

## Dear Students,

Herewith please find a collection of notes/presentations/discussion questions used during or discussed at the discussion classes in Durban, Pretoria, Bloemfontein and Cape Town. Note that the information hereunder is a collection of notes/presentations drafted/used by Ms Karels, Prof Swanepoel, Ms Lerumo and Adv Makama the various classes. The presentations hereunder DO NOT address the CJA in isolation nor do they address all the chapters of the prescribed work in the handbook.

### Chapter 12 - Basic themes:

1. Necessary content of a charge sheet (84(1) – CPA)
2. Defect in charge sheet cured by evidence (88 – CPA)
3. Defect in charge sheet cured by correction (86 – CPA)
4. Joinder of offence (81(1) – CPA) (6(2) and (3) of the CJA)
5. Joinder of accused (155 – CPA) (63(2) – CJA)

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At this point of the criminal process the accused is charged with the crime he is alleged to have committed. The following points in brief:

1. The accused has a constitutional right to be informed of the charge against him in sufficient detail to enable him to answer (to prepare a defence)
2. A trial in the HC is commenced by the DPP lodging an INDICTMENT with the registrar and in the LC a CHARGE SHEET is lodged with the clerk of the court
3. An indictment is served on an accused and a charge sheet is presented in court

#### 1. Necessary content of a charge sheet (84(1) – CPA)

84(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.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.

**The charge should disclose an offence by stipulating the elements of the crime alleged**

##### 1.1 Exceptions to sec 84(1)

1. TIME – If it is not an essential element of the offence the charge sheet is not deficient for failure to stipulate – IF STIPULATED INCORRECTLY – three month rule applies unless alibi is at issue

2. PLACE – If not of the essence then failure to stipulate does not make charge deficient – IF PLACE IS OF THE ESSENCE BUT NOT STATED – refer to sec 88/86 - CPA
3. ANIMUS – will always be relevant to the charge. If it is not averred the charge sheet is defective and reference is made to sec 88/86 – CPA.

## **2. Defect in charge sheet cured by evidence (88 – CPA) pg. 215-217**

88 *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.*

### **2.1 Section 88**

1. *Position prior to 1959 – no conviction if charge did not disclose an offence even if accused pleaded guilty or evidence proved guilt. After 1959 – see section 88.*
2. *Section 88 – if the evidence at trial proves the missing averment conviction can result:*
  - 2.1.2.1 *The charge sheet should at least name the offence*
  - 2.1.2.2. *88 refers to evidence proper and NOT presumptions*
  - 2.1.2.3 *88 does NOT authorise the replacement of once charge with another*
- 2.1.1.2 *If the accused raises the defect and the court refuses an amendment the accused may rely on the defect on appeal*

### **3. SECTION 88 OPERATES AUTOMATICALLY**

### **3. Defect in charge sheet cured by correction (86 (1) – CPA)**

86 (1)Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

### **3.1 Section 86(1)**

1. 86 comes into operation when the defect is brought to the courts attention.
2. The amendment will be ordered if the accused is not prejudiced in his defence (i.o.w the defence would have remained exactly the same regardless of the amendment)
3. Does not authorise a replacement or substitution of the original charge
4. On appeal the court will accede to an amendment if it had no doubt that the accused would not have been prejudiced by the amendment

5. If no amendment is made in terms of 86 the trial is not affected because 88 would operate automatically UNLESS the court refused an application based on sec 86

**SEE PAGE 412-413 (E) for further information on raising a defect on appeal**

#### **4. Joinder of offence (81(1) – CPA) (6(2) and (3) of the CJA)**

81 (1) Any number of charges may be joined in the same proceedings against an accused at any time before any evidence has been led in respect of any particular charge, and where several charges are so joined, each charge shall be numbered consecutively.

(2) (a) The court may, if in its opinion it will be in the interests of justice to do so, direct that an accused be tried separately in respect of any charge joined with any other charge.

(a) An order under paragraph (a) may be made before or during a trial, and the effect thereof shall be that the charge in respect of which an accused is not then tried, shall be proceeded with in all respects as if the accused had in respect thereof been charged separately.

Generally the PP will charge the most serious offence and the lesser offences as alternatives. The schedules (1-7) of the CPA are the guide in determination of seriousness.

In terms of the sec 6(2) of the CJA

6(2) In the case of a child being charged with more than one offence which are dealt with in the same criminal proceedings, the most serious offence must guide the manner in which the child must be dealt with in terms of this Act.

6(3) In the case of a child being charged with more than one offence which are dealt with in separate criminal proceedings, subsection (2) does not apply.

The seriousness of the offence in terms of the CJA is determined by the schedules of the CJA ( Schedule 1-3) and NOT the schedules to the CPA

#### **5. Joinder of accused (155 – CPA) (63(2) – CJA)**

155(1) Any number of participants in the same offence may be tried together and any number of accessories after the same fact may be tried together or any number of participants in the same offence and any number of accessories after that fact may be tried together, and each such participant and each such accessory may be charged at such trial with the relevant substantive offence alleged against him.

(2) A receiver of property obtained by means of an offence shall for purposes of this section be deemed to be a participant in the offence in question.

Section 155 must be read with the CJA if a child and adult are co-accused

63(2) Where a child and an adult are charged together in the same trial in respect of the same set of facts in terms of sections 155, 156 and 157 of the Criminal Procedure Act, a court must apply the provisions of—

(a) *this Act in respect of the child; and*

(b) *the Criminal Procedure Act in respect of the adult.*

5.1 The prosecutor is *dominus litis* and therefore may decide **NOT** to join the accused

5.2 No further accused may be added **DURING** trial

5.3 Questioning in terms of sec 112 is not evidence – accused can be joined after such questioning has taken place

#### 5.4 Consult further section 156 and 157 of the CPA

### Chapter 13 - Basic themes:

1. Assessors in the inferior/lower courts
2. Assessors in the superior/high courts (145 CPA)
3. Recusal of assessors in the lower courts
4. Recusal of assessors in the superior courts (147 CPA)
5. Impartiality and fairness
6. Recusal of a judicial officer

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Keep the following in mind:

1. The MC is presided over by a magistrate and regulated by the Magistrate Court Act. District and regional courts form part of the MC which are also called the lower or inferior courts
2. Cases in the high courts are heard before one judge or a judge and 1 or two assessors. This is not the case with appeals/review which we will deal with later. At this point we are examining the high court as a trial court (court of first instance)
  1. **Assessors in the lower courts**
    - a) In the district/regional court the presiding officer may summons two assessors to assist him in the following circumstances:
      1. He deems it expedient to the administration of justice and NO evidence has yet been led
      2. It is expedient to the administration of justice and he is considering a community based punishment for any person convicted of an offence
    - b) In the regional court a murder trial cannot be heard without two assessors unless the accused requests that the trial continues without assessors. In this case the presiding officer can still summon one or two assessors to assist.
    - c) In deciding whether the appointment of assessors is necessary the presiding officer must take various factors into account such as the educational background of the accused.
    - d) Assessors commence their function after the plea has been recorded.
    - e) With regards to a matter of fact the decision of the court is that of the majority thereof. Matters of law are decided by the judicial officer.
  2. **Assessors in the superior courts (145 CPA)**
    - a) The presiding judge has the discretion to appoint assessors in the superior courts. He may take the opinion of the DPP or state counsel in account but the decision rests with the trial judge. Failure to properly consider is a serious irregularity even where the accused agrees to dispense with assessors.
    - b) Assessors are usually advocates, magistrates, attorneys or professors of law. The judge may however appoint a person qualified in another field if the case concerns specific expert evidence.
    - c) Assessors take an oath administered by the judge and are thereafter members of the court.

- d) Any decision of fact shall be that of the majority of the court unless the judge sits with one assessor in which case the final decision is that of the judge.
- e) The judge has a discretion as to whether questions of admissibility of a confession are answered by him alone or with the assistance of assessors
- f) The judge alone decides questions of law. Application in terms of section 174 is a question of law (keep this in mind when dealing with the states right to appeal in chapter 21).
- g) The judge must give reasons for any decision regarding questions of law and any decision to decide a matter without assessors
- h) If an assessor receives any information about the accused not proven in evidence he must retire from the case.
- i) Theoretically assessors play no role in sentencing although it is not irregular for the judge to consult them on the issue.

### 3. Recusal of assessors in the lower courts

- a) The assessor may request his own recusal or the prosecutor or the accused may apply for the recusal of an assessor on one or more of the following grounds:
  - 1. assessor has personal interest in the matter
  - 2. reasonable grounds exist which tend to show a conflict of interest
  - 3. reasonable grounds exist which tend to show bias
  - 4. the assessor is absent
  - 5. the assessor dies
- b) The presiding officer must record any decision and thereafter must decide if the trial continues before the remaining court members; the proceedings start afresh; or (in the case of an absent assessor) to postpone the proceedings. If an assessor absconds and the court continues it is a fatal irregularity.

### 4. Recusal of assessors in the superior courts (147 CPA)

- 147 (1) If an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during a trial, the presiding judge may direct-
- (a) *that the trial proceed before the remaining member or members of the court; or*
  - (b) *that the trial start de novo, and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor.*
- (2) Where the presiding judge acts under subsection (1) (b), *the plea already recorded shall stand.*

The court must hear both parties on the considerations in 1(a) and (b) above

- a) Unable to act is tantamount to physical and mental disabilities
- b) The competence or lack thereof of a assessor is determined using the common law process for the recusal of a judicial officer without reference to the suspicion of impartiality. The test is therefore **OBJECTIVE**.

### 5. Impartiality and fairness

- 1. All parties must obey the presiding officer in an accusatorial system of justice. This is not however without checks and balances.

2. The presiding officer must implement the *audi alteram partem* principle and listen to both the prosecution and defence. This entails that neither party can be consulted by the PO in the absence of the other.
3. Witnesses are to be addressed formally by surname and are not to be patronised by the court.
4. Decisions of the court must only be based on evidence presented in court and heard under oath/solemn affirmation/admonition.
5. The accused must be warned of his rights at all stages of the trial especially if he is unrepresented. The rights of the accused are stipulated in section 35 of the Constitution.
6. A judicial officer must act with a degree of impartiality and fairness as expounded in Mabusa:
  - a) Questioning by the court must not lead to impartiality
  - b) The court must not descend into the arena
  - c) The court must not intimidate or upset witnesses
  - d) The court must control the trial in an open and transparent manner.
7. There is a slight difference in the trial stage for a child accused. For example the court is given wider latitude to question the child that would be permitted in the trial of an adult. Further, the court can interject in cross examination where necessary.

#### **5. 1 The 'right to silence'**

1. Theoretically the right to silence cannot be used to make negative inferences against the accused. This right is however not always sacrosanct.
2. Silence may damage the case if the state has succeeded in placing the accused on his defence and he fails to answer.
3. The accused has the right to remain silent even during a section 115 proceeding and the court may not be informed of any previous criminal convictions during the trial. Section 211 of the CPA specifically provides:
 

211 *Except where otherwise expressly provided by this Act or the Child Justice Act, 2008, or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence, whether in the Republic or elsewhere, and no accused, if called as a witness, shall be asked whether he or she has been so*
4. If however the accused attacks the character of a state witness or gives evidence of his own good character the state may, in terms of section 197 of the CPA, raise previous convictions during trial
5. If the accused raises his previous convictions during trial the proceedings are not invalidated
6. Remember that there are instances where the court will indirectly be aware of previous convictions such as for example where the accused is tried in a high court for a petty offence – accused cannot complain about this

#### **6. Recusal**

1. Recusal is determined according to common law since the CPA is silent on the issue.
2. Application may be made at the beginning of trial or during trial but the start of the trial is preferable from a case management perspective. If the judicial officer refuses to recuse himself a ground of review is established but may only be implemented after conviction if it results (the superior courts are loath to interfere in pending matters)

3. The test for judicial bias is NOT whether the judicial officer is likely to be impartial but is rather the reasonable suspicion of the parties as to his impartiality which is the test for judicial bias. The presumption of impartiality must be dislodged by the applicant not defended by the judicial officer.
4. The criteria for recusal is therefore OBJECTIVE – did the conduct of the judicial officer leave the impression in the mind of a reasonable person that the accused did not receive a fair trial
5. The **REQUIREMENTS of the test** are:
  - a) There must be a suspicion that the judicial officer MIGHT BE (different concept to would be) bias
  - b) The suspicion must be that of a reasonable person in the position of the accused
  - c) The suspicion must be based on reasonable grounds
  - d) The suspicion is one which the reasonable person WOULD (different concept to might) have held.

#### **Chapter 14: Basic themes:**

1. Dispensing of plea (109, 113, 159(1), 77, 78, 85 CPA) (48(5)(b) CJA)
2. Plea bargaining (105A CPA)
3. Guilty plea ( 112 , 113, 114, CPA)
4. Not guilty plea (115, 115A, 116, 220)
5. Section 342A
6. Entitlement to a verdict

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1. Each adult accused person is entitled to be informed of the charge against him in open court and thereafter he is required to plead thereto
  2. If the accused is a child the CJA mandates that the presiding officer informs the child of the nature of the allegations against him and the further procedures of the CJA
  3. In terms of section 106 of the CPA an accused can plead guilty, not guilty, autrefois convict, autrefois acquit, presidential pardon, lack of court jurisdiction, 204 discharge, that the prosecutor has no title to prosecute and that section 342A(3)(c) is in operation and the prosecution may not continue.
  4. Lis pendens may be raised but it is not a plea provided for in the CPA. Sec 107 of the CPA provides for a plea of Truth and Public Benefit for criminal defamation cases.
  5. **Here we deal only with the plea of guilty, not guilty and 342A.**

#### **1. Dispensing of plea (109, 113, 159(1), 77, 78, 85 CPA) (48(5)(b) CJA)**

**1.1 Refusal to plead** – court shall enter a plea of not guilty which has the same effect as the accused pleading (109).

