom and against what such an application may be made. NB (13) [25]

[TOTAL 100]

- 1. ordinary imprisonment for a term determined by the court
- 2. life imprisonment
- 3. Declaration as dangerous criminal
- 4. Declaration as an habitual criminal
- 5. S. 2860 - periodic imprisonment - (weekend imprisonment)
- 6. S. 276(1)(d) imprisonment
- 7. ~~sentences for more than one crime.~~

2y
24
Refusal to plead
- Ambiguity in plea
- obstructive and Rowdy behaviour - S. 159
- Mental abnormal recused - S. 77@79
- objections to the charge - S. 85
- Chp. 17