**1.2 Ambiguity in plea** – court enters a plea of not guilty and then questions in terms of sec 115 Of the CPA.

**1.3 Obstructive and rowdy behaviour** – 159(1) of the CPA allows the court to remove a rowdy and obstructive accused and continue the trial in his absence. This is a last resort and the accused should be fairly warned

**1.4 Mentally abnormal accused** – section 77 – 79 of the CPA were enacted to make allowance for an accused who, due to his mental state, cannot make a proper defence or who, at the time of the offence, could not act in accordance with any appreciation of wrongfulness. In terms of 48(5)(b) of the CJA a preliminary enquiry for a child can be postponed if the child has been referred in terms of 77/78/79 of the CPA.

**1.5 Objection to a charge** – section 85 of the CPA allows the accused to object to the charge (i.o.w. It does not comply with the Act, does not contain all the essential elements, does not disclose an offence, does not contain sufficient particulars or contains incorrect details) before pleading. The state must be given reasonable notice of the objection and the court may order the prosecutor to amend – where the prosecution fails to amend the court may quash the charge. Section 88 does not affect the right of an accused to object to an indictment. Objection should be raised before the accused pleads but the accused can raise it as a point of law at the close of the state's case.

## **2. Plea bargaining (105A CPA)**

**2.1 Traditional plea bargaining** – agreement struck between accused and prosecutor to plead to a lesser charge, or on a different basis to that alleged by the state, or where 1 accused pleads guilty in return for the withdrawal of charges against co-accused. The prosecutor and accused CANNOT agree on a sentence but the state can recommend a particular sentence to the court. The state is held to its agreement in the case of a traditional plea bargain.

**2.2 Statutory plea bargaining** – section 105A of the CPA:

- a) Formal agreement between prosecutor and accused where sentence can be fixed.
- b) The entire agreement must be in writing and the PP must be authorised in writing to act. The accused must be represented – unrepresented accused cannot enter into 105A agreements. The presiding officer MAY NOT take part in the negotiation process.
- c) The agreement must be entered into before pleading.
- d) It is a once off agreement and if not accepted by the court the parties cannot re-negotiate on the same facts.
- e) In court the PP presents the agreement and if the court agrees it proceeds to sentencing. If the court considers the agreed upon sentence just it will then convict the accused and impose sentence.
- f) If the court disagrees with the sentence the parties can agree to remain bound to the agreement and accept the courts sentence or, one/both parties withdraw and the trial starts *de novo*. Nothing stops traditional plea bargaining between the parties once the trial starts *de novo* but 105A proceedings are prohibited and the content of any previous 105A agreement is inadmissible although the accused can consent to the admission of all or certain of the admissions made in the previous agreement.

## **3. Guilty plea ( 112 , 113, 114, CPA)**

112 (1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-

- (a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from



time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and-

- (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*; or
  - (ii) deal with the accused otherwise in accordance with law;
- (b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.
- (2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.
- (3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

### **3.1 Correction of a guilty plea (113 CPA)**

- 113 (1) If the court at any stage of the proceedings under section 112 (1) (a) or (b) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.
- (2) If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.

### **3.2 Committal to a regional court for sentence (114 CPA)**

1. If the court following a plea of guilty but before sentence is of the opinion that:
  - a) The offence is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of the MC,
  - b) The previous convictions of the accused necessitate a sentence beyond the jurisdiction of the MC,
  - c) The accused is a dangerous criminal

It shall stop the proceedings and commit the matter for sentence in the regional court. If the regional court is, however, not satisfied with the guilty plea in the district court it can change the plea to not guilty and proceed with a summary trial.

#### **4. Not guilty plea (115, 115A, 116, 220)**

##### **115 Plea of not guilty and procedure with regard to issues**

- (1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.
- (2) (a) *Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.*  
(b) *The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.*
- (3) Where the legal adviser of an accused on behalf of the accused replies, whether in writing or orally, to any question by the court under this section, the accused shall be required by the court to declare whether he confirms such reply or not.  
**The case in terms of 115A can be transferred to the regional court for trial once the accused pleads not guilty and 116 authorises the transfer of the case for sentencing to the regional court dependant on the particular offence and where the case is heard.**

##### **5. 342A Unreasonable delays in trials : SECTION 342A (1),(2) & (3) – pg. 274 (E)**

- (1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.
- (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:
  - (a) *The duration of the delay;*
  - (b) *the reasons advanced for the delay;*
  - (c) *whether any person can be blamed for the delay;*
  - (d) *the effect of the delay on the personal circumstances of the accused and witnesses;*
  - (e) *the seriousness, extent or complexity of the charge or charges;*
  - (f) *actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;*
  - (g) *the effect of the delay on the administration of justice;*
  - (h) *the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;*
  - (i) *any other factor which in the opinion of the court ought to be taken into account.*

- (3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order-
- (a) *refusing further postponement of the proceedings;*
  - (b) *granting a postponement subject to any such conditions as the court may determine;*
  - (c) *where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without the written instruction of the attorney-general;*
  - (d) *where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;*
  - (e) .....

**DELAY IN ITSELF IS NOT AN IRREGULARITY OR INFRINGEMENT OF FAIR TRIAL RIGHTS – TRIAL PREJUDICE MUST BE ESTABLISHED TO SHOW UNREASONABLENESS**

**6. Entitlement to a verdict**

1. Once an accused has pleaded he is entitled to be found guilty or acquitted except in the following circumstances:
- a) Where the PO has recused himself.
  - b) Where separation of trials takes place.
  - c) Where the trial is referred to the regional court or converted to a preparatory examination.
  - d) Where the magistrate dies, resigns or is dismissed.
  - e) Where it appears the accused is before the wrong court.
  - f) Where the DPP uses section 13 to stop a private prosecution and order a state prosecution *de novo*.
  - g) Where the accused is referred to a Children’s Court or an enquiry is held in terms of the Prevention and Treatment of Drug Dependency Act.
  - h) Where the accused is referred for observation in terms of section 77/78 of the CPA.
  - i) Where an accused has pleaded in terms of section 119 of the CPA (case transferred to superior court).
  - j) Where the prosecution has been stopped with the necessary consent of the DPP.

## **Chapter 15**

### **Open court.**

- Attendance by the public.
- Information with regards to the conduct of the criminal proceedings. Exceptions section 153(1)-(6) of CPA and s 63(5) of CJA

### **Witnesses**

- Subpoena.
- He MAY be arrested
- Application by DPP
- Recalcitrant witness

### **Trial of a mentally abnormal person**

- Raised at any stage of trial or after conviction and sentence
- The one who alleges must prove s 78(1) balance of probabilities
- S 77 incapable of understanding,
- S 78 mental defect or illness and
- S 79 inquiry by medical superintendent or psychiatrist or psychology

### **Trial of a drug addicted person**

1. Lack of criminal capacity s 77, 78 and 79 apply
2. Inquiry in terms of s 22 of the prevention and treatment of drug dependency Act

### **Adjournment**

- by court
- Application by state or defence
- 2 basic principles apply
- Appearance on the dated adjourned to.
- Speedy trial
- Prejudice suffered by accused
- Loss of liberty
- Impairment of personal security
- Trial related prejudice
- Length of delay and reasons advanced to justify the delay

## **Chapter 16 - Joinder and separation of trials**

### **Joined trials**

- Before evidence can be led
- S 155(1) participant tried together, accessories after the same fact tried together
- S 155(2) property receiver
- S 156 separate offences but same place, same or about the same time
- Accused are identified numerically
- Adults and children as co accused CJA apply
- Advantages
- Not a general rule

### **Separation of trials**

- Section 157(2)
- Anytime
- Interlocutory application by accused or prosecutor
- By court
- Probabilities of prejudice
- Discretion of the presiding officer
- Consequences of separation

## **Chapter 17**

### **TRIAL PRINCIPLES AND THE COURSE OF THE CRIMINAL TRIAL**

A criminal trial commences once an accused has pleaded

The pleading must take place in a court with the required jurisdiction to hear evidence

#### **NATURE AND PURPOSE OF A CRIMINAL TRIAL**

- A criminal trial is a state-sponsored public, judicial and primarily oral hearing in terms of which the alleged criminal liability of an accused must in the public interest be determined by an impartial adjudicator on the basis of constitutional, statutory and common-law rules and principles of fairness which promote reliable and acceptable outcomes in convicting and punishing the guilty whilst protecting the innocent from incorrect conviction and wrongful punishment.

#### **THERE ARE SEVEN FUNDAMENTAL PRINCIPLES WHICH GOVERN A CRIMINAL TRIAL**

##### **I. The fair trial principle**

- Governed by section 35(3) of the Constitution which provides:

Every accused person has a right to a fair trial, which includes the right –

- To be informed of the charge with sufficient detail to answer it;
- To a public trial before an ordinary court
- To have the trial begin and conclude without unreasonable delay
- To choose, and be represented by, a legal practitioner, and to be informed of this right promptly
- To be presumed innocent, to remain silent, and not to testify during the proceedings
- To adduce and challenge evidence
- Not to be compelled to give self-incriminating evidence
- To be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language

In the case of **S v Baloyi** the CC held that no-one may be convicted without a fair trial.

##### **II. The principle of legality**

- The onus lies on prosecution to prove legal guilt in a properly conducted trial in accordance with the principle of legality
- A properly conducted trial in accordance with the principle of legality means that the state/prosecution obeys the rules of criminal law, criminal procedure, evidence and the Constitution during the course of the trial.

##### **III. The principle of judicial impartiality**

- A distinction is always made between the inquisitorial and accusatorial (adversarial) systems or models of criminal procedure
- In an inquisitorial system the judge is the master of the proceedings (*dominus litis*), he/she actively participates in the proceedings dominating the questioning of the accused and/or witnesses.
- In accusatorial systems the judge assumes the role of a detached umpire and should not enter the arena of the fight between the prosecution and the defence.
- South Africa mainly follows the accusatorial system.
- In the case of **S v Nnasolu** the court confirmed that a presiding officer should not enter the arena.

- However under certain circumstances and where the interest of justice permit the CPA and the CJA allows the presiding officer to ask questions. For instance –  
**Section 167 of the CPA** provides –  
 “the court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.”  
**Section 186 of the CPA** provides –  
 “the court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.”

In terms of **section 63(4) of the CJA** (75 of 2008) –

A child justice court must ensure that the best interests of the child are upheld, and to this end –

(a) May elicit additional information from any person involved in the proceedings;

#### **IV. The principle of equality of arms**

- For instance in the case of South Africa where the accusatorial system is followed - both the prosecution and defence must be given equal opportunities to present their cases.
- In **S v Msimango** the court indicated that section 166(1) of the CPA vests reciprocal rights in both the accused and the prosecution to cross-examine opposing witnesses and to re-examine their own witnesses.
- The principle of equality of arms emphasises that an accused should have legal representation.

#### **V. The principle of judicial control**

- The court should be impartial and have control and management of the proceedings within the bounds of the law of criminal procedure, for example –
  - Contempt of court in *facie curiae* (contempt in the presence of the court whilst sitting) – this is important to enable the presiding officer to control and manage proceedings in an orderly fashion.
  - A court has a common-law power to intervene where questioning of witnesses goes beyond acceptable limits or introduces irrelevancies.
  - In terms of section 166(3) of the CPA if it appears to the court that cross-examination is protracted unreasonably thereby causing unreasonable delay in the proceedings, the court may request the cross-examiner to disclose the relevancy of any particular line of examination and may, if necessary impose reasonable limits on the length of the examination or any particular line of examination.

## **VI. The principle of orality**

- The principle of orality is the principle that evidence on disputed questions of fact should be given by witnesses called before the court to give oral testimony of matters within their own knowledge.
- In the case of deaf and dumb witnesses, oral evidence shall be deemed to include gesture language
- In the case witnesses under the age of 18 years oral evidence shall be deemed to include demonstrations, gestures or any other form of non-verbal expression (s161(2) of the CPA).
- The presiding officer must ensure that the accused understands the language used. (see **section 35(3) (k) of the Constitution** which provides that every accused person has a right to a fair trial, which includes the right – to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language).
- The principle of orality distinguishes between three types of examinations .i.e. –

### **Examination-in-chief –**

- The party who called the witness is responsible for taking the witness through the examination-in-chief through a question/answer technique.
- Leading questions are not permissible under examination-in-chief.

### **Cross- examination –**

- Cross-examination is done by the opposite party, i.e. the party who did not call the witness.
- The purpose of the cross-examination is to elicit facts favourable to the cross-examiner's case.
- Cross-examination is not confined to matters raised by the witness during evidence-in-chief.
- Leading questions are permitted.
- The cross-examiner has a duty to cross-examine on matters he disputes.
- Misleading questions are not allowed.
- Vexatious, abusive or discourteous cross-examination is not allowed.

### **Re-examination –**

- This is conducted by the party who initially called the witness.
- It is in principle confined to matters which arise during cross-examination.
- No leading questions may be asked.
- New matters may not be introduced in re-examination without the permission of the court.

### **Evidence through Intermediaries in terms of section 170A of the CPA –**

This section was aimed at protecting a child witness from the harsh realities of a court session where questioning more specially cross-examination may be extremely intimidating to a child.

Section 170A (1) provides that whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.



Lawyers cannot be appointed intermediaries. The people who qualify for this are social workers, child care workers, psychologists, teachers and doctors.

**VII. The principle of finality**

- In terms of the principle of finality once the parties close their cases they should not be allowed to reopen them, unless under certain circumstances where necessarily.
- For example where new facts are introduced like during the course of the defence case, the prosecution may be allowed reopening to allow for evidence in rebuttal

**PROSECUTION CASE**

**(a) Opening**

- The prosecutor addresses the court for the purpose of explaining the charge and indicating the evidence to be adduced.
- The prosecution gives a summary of the essential features of the case for the state.
- The prosecutor should avoid any reference to evidence which may not be admissible or to any contentious matter which may prejudice the case of the accused.
- In **S v Mbata** it was held that the defence may cross-examine a State witness on a discrepancy between his evidence and the prosecutor's opening address.

**(b) Calling of State witnesses and examination-in-chief by the prosecution**

- The State calls its witnesses one by one and the prosecutor questions them.
- However the state is not obliged to call all the witnesses but those it deem important to the advancement of its case.
- The prosecution is not compelled to call witnesses who on reasonable grounds are seen to be untruthful, hostile to the state's case or in league with accused.

**(c) Cross-examination of State witnesses by the defence**

- The defence has the right to cross-examine each and every State witness.

**(d) Re-examination of state witnesses by the prosecutor**

- Once the defence is done with the cross-examination of a state witness, the prosecutor re-examines the witness (but only if it is really necessary to re-examine).

**(e) Closing of the state case**

- After all the evidence for the prosecution has been disposed of, the prosecutor must close his case.
- Only the prosecution may close their case, a presiding officer does not have authority to do so.

**DISCHARGE OF ACCUSED AT THE END OF THE STATE'S CASE**

**Section 174 of the CPA** provides –

“If, at 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 acquittal of the accused in terms of s174 is generally known within the SA criminal procedural system as the “discharge of accused at the end of the state’s case”.

In **S v Dewani** the court pronounced that “no evidence” does not mean no evidence at all but rather no evidence on which a reasonable court, acting carefully might convict and further indicated that the question whether a court should grant a discharge at close of state case is one which entails a discretion by the trial court and such discretion must self-evidently be exercised judicially.

In **S v Mphetha & Others** it was held that the credibility of state witnesses should play a limited role, and that their evidence should only be ignored where the quality is so poor that no reasonable person would accept it.

- A discharge in terms of s174 cannot be considered once the defence has commenced the presentation of its case.
- An accused with more than one charge may be discharged in respect of one or some or all of the charges against him.
- A court should where appropriate, of its own accord raise the question of a discharge, whether the accused has legal representation or not.
- A court refusal to apply s174 is not appealable. This was also confirmed by the court in **S v Ebrahim**.

#### **The test for discharge:**

Distinction between pre-constitutional era and in the constitutional era.

**In the pre-constitutional era** the so-called ‘Schuping’ test in terms of **S v Schuping** was followed.

In this case it was held that:

“at the close of the state case, when discharge is considered, the following two questions must be considered –

- (i) Is there evidence on which a reasonable man might convict, if not,
- (ii) Is there a reasonable possibility that the defence evidence might supplement the state case?

If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence.”

#### **In the constitutional era –**

In **S v Lubaxa** the SCA held that an accused must be discharged at the end of the State’s case if a conviction would only be possible if the accused were to testify and incriminate himself.

#### **THE DEFENCE CASE**

If at the close of the state case discharge is not granted in line with section 174 the defence must proceed with its case.

##### **(a) The passive defence right: closing the defence case as a response –**

- Passive defence means an accused can refuse to testify in his own defence and can also refuse to call any possible witnesses.
- This is a legitimate response and in line with the Constitution (see section 35(3) (h) of the Constitution which provides that everyone has a right to a fair trial, which includes the right to remain silent and not to testify during the proceedings).
- The defence case can be closed without any defence evidence having been led.
- The court after having been addressed by the parties is then required to consider its verdict

##### **(b) Defence address**

- If the accused intends to adduce defence evidence, he or his legal representative may address the court for the purpose of indicating to the court the evidence that will be led on behalf of the defence.

**(c) The active defence right**

- Two basic components – his constitutional and statutory right to testify in his own defence and his constitutional and statutory right to call defence witnesses if any are available.
- An accused may combine elements of his active and passive defence rights.

**(d) The active defence right and the sequence of defence witnesses**

- An accused who wishes to testify in his own defence and wants to call one or more defence witnesses is in terms of s151(1)(b) of the CPA required in principle, to testify before calling his defence witnesses.
- The purpose of this section is to avoid a situation where an accused, having heard his defence witnesses first, can tailor his testimony to fit theirs.

**Examinations –**

**a. Evidence-in-chief of defence witnesses**

- All defence witnesses including the accused as a defence witness give evidence-in-chief.
- As a rule no leading questions.

**b. Cross-examination of defence witnesses by the prosecution**

- In terms of section 166(1) of the CPA the prosecutor may examine any defence witness including an accused.
- Leading questions are permissible.
- Unfair cross-examination of an accused may result in a constitutional irregularity.

**c. Re-examination of defence witness**

- All defence witnesses including an accused who has testified in his own defence can be taken through re-examination if necessary.

**FINAL ARGUMENTS BY PROSECUTION AND DEFENCE**

- Once all evidence has been adduced, the prosecutor may address the court on the merits, i.e. the question of guilt or innocence and the defence may thereafter also address the court.
- In terms of section 175(2) of the CPA the prosecutor has the right to reply on any matter of law raised by the defence in its address; and the prosecutor may also, with the permission of the court, respond to any matter of fact raised by the defence in its address.
- An unrepresented accused is allowed to address the court in his own and the court has a duty to inform him of this right.
- The court's failure to allow an address can infringe the constitutional fair trial right of the accused.

Once the parties have addressed the court on their final arguments in support of their cases the court must give the verdict within reasonable time.

## Chapter 18 - Basic themes:

### 1. Competent verdicts

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1. Judgement must be delivered in open court and in a language the accused understands (translation of the entire judgement is permitted to accommodate this right).
2. The court ordinarily delivers an ex tempore (immediate) judgement where the facts are straightforward. Where the factual and legal issues so demand the court is however entitled to postpone its judgement.

In terms of sec 146 of the CPA the court must provide reasons any conclusions reached as to any question of law or fact. Proper reasons require 'an intelligent analysis of the evidence' and should not consist of 'a mechanical regurgitation of the evidence'

### 1. **Competent verdicts**

- a) It is possible that the evidence presented in court does not prove the charge in question but does prove another charge not specifically formulated in the charge sheet. These are unexpressed, latent or implied charges. The accused can be found guilty of the crime proven in court despite the fact that it is not specifically formulated. This is referred to as a competent verdict and is statutorily governed (sec 256 – 270 of the CPA).
- b) Since the accused is entitled to be informed of the charge against him it has been argued that competent verdicts may be unconstitutional. The court in *Fielies* however stated:
  - The right to be informed of a charge includes the right to be informed of competent verdicts. This is specifically important for an unrepresented accused and should take place before the accused pleads (especially where the statutory provision applicable shifts the onus to the accused). Failure to inform an accused will NOT NECESSARILY result in a fatal irregularity but each case must be judged on its particular circumstances. If an unrepresented accused has not been reasonably informed the return of a competent verdict would not be sanctioned. The ultimate test is 'has the accused been given a fair trial'.
  - See page 314 – 317 (E) of the textbook for examples of competent verdicts.

## **Chapter 19: Basic themes:**

1. Imprisonment as a form of punishment
2. Fine as a form of punishment
3. Correctional supervision as a form of punishment
4. Committal to a treatment centre as a form of punishment
5. Suspended and postponed sentences
6. Sentence for more than one crime
7. Compensation and restitution
8. "Minimum sentence" sentencing in terms of the CPA

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1. Study pages 325 – 335 (E) independently. We concentrate here on the forms of punishment.
  2. Ensure that you can fully distinguish between the principles of sentencing for adults and minors.

### **1. Imprisonment**

- a) Imprisonment is a drastic reaction to the actions of an offender. The CPA provides very little exact guidance as to sentencing and each case is determined on its unique aggravating and mitigating factors.
- b) Ordinary imprisonment is determined by the court guided by the jurisdiction of its reach. Another factor in the determination of length of imprisonment is whether the crime is a common law or statutory crime. Common law crimes are sentenced according to the general jurisdictional restriction of the court. A statutory crime is sentenced according to the penalty clause in the enabling legislation. A court cannot sentence a person to imprisonment for less than four days (see the exception in the case of imprisonment till the rising of the court) and Methuselah sentences are generally discouraged.
- c) Most prisoners are released before the expiration of their sentences. A prisoner serving a sentence of more than 1 year can only be considered for release after serving half of his sentence where after he is placed on parole until the expiration of the original sentencing period. Section 276B of the CPA empowers the sentencing court to determine a 'non-parole period' but the court can only set these limits in sentences of more than two years per charge and the non-parole period can only extend to cover two thirds of the sentence.
- d) Life imprisonment is governed by sec 276 of the CPA and can be implemented by the HC (and Regional court in certain circumstances). A prisoner is however eligible for parole after serving 25 years or reaching the age of 65.
- e) Declaration as a dangerous criminal is authorised by sec 286(A) of the CPA. This sentence allows the court to imprison a person for an indefinite period of time if it determines him to be a danger to the physical or mental wellbeing of another person and that the community should be protected from him. The court is required to fix a date on which the sentence is reviewed. At such a review the court can order continued re-incarceration or convert the sentence to another form of imprisonment or order the prisoners release.

- f) Declaration as a habitual criminal is governed by sec 286 of the CPA and can be passed if the court is satisfied that the convict habitually commits offences and that the community should be protected against him. A habitual criminal serves a minimum of 7 years and a maximum of 15 years. **NOT APPLICABLE TO CHILD OFFENDERS**
- g) Periodic imprisonment is served for periods of time (between 24 and 48 hours) where after the accused is returned to his normal existence. This form of imprisonment is imposed for a minimum of 100 hours and a maximum of 2000 hours and can be implemented for any crime other than those in which a minimum sentence is applicable.
- h) Sec 276(1)(i) imprisonment allows the Commissioner of Correctional Services to release a prisoner during the course of his sentence on correctional supervision. This form of imprisonment can only be implemented if the term of imprisonment does not exceed 5 years. The prisoner must serve at least one sixth of the sentence before he is released.

## **2. Fine as a form of punishment**

- a) When implementing a fine as a form of punishment the court must consider the seriousness of the offence and whether it is of a stature which justifies a fine as opposed to prison as well as whether the person has the means to pay the fine. A third factor is whether the crime was one of a financial nature. A crime committed for financial gain is particularly suited to a fine as a form of punishment.
- b) Currently, a district court can impose a fine up to R 120 000 and a regional court a maximum of R 600 000.
- c) The court must take financial means of the convict into account when determining a fine.
- d) If a fine is not paid immediately the court can order imprisonment as an alternative unless a deferred fine is ordered. A deferral occurs when the court orders that the fine be paid at a later date or in instalments. The fine must however be paid within 5 years if the date of imposition. The fine is paid to the state and the court CANNOT order that it be paid to the victim or any other person (do not confuse a fine with compensation in terms of section 300 and 301 of the CPA)

## **3. Correctional supervision as a form of punishment**

- a) Correctional supervision is 'community service' performed in the community where the offender normally works and lives. This form of punishment includes house arrest, monitoring and community service. This form of punishment can include an order of victim-offender mediation and a family conference. This form of punishment can be ordered for a maximum period of 3 years.
- b) Correctional supervision can be imposed on its own, as a condition of a suspended sentence, in addition to imprisonment and as a replacement for an existing term of imprisonment when recommended by the Commissioner of Correctional Services.

A probationer is monitored while he fulfils the conditions of his sentence and if he is determined unsuitable for correctional supervision the Commissioner may recommend this to the court and the court can impose any other suitable sentence

## **4. Committal to a treatment centre**

- a) If the court is satisfied that the accused displays the symptoms described in section 21(1) of the Prevention and Treatment of Drug Dependency Act it may order committal to a treatment centre in terms of the same Act in addition to or instead of any other sentence.
- b) The period of committal is indefinite but if the prisoner is not released after a period of 12 months the superintendent of the centre is required to report the matter to the Director-General of Social Development.

- c) The Prevention and Treatment for Substance Abuse Act which is now in operation has a similar provision as section 296 of the CPA and includes the eligibility of a person committing crime in order to finance his dependency. A probation officers assessment report is required and the sentence is indefinite with the proviso that any stay of more than 12 months must be reported by the superintendent of the treatment centre to the Director of Social Development.

#### **5. Suspended and postponed sentences**

- a) A suspended sentence is one which is imposed in full but not executed. The execution is suspended by a certain condition(s) which if breached results in the execution of the sentence. A sentence can be wholly or partially suspended. The maximum term for which a sentence may be suspended is 5 years. Any condition attached to a suspended sentence must be related to the committed offence, must be stated clearly and unambiguously and must be reasonable.
- b) A postponed sentence occurs when the court convicts a person but does not impose a sentence on the proviso that the offender is ordered to appear before the court at a later date. A postponed sentence can be conditional or unconditional. If the court sets a date to reappear and the court finds that all conditions have been met no sentence is imposed and the persons criminal record reflects a caution. The maximum period for which a sentence may be postponed is 5 years.
- c) Any sentence can be partially or wholly suspended or postponed unless the offence in question is one in which a minimum sentence is applicable. In these cases the sentence may only be PARTLY suspended.

#### **6. Sentence for more than one crime**

- a) If an accused is convicted of more than one crime in the same trial the court retains its full sentencing jurisdiction over each crime. The cumulative effect of more than one sentence may however result in an unduly harsh sentence. The court can order the whole or part of each sentence to run concurrently but this is only possible for sentences of imprisonment or correctional supervision.
- b) There are 2 other options to avoid a harsh cumulative effect. The first involves reducing each individual sentence so that the overall sentence is not unduly harsh (criticised on the basis that each individual sentence may be viewed as inadequate). Secondly, some or all of the counts can be taken together for sentencing – this is however problematic on appeal or review.

#### **7. Compensation and restitution**

- a) Sec 300 of the CPA provides for an order of compensation if the offence has caused damage to or loss of property belonging to another person. This is in effect a civil judgement. The compensation jurisdiction of the HC is unlimited, the district court R 300 000 and the regional court R 1 000 000. The court can act in this manner only when requested to by the injured party or the prosecutor acting on instruction of the injured party. A sentence of imprisonment in default of payment cannot be ordered because this is a civil remedy.
- b) Section 301 of the CPA 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 that the buyer returns the goods to the owner thereof.

#### **8. Minimum sentencing – CPA and Act 105/1997**

- a) Act 105 of 1997 sets out certain prescribed minimum sentences for specific crimes. Rape and murder with certain aggravating circumstances are for example prescribed life sentences in terms of section 51. Other specific crimes are prescribed sentences ranging from 5 to 25 years.
- b) Only a HC or regional court can implement minimum sentences.

- c) A court can however deviate from the prescribed sentences where substantial and compelling circumstances exist which justify such departure from the prescription.
- d) In *Malgas* the court said that the minimum sentence must be seen as a point of departure but that the totality of mitigating circumstances may justify a deviation from that initial point.
- e) In *Centre of Child Law v Minister of Justice and Constitutional Development* the court declared the application of minimum sentences to any person below 18 years as unconstitutional. Previously the Act was applicable to children between the ages of 16 and 18.
- f) Some have argued that minimum sentencing is unconstitutional but in *Dodo* the court said that the legislation does not curb the courts discretion to deviate from a prescribed minimum (which in some cases would be disproportionate to the offence) and therefore no constitutional right was infringed. Since sentence terms are determined differently by different PO's this argument is debatable since an unequal application may take place.

#### **Chapter 20: Basic themes:**

1. Comparison of appeal and review
2. Categories of review procedures
3. Judicial review in terms of the Constitution
4. Review in terms of the CPA
5. Review in terms of the Superior Courts Act

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The right to apply for a review is entrenched within section 35(3)(o) of the Constitution, 1996. In *Ntuli* the court confirmed this right as “the opportunity for an adequate reappraisal of every case and informed decision on it”

#### **COMPARING APPEAL AND REVIEW – pg. 372 – 374 (E)**

##### **Review**

- Should a party feel aggrieved about an irregularity involved in arriving at the conviction, the best procedure is to seek redress by way of review.
- A review is concerned with the validity of the proceedings.
- A review in terms of the Superior Court Act can be brought only on the ground of specific procedural irregularities
- In a review it is permissible to prove any of the grounds for review (including alleged irregularities that does not appear on the face of the record) by affidavit –
- The accused who brings the matter before the court by way of review, is confined to the specific grounds for review
- There is no time limit in the case of a review.



- In the case of a review, facts could be brought to the notice of the court by means of an affidavit in order to prove the irregularity and the enquiry is then whether the proceedings have been in accordance with justice and/or whether the accused has been prejudiced by the irregularities in the proceedings
- A review is sought by way of a notice of motion whereby the respondents are called upon to show cause why the decision or proceedings should not be reviewed and corrected or set aside.

## **Appeal**

- An appeal is the correct way to challenge a conviction or sentence or both.
- An appeal is concerned with the substantive correctness of the decision based on the facts or merits of the case on the record and the law relevant to such facts.
- An appeal may be brought against the findings of a lower court on any point of law and/or fact.
- In an appeal the parties are confined to what appears on the record
- 'While any question of law or fact, or any gross irregularity appearing on the face or the record, may be raised by means of an appeal'
- An appeal must be brought within a certain time
- Appeal is tantamount to a retrial on the record
- An appeal is lodged by way of an application for leave to appeal

## **2. Categories of review procedures**

- a) The first category of review is statutorily enacted. The South African examples are review under the Superior Courts Act and review under sections 302, 304(4), 304(A) and 306 of the CPA. The Superior Courts Act regulates the grounds of review procedure as: (1) absence of jurisdiction, (2) interest in the cause, bias, malice or corruption on the part of the presiding officer, (3) gross irregularity in the proceedings and/or, (4) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence. The CPA makes provision for Automatic review (302), Extraordinary Review (304(4)), review of proceedings before sentencing (304(A) and setting down of a case for argument in terms of section 306.
- b) The second category is review procedure of a common law origin which includes the HC's inherent jurisdiction to review as acknowledge by sec 173 of the Constitution. The SCA has no common law jurisdiction to review the actions of the HC and can only intervene if (1) an appeal or (2) an appeal on special entry of an irregularity or illegality in the procedure or (3) an appeal by means of reservation of a question of law, is instituted.
- c) The third category of review are reviews provided for by other legislation. Judicial review powers were conferred upon the higher courts by the Constitution.

Hereunder we deal first with appeal in terms of the CPA and Superior Courts Act (category 1) and then with judicial review in terms of the Constitution (category 3).

## **3. Review in terms of the CPA**

- a) **Automatic review for adult offenders**

Automatic review - Automatic review is the function of the HC which reviews certain sentences of the MC to determine **whether justice was done (test)**. There is no automatic review of HC sentences. The judge is confined to the record of the proceedings. Automatic review does not bar the accused from seeking an appeal. Generally a represented **adult accused** sentence is not subject to automatic review unless the representative was absent for the trial on sentence .

- In the district court sentences of three months and longer passed by a magistrate who has held the position for less than seven years or a sentence of 6 months and longer if the magistrate has held the position for longer than 7 years are subject to automatic review.
- A fine in the district court of R 6 000 or more passed by a magistrate who has held the position for less than 7 years or R 12 000 if the magistrate has held the position for more than 7 years is subject to automatic review.
- **THE REQUIREMENTS DIFFER FOR CHILD OFFENDERS – MAKE SURE YOU CAN DISTINGUISH**
- Procedurally, the clerk of the court transmits the record to the HC registrar no later than 1 week after the sentence. The magistrate may append any remarks he considers desirable on the record. The accused is entitled, within 3 days of conviction, to supply a written statement or argument to the registrar to be submitted with the record for review. The record is then sent to a judge in chambers. If the judge is not satisfied he **may** ask the magistrate to provide reasons for the particular approach. If then satisfied the judge signs a certificate. If not satisfied 2 judges must consider the matter before passing judgement. If the record is lost the court makes use of reconstructed evidence. If no such reconstruction can be made the conviction and sentence must be set aside. Automatic review is suspended if the accused has noted an appeal against sentence or has a right of automatic appeal.

- b) Extraordinary review – the HC has the power of extraordinary review when it is brought to its attention that the sentence imposed was not in accordance with justice and the record was not submitted to it or the sentence is not subject to automatic review or was passed in the regional court. In this case the court has the same powers as those under automatic review.
- c) Review of proceedings before sentence – if a regional or district court magistrate has convicted an accused but before passing sentence is in doubt whether the conviction is in accordance with justice he may without passing sentence refer the matter to a judge in chambers for review.
- d) Set down of case for argument – this procedure provides a mechanism for a convicted accused to bring his matter for review before a HC before the record has been transmitted to the HC on automatic review and where he is not satisfied with merely providing a written argument or statement to support the record on automatic review. Essentially it provides a mechanism whereby the accused sets his matter down for argument before the court. The accused must notify the DPP of the court date at least 7 days before the hearing and must also state the grounds upon which the setting aside or alteration is sought.

#### **4. Review in terms of the Supreme Court Act**

- a) The Superior Courts Act sets out grounds upon which an accused can seek a review of the decision of a lower court. In terms of section 22(1) proceedings in any **lower court** can be brought on the basis of (1) absence of jurisdiction, (2) interest in the cause, bias, malice or corruption by the presiding officer, (3) gross irregularity in proceedings, or (4) the admission of inadmissible or incompetent evidence (or rejection of admissible or competent evidence).
- b) Procedurally review is sought by way of a notice of motion directed and delivered to the PO and all affected parties. The procedure is embodied in rule 53 of the Uniform Rules of Court. The notice of motion calls upon such persons to show cause why

the LC decision or proceedings should not be reviewed, corrected or set aside and to despatch within 15 days of receipt of the notice of motion the record of such proceedings with reasons as he is by law required to give and to notify the applicant (accused) of such despatch.

- c) Review at the instance of the prosecution – The HC may review any alleged procedural irregularity at the instance of the prosecution but the prosecution will usually rely on section 304(4) of the CPA to notify the High Court of irregular proceedings.

#### **5. Nature of constitutional judicial review**

- a) Judicial review originates from American case law where the court acknowledged the judicial power to set aside a statute or provision thereof on the basis that it is unconstitutional. The South African Constitution demands that law or conduct inconsistent with the Constitution should likewise be invalid. It is however trite that an inconsistent law or conduct does not lapse automatically and must be brought to the attention of a court in order to be declared invalid. This is in essence the purpose of constitutional judicial review.
- b) The Constitutional Court, Supreme Court of Appeal and High Court of South Africa must ensure that the values and ideals of the Constitution are enforced through their powers of judicial review.
- c) These courts have the power to review actions by the government and the conduct of persons, and to review the constitutional validity of legislation passed by parliament.
- d) Please note: if an order of constitutional invalidity relates to an ACT OR PARLIAMENT OR PROVINCIAL LEGISLATION the order of invalidity must be confirmed by the Constitutional Court.
- e) When determining constitutional validity the court takes a two pronged approach: firstly, it must be determined if a right or freedom has been infringed or violated. If the answer is affirmative the second stage of the process requires the court to consider if the infringement is reasonable and justified when measured in terms of the limitation clause.
- f) The relief sought in a constitutional review can include an order of constitutional invalidity, rectification of constitutional defect, exclusion of unconstitutionally obtained evidence, temporary interdict or declaration of rights.
- g) With regard to criminal procedure a constitutional issue is not raised where the accused is dissatisfied with the finding of the trial court.
- h) According to Friedman a court can refuse to hear a constitutional challenge until an accused has pleaded. It may however hear a challenge before pleading taking into account (1) the prospects of the success of the challenge, (2) the possible length of delay of the trial, and (3) the possible prejudice to the accused if the constitutional challenge is not decided immediately.

## **Chapter 21: Basic themes:**

1. General and miscellaneous issues
2. The right to appeal and leave to appeal
3. Appeals to the HC from LC by an accused
4. Appeal from the LC to HC by the prosecution
5. Appeals to the full court and SCA by an accused
6. Appeal to the SCA by the prosecution

### **GENERAL AND MISCELLANEOUS ISSUES pg. 497-417 (E)**

#### **1. No appeal before conviction**

- In general there is no appeal before the finalisation of a criminal trial. HOWEVER in exceptional circumstances the HC will use its inherent power to prevent irregularity before the close of a criminal trial (for example where a LC magistrate refuses to allow legal representation). This interference (by way of mandamus or interdict) is permitted where the order of a LC is final and definitive (such as a decision on the jurisdiction of the court or an exception to a charge) and will not be permitted where the magistrate performs his functions properly but come to a wrong conclusion on the merits. Where the accused can obtain relief by way of appeal or review no appeal will be heard before conviction. Further, there is GENERALLY no procedure to allow for the reservation of a question of law to the SCA, special entry or ordinary appeal before sentencing in the HC ALTHOUGH there are deviations in case law such as Basson and Majola.

#### **2. Appeal against sentence**

- IN GENERAL the HC and SCA do not have a general discretion to interfere with the sentence of another court. Its powers on appeal come from judicial precedent. The appeal court cannot alter a sentence simply because it would have imposed a lighter sentence. The appeal court can only interfere with the sentence of a lower court where the trial court did not exercise its sentencing jurisdiction in a proper and reasonable manner. This will be the case where:
  - i. The sentence is affected by an irregularity to the extent that a failure of justice has resulted (for example, a magistrates court sentence beyond its sentencing jurisdiction).
  - ii. Where the trial court misdirects itself to the extent that its decision on sentence is vitiated (for example, taking into account irrelevant factors).
  - iii. When the sentence is so severe that no reasonable court would have imposed it. In this case the sentence must induce a 'sense of shock' or be 'startlingly inappropriate' or there must be a 'striking disparity' between the sentence of the trial court and the sentence of the appeal court had it been the court of first instance. Other measures used in case law include 'no reasonable court would have imposed the sentence imposed by the trial court' and 'whether the trial court has reasonably exercised the discretion conferred upon it'. In combination these questions all come to one test: **whether the trial court could reasonably have imposed the sentence that it did.**

#### **2. Appeal against sentence – continued**

- UNLESS AN APPEAL IS BASED SOLELY ON A QUESTION OF LAW the appeal court has jurisdiction to impose any form of sentence in lieu of or in addition to the sentence imposed PROVIDED that the appeal court shall not alter a conviction or sentence based solely on an irregularity or defect in the record UNLESS such irregularity or defect constitutes a failure of justice. The court must impose a sentence in light of the appellants right to the least sever form of punishment available if the punishment for the offence has changed between the time the offence was committed and the time of sentencing. HOWEVER, where the appeal court sets a sentence aside on the grounds of irregularity, misdirection or inappropriateness it is competent to impose a sentence that was not available to the trial court at the time of sentencing.
- UNLESS AN APPEAL IS BASED SOLELY ON A QUESTION OF LAW a HC with appeal jurisdiction may increase the sentence on appeal even where the appeal was made only against conviction. In Bogaards (2013) it was decided that the court must give notice to the appellant when considering an increase of sentence on appeal. If the court has not of its own accord given notice to the accused that it is considering increasing sentence on appeal, the court has no jurisdiction to increase sentence on appeal based on a state application if the state has not formally lodged a cross-appeal in terms of section 310A of the CPA. When considering an increase in sentence the court must take into account if the trial court exercised its discretion unreasonably or improperly or misdirected itself. The court must also consider the offence, offender and the interests of society – a court will not likely increase a sentence even though it would have given a heavier sentence.

### **3. Appeal on facts**

- IN GENERAL an appeal court is loath to interfere with the findings of a trial court on the facts because the trial court has the advantage of seeing and hearing witnesses – it thus has the material from which to make credibility findings; however
- Where a court hears an appeal it has the benefit of the entire record of the proceedings and thus may be better placed to decide issues than the trial court especially where the trial court findings were based largely on inferences and probabilities.
- IN GENERAL –if there is no misdirection in the facts, it is presumed that the trial courts’ evaluation of the evidence as to the facts is correct and that the court of appeal will interfere only if the evaluation is wrong. When deciding if the trial courts evaluation of the fact was wrong the evidence must be assessed as a whole. The whole of the evidence does not rest solely on the demeanour of witnesses at trial although, in the search for truth, the court will place emphasis on witness demeanour and credibility and hence presiding officers at trial must indicate on the record in what respects it found the evidence of a witness unsatisfactory.
- If the question on appeal is whether the trial court drew the correct inferences from the facts, and the facts themselves are not in dispute, the appeal court is in the same position as the trial court as it has the record of proceedings and can judge for itself where corroborative evidence is present.

### **4. Difference between appeal on fact and appeal on question of law**

- In an appeal on fact the appeal court is required to retry or rehear the case on the record before it together with any other evidential material it may have decided to admit, and then to decide if there is reasonable doubt as to the accused persons guilt.
- In an appeal on a question of law the question is not whether the appeal court would have made the same finding BUT if the trial court could have made such a finding. The facts of the case are used to determine if the trial court COULD have come to a different legal consequence than what it did. It is not a question of evidence, of whether the finding of the trial court is right or wrong, but rather if the

use or interpretation of law (question of law) supports the legal consequence. For example, asking the appeal court if a particular inference is the only possible inference to be drawn from a set of facts is a question of fact and not law.

#### **5. Appearance of the appellant**

- Where an appellant notes and prosecutes an appeal and then fails to appear the court of appeal can:
  - i. Summarily dismiss the appeal
  - ii. Strike the appeal from the roll in which case it will only be reinstated if a substantive application is brought indicating a reasonable prospect of success.
  - iii. Postpone the appeal if it is reasonable to believe that the appellant failed to appear through no fault of his own.
  - iv. It may hear the appeal.

#### **6. Withdrawal of appeal**

- IN GENERAL the accused has a right to withdraw his appeal but notice ought to be given to the court and the DPP, **however**;
- Where an increase in sentence is being considered the appellant must apply to the court to withdraw his appeal AND;
- Where the appeal has progressed to the point where the court of appeal has taken cognisance or the matter is enrolled for argument or set-down the appellant may not withdraw without the leave of the court (this applies to the appeals to the HC and SCA).

#### **7. Open justice and inspection in loco**

- The provisions of section 153 and 154 of the CPA applies to appeal proceedings.
- A court of appeal may hold an inspection in loco.

#### **8. Record of proceedings**

- It is important on appeal to have a proper record of the proceedings in the trial court.
- Where there is an error in the record the accused or prosecutor may apply to the court to correct such defect. The application is brought in open court.
- If essential evidence is missing AND CANNOT BE SUPPLEMENTED from the record the appellants appeal must succeed. HOWEVER, there must be some indication in the record itself or by way of affidavit made by the appellant regarding the materiality of the missing information.
- Where the trial record is missing or a lost portion which is material to the matter cannot be reconstructed the conviction and sentence OUGHT to be set aside. It is not permissible to refer the matter back to the trial court for the trial to start de novo.
- The state and the appellant have the duty to reconstruct the record where necessary from secondary sources if the record is inadequate for the proper consideration of an appeal.

#### **9. Exceptions to the right of recourse to a higher court**

- IN GENERAL an adult accused may, with the leave of the court, appeal his matter to a higher court. There are however exceptions where no appeal is allowed:
  - i. A fugitive convicted person may not appeal as he is beyond the jurisdiction of the court and his illegal action prevents him from approaching the court for relief.
  - ii. A third party who has an interest in a verdict of guilty or in its subsequent order has no *locus standi* to appeal.

- iii. A finding of not guilty because the accused lacked criminal capacity is not appealable where the finding was made in consequence of such an allegation made by the accused.
- iv. The accused may not appeal against the putting into operation of a suspended sentence.
- v. An appeal may not be continued after the death of the appellant. Where the appeal was noted by the state it may proceed however if the state would derive some pecuniary benefit if the appeal was upheld. If the appellant dies before judgment is given on appeal and the judgment affects his estate (e.g. when the sentence was a fine) the appeal court may pronounce judgment. When a fine is imposed it provides the executor of the deceased estate with the locus standi to prosecute the appeal.

### **THE RIGHT TO APPEAL – pg. 395 – 398 (E)**

#### **1. Right to appeal – pre-constitutional history**

- During the Dutch occupation there was no right of appeal and thus leave is not at issue.
- From 1652-1806 the *Raad van Justisie* was the court of appeal from lower courts. In this court the appellant, on payment of a sum of money, could ask for a re-hearing based on the record of proceedings in the lower court.
- From 1910 to 1955 further appeal to the Privy Council was permitted ONLY with the leave of the Privy Council. This further appeal was only for matters that were heard in a lower court and had been heard by the *Raad van Justisie*.
- Until 1879 no appeal was permitted in a criminal cases tried in SUPERIOR courts but after this date they were permitted with leave to appeal but only in limited circumstances – leave to appeal against the facts was however still not permitted and the entire appeal process was aimed rather at irregularities and questions of law.
- Today the right to appeal to a higher court is governed by statute and the Constitution but the post-constitutional development is tied to the concept 'leave to appeal' in the case of adult accused (see the position with regard to child offenders as it differs from what is discussed here).

#### **2. Right to appeal – post-constitutional development**

- Before 1997 all persons who wished to appeal from a LC to a HC were required by section 309(4)(a) of the CPA to obtain a judges certificate which certified that there were reasonable grounds for an appeal. Ntuli (1997) declared this provision invalid – All convicted persons has an unlimited or absolute right of appeal to a higher court against a decision of a lower court without the need for a judges certificate as reasonable grounds.
- On 28 May 1999 the amended CPA (Act 76 of 1997) was implemented so that appeals from lower courts to higher courts were once again limited – the DOJ argued that the HC were backlogged as a result of the unlimited appeals coming from the LC. This amendment reverted to the so called leave to appeal position applicable to appeals heard from a HC (**remember there had never been a general right of appeal from a HC and leave to appeal had always been a requirement**) in which the appellant required the leave of the court of first instance (LC) to take his case to a higher court on appeal.
- In Steyn (2001) the court considered the constitutional validity of leave to appeal as embodied in section 309B and 309C of the CPA (implemented in 1999 under the auspices of the 1997 amendment). The Court declared these provisions invalid and suspended the invalidity for 6 months to allow the legislature time to amend the legislation WHICH WAD NOT DONE and as a result the order of invalidity became effective on 28 May 2001. As a result all appeal launched but not completed by the 28<sup>th</sup> of May 2001 were goverended by the previous position I.E. No leave to appeal was required.

- In 2003 however right of appeal from a LC to HC was again restricted by the amended section 309B and 309C. The present position is that all accused persons must now obtain leave to appeal from the court of first instance in order to appeal their case.
- In Shinga (2007) the constitutional validity of leave to appeal was once again tested. The court declared some parts of the then provisions as invalid but overall held that the requirement of leave to appeal is not unconstitutional and thus the practice continues.

### **3. Application for leave to appeal in a lower court**

- When a convicted person wants to appeal from a LC to a HC against conviction or sentence he must apply to the court of first instance (LC) for leave to appeal against the sentence or conviction.
- The requirements for the application:
  - i. Must be made within 14 days of passing the sentence or order OR within such reasonable periods as the court ON APPLICATION (condonation) may permit.
  - ii. The application must set forth clearly and specifically the grounds upon which the accused wishes to appeal.
- The leave to appeal can be heard orally in court after sentence or order OR can be heard in a separate hearing. In the case of a separate hearing the magistrate who heard the case hears the application BUT it can also be heard by another magistrate who must be given a copy of the record by the clerk of the LC if the matter originated in a district court. If the matter originated in a regional court and the ACCUSED WAS REPRESENTED the magistrate assigned to hear the matter (where he is not the trial magistrate) is only receives a copy of the judgment which includes the reasons for judgment, sentence or order.
- In 1971 the case of Horne set guidelines for the the consideration of reasonable grounds. Grounds of appeal are required so that:
  - i. The magistrate must know what issues are challenged so that he can deal with them in the leave to appeal judgment.
  - ii. Counsel for the state must know the grounds of appeal so that it can prepare argument to assist the court.
  - iii. The appeal court must know the grounds of appeal so that it knows what part of the record to consider and to prepare for the appeal.
- The leave grounds can be amended with the leave of the court but an accused who originally appealed only against sentence cannot amend to include an appeal against conviction,

### **3. Application for leave to appeal in a lower court - continued**

- Procedure after leave to appeal is granted:
  - i. The clerk of the LC transmits copies of the record and all relevant documents to the registrar of the HC. With the consent of the DPP and the accused parts of the record may be sent instead but the HC may still request the entire record.
  - ii. On the date set down for hearing the parties present argument in open court based on their previously submitted heads of argument of which the appeal court is in possession. According to Shinga the hearing of an appeal in chambers on written argument is unconstitutional and not permitted.
- **Procedure after leave to appeal is denied**
  - i. Where leave to appeal is denied by the court of first instance the magistrate must record his reasons for the refusal and must inform the accused of his right to petition and of the correct procedure to affect these rights.
  - ii. The accused may then petition the judge president of the the division of the HC having jurisdiction to grant leave to appeal. The application must be made within 21 days of the refusal or within reasonable time as condoned ON APPLICATION. The accused must also inform the clerk of the LC of the petition.



- iii. Once the clerk received notice of the petition he must without delay submit (i) the application that was refused; (ii) the magistrate's reasons for refusal; and (iii) the leave to appeal record, to the registrar of the HC.
- iv. The petition is considered in chambers by 2 judges assigned by the JP. If the 2 judges cannot come to a decision or differ the JP or any judge assigned by him must consider the application and the outcome is based on majority decision.
  - **Procedure after leave to appeal is denied – continued**
- v. Judges considering a petition may:
  1. Call for further information from the magistrate from the TRIAL magistrate or the magistrate who heard the leave to appeal as the case may be,
  2. In exceptional circumstances ask that the petition or part thereof be argued before them;
  3. Grant or refuse any application;
  4. If the petition includes an application for condonation (discussed hereunder) the court may order (i) that an application for leave to appeal must be made to the court of first instance within a time period fixed by them; or (ii) direct that an application for leave to appeal must be submitted to any other assigned magistrate assigned to the court concerned.
  5. Grant or refuse the application for leave to appeal subject to their decision on any application to lead further evidence;
  6. Grant or refuse an application to lead further evidence and if granted refer the matter back to the magistrate's court for hearing of further evidence, before deciding the application for leave to appeal.

#### **IF THE PETITION IS DENIED THE PETITIONER CAN APPROACH THE SCA OR EVEN THE CC DEPENDING ON THE ISSUES INVOLVED**

##### **Other applications that may accompany a leave to appeal**

- When a person wishes to apply for leave to appeal from a LC to a HC or when he petitions the HC after refusal by the LC the leave to appeal can be accompanied by (i) an application for condonation and/or; (ii) an application to adduce further evidence.
- The CPA provides set time period in which leave to appeal must be applied for. If the appellant does not comply with this requirement he may apply to the court to **condone the late filing of notice to appeal**. The discretion to grant and the grounds on which such an application will be granted rests with the court but in general the criminal courts are more liberal than civil courts because of the consequences of refusal. The court must have reasonable grounds to refuse. In Mohlathe (2000) the court decided that the exercise of discretion must be exercised in light of all the surrounding circumstances including the merits of the case, the degree of lateness, the tendered for the lateness, the prospects of success, and the importance of the case – these factors are interrelated and not decisive on their own. In van der Westhuisen the court said that the litigant cannot be punished for the actions or his attorney provided that the litigant kept an interest in the appeal and made an attempt to keep abreast with its progress.
- A leave to appeal may be accompanied by an application to lead further evidence. The application is supported by an affidavit which must set out:

##### **4. Other applications that may accompany a leave to appeal – continued**

- i. That further evidence, which would presumably be accepted as true, is available;
- ii. That if accepted the evidence would lead to a different decision or order and;
- iii. There is a reasonable acceptable explanation for the failure to produce evidence before the close of trial.
  - The court granting an application for further evidence must –

- i. Receive that evidence and further evidence rendered necessary thereby including evidence in rebuttal called by the prosecution and the court; and
- ii. Record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.

If further evidence is accepted it is taken as having been taken or admitted at trial.

**REMEMBER: THE ACCUSED CAN APPLY OR PETITION FOR LEAVE TO APPEAL, CONDONATION, AN APPLICATION TO LEAD FURTHER EVIDENCE**

**5. Leave to appeal from LC to HC – exceptions**

- All those who wish to appeal from a LC to a high court must apply for leave to appeal unless:
  1. Where the convicted person was below the age of 16 years at the time of the commission of the offence;
  2. Where the convicted person was between the ages of 16 and 18 years at the time of the commission of the offence and sentenced to any form of imprisonment that was not wholly suspended;
  3. Where the convicted person was sentenced to life imprisonment by a regional court under section 51 of the Criminal Law Amendment Act (105/1997).

**PROSECUTORIAL APPEAL LC TO HC pg. 421-425 (E)**

- IN GENERAL: The prosecution may not appeal on an acquittal on the facts of the case EXCEPT where section 65A of the CPA is invoked to allow the DPP, with the leave of a judge in chambers, to appeal the release of an accused on bail or against bail conditions sets by the bail court. In this case the appeal is heard by a single judge of a local seat of the HC.
- The prosecution may appeal on a question of law decided by a lower court and against a decision on sentence.
- 1. **Appeal on a question of law**
  - Section 310 of the CPA provides that when LC gives a decision in favour of the accused on a question of law the DPP may require the judicial officer to state a case for the consideration of the court of appeal, setting forth the question of law decided on and the reasons it reached its decision on the question of law. The DPP or NDPP may then appeal the decision. It is not for the prosecution to state the question of law which is rather set forth in the case stated by the magistrate in question.
  - The prosecution may appeal on a question of law where the LC has convicted the accused of a lesser offence which is a competent verdict on the offence actually charged.
  - Other examples of appeal on a question of law include a decision in favour of the accused in terms of section 174, 84, 85(2).
  - The accused does not have to be acquitted for the prosecution to appeal on a question of law. The question of law on appeal must however not be hypothetical and academic but must rather be of such a nature that it would affect the outcome of the case.
  - The rules of procedure for this type of appeal are found in the Magistrate's Court Rules.
  - If the appeal is allowed the court of appeal may impose a sentence or make such order as the lower court should have made or it may remit the case to the trial court and give directions in which case the court a quo re-opens case with notice to both parties and deal with it in the manner in which it should have in the first instance.
  - If the appeal is denied the prosecution can, with special leave of the SCA, appeal to the SCA.

**2. Appeal against a sentence**

- In terms of section 310A of the CPA the prosecution may appeal the sentence imposed on an accused in a LC. There is uncertainty if this right applies to a private prosecutor.
- Leave to appeal must be granted by a judge in chambers.
- A written notice of the application stating the grounds of the application must be lodged with the registrar of the appropriate HC within 30 days of the passing of the sentence (condonation for late filing is permitted at the discretion of the court).
- The accused is entitled to lodge written submissions with the judge hearing the application for leave.
- The grounds will usually be based on unfairness to the state or on an allegation that the sentence is incorrect or imposed against binding authority.
- KEEP IN MIND – Section 310A repealed the previous position in which the prosecution could ask to increase sentence where the accused brought an appeal. The current position is that the prosecution can only ask for an increase in sentence, where the accused has already noted an appeal, if it has applied for an been granted leave to cross-appeal OR where it notes an appeal against sentence in instances where the accused has not noted an appeal.
- The decision of the HC is final and if it declines leave or denies the appeal the state has no further right of appeal against sentence to the SCA as it does in the case of an appeal on a question of law.

#### **POWERS OF A HC SITTING AS A COURT OF APPEAL pg. 425-427 (E)**

##### **1. Section 304(2) read with 309(3) CPA and section 19 of the Superior Courts Act**

- The powers of a HC sitting as a court of appeal are:
  - i. The court may hear further evidence and it may exercise this power of its own accord or on application by the appellant. An application to lead further evidence cannot be made after an appeal has been dismissed. In this case the court may summon any person to appear and give evidence or produce any document BUT the court does not have to hear this evidence itself and may remit the case back to the trial court for hearing of further evidence. The case is usually remitted when the evidence is of a formal or technical nature. The TEST in deciding to hear further evidence is whether the true interests of justice require a completed case to be re-opened.
  - ii. The court may confirm, alter or quash the conviction. If the accused was convicted on one or more alternative counts the appeal court can quash the original conviction and convict on an alternative count only IF THE PROSECUTION DID NOT WITHDRAW THE ALTERNATIVE CHARGES AFTER CONVICTION ON THE MAIN CHARGE.
  - iii. The court may confirm, reduce, alter or set aside a sentence or order but MAY NOT extend the appeal against sentence to include an appeal against conviction.
  - iv. The court may correct the proceedings of a lower court.
  - v. The court may generally give such judgment or impose such sentence or make such order as the LC could have given, imposed or made, on any matter which was before it at the trial in question.
  - vi. The court may remit the matter to the magistrate's court with instructions to deal with the matter in such a manner as the appeal court deems fit (this is especially apt where the LC did not comply with the requirements of section 112 or 113 of the CPA).
  - vii. The court may make an order affecting the suspension or the execution of a sentence.
  - viii. The court may increase the sentence on appeal BUT ONLY IF THE APPEAL WAS NOT ONE BASED SOLELY ON A QUESTION OF LAW and the court has informed the accused that it is considering increasing the sentence on appeal. The appeal court cannot increase

the sentence beyond the sentencing jurisdiction of the trial court (keep in mind that in certain instances a regional court can give a life sentence in terms of Act 105 of 1997).

ix. The court of appeal has the power to give any judgment or make any order which the circumstances may require.

## **2. Execution of sentence pending appeal**

- The accused is not by right released on bail pending appeal. He may however apply to the trial court to be released on bail pending the outcome of an appeal – in other words the execution of the sentence is suspended on order of the trial court.
- An appeal does however suspend the execution of an order (such as for example an order suspending a driver's license as part of sentence) pending the outcome of the appeal.

## **3. Remission for new sentence**

- Where an appeal court remits a case to the LC for altered sentence or addition to sentence, such sentence need not be passed by the original trial magistrate.

## **4. Fresh trial**

- Proceedings may be instituted again when the conviction of a LC was set aside because:
  - i. The court was not competent to convict
  - ii. The charge sheet was invalid or defective
  - iii. There was a technical irregularity in the proceedings.
- In these cases the accused cannot rely on a plea of *autrefois acquit* or *autrefois convict*.

## **APPEAL TO A FULL COURT AND TO THE SCA – pg. 429-450 (E)**

### **1. General remarks**

- Appeal to the SCA or full court are not a right but limited by the requirements of leave to appeal granted by the HC as the court of first instance and ,if refused, by petition to the SCA (keep in mind that an absolute right exists for certain child offenders but here we concentrate on adult offenders convicted in a HC).

### **2. The SCA**

- The SCA consists of a President, Deputy President and a number of judges and acting judges of appeal determined by legislation.
- The SCA may hear any appeal on whatever matter including constitutional matters. It is the highest court of appeal for NON-CONSTITUTIONAL matters (for which the CC is the highest court of appeal).
- The SCA is a court of APPEAL and may not hear a criminal trial as a court of first instance. It may however act as a court of first instance in matters of contempt of court but this does not constitute a criminal trial by definition.
- The quorum of the SCA is 5 judges in criminal appeal matters but the President of the court may direct that a criminal appeal is heard before 3 judges only but only if the matter is not constitutional in nature or has is a matter of public importance.
- In appeal cases reserved on a question of law the SCA is the competent court of appeal.

### **3. A full court**

- In terms of the Superior Courts Act a full court is division of the HC consisting of 3 judges. According the CPA a full court means the court of a division of the HC, or the South Gauteng High Court, sitting as a court of appeal and constituted before 3 judges.
- A full court is a court of appeal and not a court of first instance.

- The decision of the majority of the court is the final decision on appeal. Where no majority is obtained the matter is adjourned and commenced de novo before a court consisting of 3 other judges.
- A matter is heard by a full court when:
  - i. It is an appeal from a decision given by a single judge in the trial court of a division of the HC. In considering the leave to appeal the HC trial judge must determine if the appeal merits the attention of the SCA which is largely decided by considering if the appeal is a matter of public importance or where the appeal is especially difficult or complicated. Where the HC directs that the appeal is heard by a full court the direction may be set aside by the SCA on application (by way of petition addressed to the President of the SCA) by the accused or DPP within 21 days of the order.
- A matter may not be heard by a full court when
  - i. It is an appeal from a lower court which was heard by a HC as a court of appeal – the accused cannot ask that the appeal decision of the HC as a court of appeal be further appealed to a full court. Only matters heard before a HC as a court of first instance may be appealed to a full court.
  - ii. Where it is directed by the court hearing the leave to appeal application that the matter deserves the attention of the SCA.
  - iii. Where leave to appeal on special entry of irregularity or illegality against the proceedings of a HC has been granted.
  - iv. Where a question of law has been reserved by a division of the HC unless the court has directed that the question of law shall be heard by a full court.

#### **4. Right of appeal to a full court or the SCA**

- As is the case of appeal from the LC to the HC no person can appeal from a HC as a trial court to the full court or SCA without leave to appeal. There is no absolute right of appeal unless the appellant is below the age of 16 years or between 16 and 18 years (at the time of the commission of the offence) sentenced to imprisonment not wholly suspended.
- Where the initial trial was heard before a single judge in the HC leave can be granted to the full court or SCA or where the trial court consisted of more than one judge the court may direct the appeal to be heard by the SCA.
- Criminal trials may be taken to the SCA on appeal in the following manner:
  - i. Cases heard in a LC and then taken on appeal to a HC by the prosecution or accused may be further appealed to the SCA but ONLY with the special leave of the SCA.
  - ii. In cases tried in a HC as court of first instance a matter may be taken on appeal to the SCA:
    - a. Where leave to appeal is granted by the trial judge (or another judge where necessary) – where leave is denied the appellant may approach the SCA by way of petition.
    - b. Where application for appeal on grounds of special entry is granted by the trial court based on an alleged irregularity or illegality. Where the special entry is refused the SCA can be approached on petition addressed to the President of the SCA.
    - c. Where a question of law is reserved by the trial court on its own accord or at the request of the prosecution or accused. Petition to the SCA is possible if reservation is refused.
    - d. Where the state has been given leave to appeal against the sentence.
    - e. Where the matter is brought to the SCA by the Minister of Justice for a decision on a question of law. Here there are no consequences for the accused.

- f. If the matter was heard before 3 judges in the HC.
- iii. Matters decided on appeal by a full court may be brought to the SCA only with the special leave of the SCA.

### **LEAVE TO APPEAL FROM HC TO FULL COURT OR SCA – pg. 434 – 450 (E)**

#### **1. Leave to appeal – introductory remarks**

- All adult accused convicted by a HC for any offence may within 14 days of the passing of sentence or order as a result of conviction may apply to the trial court for leave to appeal against the sentence, conviction or order. Condonation may be granted on application.
- Leave to appeal the decision or order of a HC sitting as a court of appeal must be applied for within 15 days after the judgment or order was given.
- An accused found not guilty by reason of mental disorder at the time he committed the act may appeal if the finding was not made as a result of him raising the allegation of mental defect or disorder.
- Leave to appeal before termination of the HC trial IS IN PRINCIPLE not allowed.
- The DPP may within 14 days of the passing of the decision apply for leave to appeal against the decision of a HC to release an accused on bail BUT MAY NOT appeal the bail conditions.
- The leave to appeal is made to the judge of the trial court if it is an appeal based on the decision of the trial court.
- Leave to appeal is made to the SCA where leave is sought to appeal a judgment or order given by a HC sitting as a court of appeal.

#### **2. Grounds of appeal**

- An application for leave to appeal by the accused or prosecutor must set out clearly and specifically the grounds of appeal. The grounds may be raised during a verbal application for leave made after sentence and then form part of the record or as part of a written leave to appeal application.
- The court may grant leave only for specific issues raised in the grounds or grant a general leave to appeal in which case all issues can be canvassed on appeal. Where the trial court restricts the matters on appeal the SCA may be approached to widen the grounds set by the trial court. The division granting the leave may not however extend the grounds after it has given leave to appeal on specific grounds – in this instance the SCA has jurisdiction.
- When the court considers application for leave to appeal it must assess whether the applicant has reasonable prospects of success and whether there is some other compelling reason for the appeal such as is the case with conflicting decisions on a particular point. The court hearing the leave to appeal must consider whether there is a reasonable prospect that another court might come to a different conclusion. A mere possibility is insufficient. Leave to appeal may also be granted where there is no prospect of success based on the record but where an application to lead further evidence may alter the position.

#### **3. Application to lead further evidence**

- When applying for leave to appeal the appellant may also apply for leave to lead further evidence. It must be supported by an affidavit stating:
  - i. That further evidence, which would presumably be accepted as true, is available;
  - ii. That if accepted the evidence would lead to a different decision or order and;
  - iii. There is a reasonable acceptable explanation for the failure to produce evidence before the close of trial.
- The court granting an application for further evidence must –

- i. Receive that evidence and further evidence rendered necessary thereby including evidence in rebuttal called by the prosecution and the court; and
- ii. Record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.
  - If further evidence is accepted it is taken as having been taken or admitted at trial.
  - This application may only be brought with a leave to appeal – if the leave to appeal is refused with final effect the application to lead further evidence is incompetent.
  - If new evidence only comes to light after leave to appeal is denied the remedy is exhausted.
  - If the leave to appeal was granted but leave to lead further evidence refused, the accused can approach the SCA.
  - Once the SCA has denied an application to lead further evidence it has no jurisdiction to act and the only remedy available to the accused is in terms of section 327 of the CPA.

#### **4. Application for condonation**

- Leave to appeal must be applied for within prescribed time limits.
- Non-compliance with the time limits may be condoned by the court on application.
- The court will not condone non-compliance where the appeal has no reasonable chances of success.
- If application for condonation is refused the appellant may within 21 days address a petition to the President of the SCA for condonation.

#### **5. Petition procedure**

- Where an application for (i) leave to appeal the judgement, sentence or order of a HC; (ii) to adduce further evidence and/or (iii) for condonation is refused, the accused can approach the SCA by way of petition.
- The petition is addressed to the President of the SCA and must be made within 21 days of the refusal by the court hearing the leave to appeal or application to lead further evidence or application for condonation.
- The petition is considered in chambers by 2 judges designated by the President of the SCA. Where they cannot decide the issue for a difference of opinion, the petition will be considered by the President or another judge appointed by him. The decision is then that of the majority.
- The judges considering the petition may:
  - i. Call for any further information that was not required to be submitted, from the judge who refused the application or from the judge presiding at the trial whatever the case may be or;
  - ii. In exceptional circumstances order the application be argued before them at a time and place determined by them.
- After consideration of the petition, the judges may:
  - i. Grant or refuse the application for leave to appeal,
  - ii. Grant or refuse the application for condonation
  - iii. Grant or refuse an application to lead for evidence. On granting this application the SCA may refer the matter back to the HC to hear the further evidence before deciding on the application for leave to appeal.

#### **6. Appeal on special entry of irregularity or illegality to the SCA**

- There is no review procedure for cases heard in the HC where there may be an irregularity as there is for cases heard in the LC.
- The accused in the case of an irregularity during trial in the HC may however rely on special entry proceedings. If he is subsequently convicted the matter may be taken to the SCA.
- In a special entry the accused asks during trial or after trial that an alleged irregularity be entered onto the record of proceedings.
- The irregularity usually takes two forms:
  - i. Irregularity relating to trial – for example an assessor that obtains extra-curial information detrimental to the accused
  - ii. Irregularity arising during trial – such as for example a judge refusing to allow proper cross-examination.
- Where the accused alleges either of the above he may during trial or within 14 days of conviction apply for a special entry to be made on the record stating in what respect the proceedings were irregular or not according to law. The court is bound to make the entry unless it is of the opinion that the request is mala fide or that it is frivolous or absurd or would constitute an abuse of court process.
- If the accused is convicted he may appeal to the SCA against the conviction on the grounds of the irregularity or illegality.
- The court will not as a rule overturn a conviction by reason of irregularity unless a failure of justice has resulted because of the irregularity. The question is if the accused would still have been found guilty had the irregularity not occurred.

#### **7. Reservation of a question of law**

- During trial in a HC a question of law may arise which may be of such a nature that even the court is unable to provide a clear answer. In this case the court of its own accord or at the request of the prosecutor or accused may reserve the question for the consideration of the SCA. The court then states the question, and directs that it be entered in the record and that a copy of the record be transmitted to the registrar of the SCA for consideration after the accused has been convicted or acquitted.
- The reservation of a question of law is of little use to the accused because he can raise the same points on appeal. For the prosecution the reservation of a question of law is important because it allows it to appeal on a point of law. The prosecution can reserve a question of law for consideration by the SCA in the following instances:
  - i. Where the accused has been acquitted or where he is convicted in terms of a competent verdict. If the prosecution succeeds in this instance the SCA may allow the accused to be re-indicted. The question must not be academic or hypothetical but must have an impact on the acquittal or conviction on competent verdict.
  - ii. Where the court quashes an indictment.
  - iii. Where there has been a conviction but the clarification of a question of law may be to the benefit of the accused.
  - iv. Where the question of law may have bearing on the validity of the sentence imposed.

#### **8. When may the prosecution appeal to the SCA**

- IN GENERAL the prosecution cannot appeal a finding of facts UNLESS it relates to the release of an accused by the HC on bail. In this case the prosecution can appeal the release on bail but not the conditions of release. In this case the prosecution must apply for leave to appeal.
- The prosecution can appeal on a question of law with leave to appeal.
- The prosecution may appeal a sentence with leave to appeal. Remember that that prosecution cannot simply apply for an increase in sentence when the accused initiates the appeal - it must launch a cross-appeal which it can only do with leave of the trial court.

#### **9. Powers of the SCA**



- The SCA may:
  - a. Dispose of an appeal without hearing oral argument.
  - b. Receive further evidence.
  - c. Remit a case to the court of first instance for further hearing with instructions.
  - d. Confirm, amend or set aside the decision which is the subject of appeal and render any decision as the circumstances require.
  - e. Impose a sentence more severe than that imposed by the trial court.
  - f. Remit the case for the hearing of further evidence or hear the evidence itself.

### **Chapter 22: Basic themes:**

1. General and miscellaneous issues
2. Expungement
3. Re-opening of case and the powers of the President

#### **GENERAL AND MISCELLANEOUS ISSUES pg. 451-454 (E)**

- The Constitution empowers the President of RSA to pardon or reprieve offenders and to remit any fines penalties or forfeitures.
- There is no right to be pardoned but any application for pardon must be considered rationally, in good faith, in accordance with the principles of legality and with undue delay.
- There are no guidelines on the Presidents prerogative but it must be exercised in accordance with the Constitution.
- The power can be exercised of the President's independent accord or on application.
- The prerogative to commute a sentence is that of the President but in practice he is advised by the Minister of Justice based on the recommendations of the DPP, the presiding officer of the trial court and state law advisors. Despite this the power of mercy is an executive decision.
- The Constitutional Court can declare (or confirm a declaration made by another court) any conduct of the President as unconstitutional and this includes his power to reprieve, pardon or otherwise extend mercy. In this case the action can be declared invalid when the decision was in bad faith or was so irrational that no reasonable executive authority could have reached such a conclusion or that the power was exercised irregularly and therein violated the constitutional rights of others in an unreasonable and unjustified manner.

#### **EXPUNGEMENT OF RECORDS pg. 454 (E)**

- Expungement of a criminal record for a conviction and subsequent sentence is an executive action but in the case of South Africa it is supported by legislation and takes place as follows:
  1. Automatically in the case of certain offences as mentioned in the Internal Security Act for example.
  2. On application by the person concerned or;
  3. After a fixed period of time.

#### **RE-OPENING A CASE AND THE POWERS OF THE PRESIDENT pg. 454 - 456 (E)**

- Section 327 of the CPA is designed to grant relief to an accused by way of petition to the President of RSA for hearing of further evidence once all recognised judicial procedures are exhausted or are no longer available.
- The re-opening of a case after it has been finalised by the SCA can only take place through the provisions of section 327.
- Section 327 directs that a person convicted in any court who has exhausted all remedies of appeal or review (or where they are no longer available to him) may submit a petition to the Minister of Justice, supported by an affidavit stating that further evidence has become available which materially affects his conviction and sentence.
- If the Minister considers the allegation of further evidence and its effect on the accused to be true, refers the petition and its supporting affidavits to the court which convicted the accused.
- The court may permit the examination of witnesses in connection with the further evidence as if it was a normal criminal trial and thereafter assesses the value of the further evidence. Thereafter the court advises the President of the RSA whether and to what extent the further evidence affects the conviction.
- The President may then:
  - i. Direct the conviction be expunged (free pardon)
  - ii. Commute the conviction to a lesser one and adjust the sentence accordingly
- No further appeal or review or proceedings are permissible in respect of the proceedings, findings or advice of the court in terms of section 327. Further there is no appeal or review of a refusal by the Minister to refer the matter to the trial court or against the President's decision on the advice of the trial court.

### **CMP3701 DISCUSSION QUESTIONS**

Dear Students,

The questions hereunder are those discussed in the various discussion classes.

#### **Question 1**

**Where the prosecutor fails to allege in the charge sheet that the offence was committed in a public place and such allegation is a vital element of the offence to properly inform the accused, Mr A, who could not be found guilty unless the prosecution rectifies the defective charge sheet:**

- (i) **Discuss the relevant procedure relating to how the prosecution could rectify the omission in the charge sheet.**

**(6)**

(ii) Assuming that the missing allegation is not material; could the defective charge be rectified? Discuss the relevant procedure. (6)

(iii) Could Mr T be joined as a co-accused to the charge against Mr A in the abovementioned scenario? Discuss the requirements in terms of section 155 of the Criminal Procedure Act. (3)

Section 86 of the CPA is applicable which allows for amendment when:

- a) There is a defect for want of an essential averment,
- b) There is a variance between the averment in the charge and the evidence offered in proof thereof or,
- c) Where words are omitted or included unnecessarily.

Prior to 1959 the charge had to at least disclose an offence.

The change:

- a) Must not prejudice the accused in his defence,
- b) Sec 86 is for amendment NOT replacement
- c) If the court refuses an amendment under this section the issue can be raised on appeal but if 86 is not invoked the proceedings will not be invalidated because section 88 comes into play for immaterial errors.

Assuming that the missing allegation is not material; could the defective charge be rectified? Discuss the relevant procedure.

Section 88 could be used to remedy the situation. Section 88 allows for correction of an error in the charge through evidence and therefore operates automatically without actually invoking section 86. In terms of section 88:

1. The offence must be named in the charge
2. The prosecution must exercise caution in framing the charge sheet.
3. The Hershel rule applies if the want of averment is brought to the courts attention prior to judgement.
4. Can only be cured by proper evidence and NOT presumptions.

5. No replacement of the charge may occur.

**Could Mr T be joined as a co-accused to the charge against Mr A in the abovementioned scenario?**

Yes. Section 155 states that any number of participants in the same offence may be tried together.

## QUESTION 2

- (i) Discuss plea and sentence agreements (P&S.A)
- (ii) Compare traditional plea-bargaining to plea and sentence agreements

(15)

### Question 2 (i)

**1 A prosecutor must be authorised in writing by** the National Director of Public Prosecutions to enter into P&S.A

**2 Only an accused who is legally represented** may, **before the accused pleads to the charge brought against him/her, negotiate and enter** into an agreement in respect of-

(i) **a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and if the accused is convicted of the offence to which he or she has agreed to plead guilty-**

(ii) **a just sentence to** be imposed by the court; or

— the postponement of the passing of sentence in terms of section 297 (1) (a); or

- a just sentence to be imposed by the court, of which the operation of the whole or any part thereof is to be suspended in terms of section 297 (1) (b); and- if applicable, an award for compensation as contemplated in section 300.

### 3 **The prosecutor may enter into P&S.A-**

(i)after consultation with investigating officer;( unless it will delay the proceedings to such an extent that it could affect the administration of justice adversely –

(ii)with due regard to, at least, the

- nature of and circumstances relating to the offence;

- personal circumstances of the accused;

-previous convictions of the accused, if any; and

- interests of the community, and

(iii)after affording the complainant or his or her representative ( unless it will delay the proceedings to such an extent that it could affect the administration of justice adversely, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding) regarding the contents of the agreement; and the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.

(iii)The prosecutor shall, before the accused is required to plead, inform the court that a PSA has been entered into.

### 4 A **P&S.A. shall be in writing and shall at least-**

- state that the accused, before entering into the agreement, has been informed that he or she has the right-

(i)**to be presumed innocent until proved guilty beyond reasonable doubt;**

(ii)**to remain silent and not to testify during the proceedings; and**

(iii)**not to be compelled to give self-incriminating evidence;**

state fully the terms of the agreement, the substantial facts of the matter, all other facts relevant to the sentence agreement and any admissions made by the accused;

**5 P&S.A must be signed by the prosecutor, the accused and his or her legal representative;** and

(d)if the accused has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that he or she interpreted accurately during the negotiations and in respect of the contents of the agreement.

**6 The court shall not participate in the negotiations**

and the court shall **after being informed by the prosecutor** of the P&S.A must be satisfied that all requirements above have been met and

(i) require the accused to confirm that such an agreement has been entered into; and

**7 If the court is not satisfied** that the agreement complies with the requirements the court shall-

(i)inform the prosecutor and the accused of the reasons for non-compliance; and

(ii)**afford the prosecutor and the accused the opportunity to comply with the requirements concerned.**

**8 IF THE COURT IS SATISFIED** that the agreement complies with the requirements the court shall require **the accused to plead to the charge and order that the contents of the agreement be disclosed in court.**) After the contents of the agreement have been disclosed, the court shall question the accused to ascertain whether-

- (i) he or she confirms the terms of the agreement and the admissions made by him or her in the agreement;
- (ii) with reference to the alleged facts of the case, he or she admits the allegations in the charge to which he or she has agreed to plead guilty; and
- (iii) the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced.

**9 If the court is not satisfied that the accused** is guilty of the offence in respect of which the agreement was entered into; or

- (ii) it appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge; or
- (iii) for any other reason, the court is of the opinion that the plea of guilty by the accused should not stand,

record a plea of not guilty and inform the prosecutor and the accused of the reasons therefor. If the court has recorded a plea of not guilty, the trial shall start de novo before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.

10 IF THE COURT IS SATISFIED THAT THE ACCUSED ADMITS THE ALLEGATIONS IN THE CHARGE and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement. For such purposes the court may ask questions including questions about the previous convictions of the accused, to the prosecutor and the accused; and hear evidence, including evidence or a statement

by or on behalf of the accused or the complainant; and

The court must, if the offence concerned is an offence-

referred to in the Schedule to the Criminal Law Amendment Act, 1997 (Act 105 of 1997); or

or for which a minimum penalty is prescribed in the law creating the offence,

have due regard to the provisions of that Act or law.

If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.

BUT IF THE COURT IS OF THE OPINION THAT THE SENTENCE AGREEMENT IS UNJUST, the court shall inform the prosecutor and the accused of the sentence which it considers just and

the prosecutor and the accused may-

**(i) abide by the agreement** with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence; or

or (ii) **withdraw from the agreement**.

If the prosecutor and the accused **abide by the agreement** the court shall convict the accused of the offence charged and impose the sentence which it considers just.

If the prosecutor or the accused **withdraws from the agreement** the trial shall start de novo before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.

**11 WHERE A TRIAL STARTS DE NOVO THE AGREEMENT SHALL BE NULL AND VOID and no regard shall be had or reference made to- any negotiations which preceded the entering into the agreement; the agreement; or any record of the agreement in any proceedings relating thereto unless the accused consents to the recording of all or certain admissions made by him or her in the agreement or during any proceedings relating thereto and any admission so recorded shall stand as proof of such admission.**

### Question 2(ii)

#### Comparison between plea and sentence agreements (P&S.A) and traditional plea agreement

inherent similarity between both processes: both provide for plea bargaining on lesser offences for lesser sentence or on offence charged for lesser sentence or where the accused agrees to plead guilty to one charge on the basis that the rest of the charges are withdrawn.

Differences:

#### P&S.A.

is formal, legally structured/prescribed process before accused pleas;

Agreement must be in writing;

Only between state and legally represented accused;

Prosecutor need to be legally authorised by DPP ;



Binding on all parties once acceptance of conviction and sentence;

DPP issues directives as to procedures to follow/ as to which offence /sentences agreements may be agreed upon;

It provides for the participation of the victim/complainant/investigating officer (*Sassin* 2003).

### Traditional Plea bargaining

Informal unwritten process commencing any time before judgment in respect of traditional plea bargaining procedure;

Agreement need not be in writing;

No legal counsel required for accused to enter into plea bargaining process;

Prosecutor need not be legally authorised by DPP to enter in traditional plea bargaining procedure ;

Does not bind court on sentence but principles of fairness dictate that the parties are bound to agreement and cannot resile from agreement

No directives in respect of traditional plea bargaining; no regard for the participation of the victim/complainant/investigating officer

### **QUESTION 3**

#### **Discuss and compare the statutory correction of plea of guilty and common law**

##### 1) The Statutory correction of plea of Guilty

After the accused has pleaded in terms of s 112, but before sentence, the court may, if it is in doubt whether the accused is

(1) in law guilty of the offence to which he has pleaded guilty, or satisfied that the

(2) the accused does not admit an allegation in the charge, or

(3) the accused has incorrectly admitted any such allegation or

(4) the accused has a valid defence to the charge, or

(5) the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution. The conviction apparently falls away automatically.

Admissions already made stand as proof of relevant facts. Where such admissions embrace all the facts the State must prove in order to establish the offence and the guilt of the accused in respect thereof, the accused can be convicted. The court must weigh the accused's admissions and his failure to testify in order to decide whether all the elements of the offence have been proved. A prosecutor may not substantially contradict the version of an accused who has pleaded guilty, unless a plea of 'not guilty' is noted. The provisions of s 113 are mandatory and in changing the plea, doubt and not probability is sufficient.

The test in s 113 is objective and court must have *reasonable doubt* as to whether the accused admits the allegation. The question whether the accused's non-admission of an allegation in the charge sheet is false or not, is not relevant at this stage of the proceedings. Allegations admitted by the accused up to the stage at which the court records a plea of 'not guilty', other than allegations incorrectly admitted by the accused, stand as proof in any court of such allegation. Where an accused has pleaded guilty to the charge and plea of 'not guilty' has been entered, the trial could be resumed before another magistrate in terms s 118.

## 2) Common law amendment of plea from 'guilty' to 'not guilty'

- a) Section 113 does not necessarily exclude the common law \_ *Attorney-General, Transvaal v Botha* 1993 (2) SACR 587 (A).
- b) Where a matter arises for which s 113 does not make provision, the common law still applies. The accused is then only required to offer a *reasonable explanation* for having pleaded guilty.
- c) A reasonable explanation could be, for example, that the plea was induced by fear, fraud, duress, misunderstanding or mistake.
- d) In the case of an unrepresented accused, a change of plea should not succeed where there is no indication that the accused did not understand the charge and where the court offers the accused an opportunity to give an explanation by way of evidence which the accused, without any reason for his refusal, declines to use.
- e) An application to change a plea from 'guilty' to 'not guilty' may be brought after conviction but before sentence. In such a case there is *an onus on the accused to show on balance of probabilities that the plea was not voluntarily made* \_ *De Bruin* 1987 (4) SA 933 (C), *Booyesen* 1988 (4) SA 801 (E).

- f) In *Botha* 1990 (1) SA 665 (T), held that at common law, an application for amendment of a plea of guilty, brought *before sentencing*, does not shift the onus to the accused. The court is not *functus officio* until the sentence has been imposed. Even if an explanation as to why the accused pleaded guilty is somewhat improbable, the court should not refuse an amendment to the plea unless it is satisfied not only that the explanation is improbable but that it is beyond reasonable doubt false. If there is any reasonable possibility of his explanation being true then he should be allowed to withdraw his plea of guilty.
- g) Before the amendment of s 113 in 1996 the test was one of reasonable doubt: if the court had a reasonable doubt whether the accused had actually or correctly admitted the allegations in the charge, or whether the accused had a valid defence to the charge, it was obliged to enter a plea of 'not guilty'. Similarly, an accused who wished to withdraw a plea of guilty had to give an explanation as to why he pleaded guilty and now wished to change that plea. If the explanation was reasonably possibly true, the accused would be allowed to withdraw the plea.
- h) -Since the amendment the requirement of reasonable doubt has been replaced with a lighter test. It is sufficient if it were alleged that the accused did not admit, or has incorrectly admitted an allegation in the charge, or that the accused has a valid defence to the charge.
- i) -Where the application for amendment of plea from guilty to not guilty rests upon two issues, namely coercion on the one hand and actual innocence on the other, the merits of the matter in relation to the guilt or innocence of the accused must be taken into account.
- j) The trial court will at least have to decide whether there is a reasonable possibility that the accused is innocent and that the application is bona fide. It is permissible to have regard to the accused's statements during the s 112 (b) plea explanation.
- k) Only in the most exceptional circumstances will such a change plea from guilty to not guilty be allowed after the verdict. Where, however, the accused pleads guilty to certain charges in order to obtain advantages with regard to the other charges, the court may refuse to allow him subsequently to change his plea.
- l) In *Mazwi* 1982 (2) SA 344 (T) the view was taken that the test to be applied in deciding whether to grant an application to withdraw a plea of guilty is that set out in s 113, and there is no room for a common law withdrawal of a plea of guilty. BUT *Hazelhurst* 1984 (3) SA 897 (T), held differently- that s 113 is applicable only in proceedings in terms of s 112 (i.e. in the course of questioning the accused whether he admits the allegations in the charge to which he has pleaded guilty) and the magistrate, without an application on the part of the accused, must change the plea to one of not guilty if certain facts emerge from the questioning. Common law still applies.

#### QUESTION 4

Where an accused at a summary trial pleads not guilty, the presiding official may ask him whether he wishes to make a statement indicating the basis of his defence. The accused may also make admissions in the course of explanation of plea. Discuss both instances.

(10)

(That is, discuss the plea explanation and admissions made during plea explanation)

1) Plea Explanation- plea of not guilty

- a) In terms s 115 (1), where an accused at a summary trial pleads not guilty, the presiding official may ask him whether he wishes to make a statement indicating the basis of his defence.
- b) According to s 115 (2) (a), where the accused does not make a statement, as he is entitled to, 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.
- c) The court must, at all times, inform the accused that he is not obliged to answer any questions.
- d) This discretion is to be exercised judicially – *Herbst* 1980 (3) SA 1026 (E); *Masike* 1996 (2) SACR 245 (T).
- e) The court may, in its discretion, put any question to the accused in order to clarify any matter with regard to the statement made to indicate the basis of his defence, or his replies to questions put to him in order to establish which allegations in the charge are in dispute – s 115(2)(b).
- f) The questioning by the court should not go beyond the matters in issue in the case and should be limited to those issues in respect of which the accused's statement is unclear and require clarification.
- g) It is not required of an accused that his statement intended to indicate the basis of his defence be made under oath – *Xaba* 1978 (1) SA 646 (O).
- h) It is important that presiding officers bring home to accused, especially where they are unrepresented, that the statement in clarification of the plea is still not evidence under oath, but only directed at preventing unnecessary evidence being led by the State – *Mothlaping* 1988 (3) SA 757 (NC).

- i) The explanation of plea is, therefore, not evidential material upon which a conviction can be based – *October* 1991 (1) SACR 455 (C).
- j) The procedure prescribed in s 115 must be completed after plea and before the commencement of the State's case. The magistrate should record *verbatim* the questions put by him to the accused and the accused's reply to each question.

2) Admissions made in the course of plea explanation

- a. The court must enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty may be recorded as an admission and, if the accused consents, such admission is duly recorded – s 115(2)(b).
- b. The accused can reduce the total number of facts which are put in issue by a plea of not guilty and which have to be proved by the State, by admitting facts which will then no longer be an issue.
- c. If he consents thereto, that admission will be recorded and deemed to be an admission in terms of s 220. Such an admission is sufficient proof of the relevant facts and absolves the State of the burden of proving these facts. Sufficient proof is naturally not conclusive proof, and can later be rebutted by the accused, eg on the grounds of duress or mistake or by other legally acceptable facts – *Seleke* 1980 (3) SA 745 (A).
- d. An accused is not obliged to consent to his admission being recorded. Where he does not consent, the onus remains on the State to prove by admissible evidence all the facts which were put in issue by the plea of not guilty.
- e. The judicial officer is entitled to question the accused only where it is not clear from such statement to what extent the accused denies or admits the allegations which comprise the charge against him.

#### QUESTION 4

**Discuss the plea of *autrefois acquit*. (7)**

- It is possible to raise this plea after the commencement of the trial
- For a plea of *autrefois acquit* to be sustained if an accused is charged again, there must have been a trial or prosecution followed by an acquittal

➤ The essentials of the plea of *autrefois acquit* are that the accused has previously been acquitted –

(1) of the same offence with which he is now charged;

(2) by a competent court; and

(3) upon the merits.

➤ If these three factors are present the accused is said to have stood in jeopardy of having been convicted

Explain meaning of above concepts:

Briefly:

Same offence/Similarity of offences- Long case

If at the trial there is not a substantial difference between the facts alleged in the charge and the facts proved by the evidence, the accused may be convicted (at any rate, where the charge is amended); should he thereafter be acquitted he may plead *autrefois acquit* when subsequently charged on the amended charge. Competent verdicts indicate similarity

'on the merits'

It is required that the acquittal must have been 'on the merits'. This means that the court (whether at the trial or ultimately upon appeal) must have considered the merits of the case, whether in fact or in law, and must not have acquitted the accused merely because of a technical irregularity in the procedure. *Naidoo, Moodie*

Competent court- court having jurisdiction

The plea of *autrefois acquit* can be sustained even where it is based on the judgement of a foreign court.

## QUESTION 5

When may court exclude public from a trial? Indicate the relevant legal provision and justification for such exclusion

Constitution protect open and public trial, exceptions thereto allowed:

Authority CPA or CJA	Reason	Mandatory or discretionary?
153(1) of CPA	Where the security of the state, good order, public morals or the administration of justice are threatened by a public trial, ...	the court MAY order the proceedings to be held in camera.
153(2) of CPA	Where there is a possibility of harm to a witness or the accused, ...	the court MAY order that such a person testify behind closed doors and that the identity of the person not be released for a certain time period.
153(3) of CPA	Where the complaint is one of a sexual nature or where the offence relates to extortion, ...	the court MAY, at the request of the witness, direct that the court be cleared and that judgment be given behind closed doors, where necessary, to protect the identity of a witness.
153(3A) of CPA	Where the offence relates to a sexual offence, ...	any person whose presence is not necessary at the proceedings relating to the offence MAY NOT be admitted while the witness is giving evidence.
153(5) of CJA	Child witness:	Where a witness is under the age of 18, the court MAY direct that the court be cleared, except for the presence of the witness and

		his parents or guardian.
153(6)of CJA	Children in the gallery:	The court MAY direct that no person under the age of 18 be present, unless he is a witness or his presence is authorised by the court.
158(2) of CJA	The court, on the request of the prosecutor or with the consent of the witness or accused, ...	MAY order that a witness give evidence by means of electronic media.
63(5) of the Child Justice Act (CJA)	Child offender's identity may not be published- best interest of child- s 28 of the Constitution.	Proceedings at the trial of a child are closed , but the court MAY grant permission for attendance.

## QUESTION 6

### 1) Discuss the rights, duties and recusal of assessors

- (1) The decision or finding of the majority of the members of the court upon any finding on a question of fact shall be the decision or finding of the court, except where the presiding officer sits with only one assessor, in which case the decision or finding of the presiding officer shall in the case of a difference of opinion, be the decision or finding of the court.
- (2) If the presiding officer is of the opinion that it would be in the interests of the administration of justice that the assessors assisting him do not take part in any decision upon the question whether evidence of any confession or other statement is admissible against him, the presiding officer alone shall decide upon such question, and he may, for that purpose sit alone. The presiding officer has a discretion to decide whether or not assessors should adjudicate on the admissibility of a statement made by an accused.
- (3) The presiding officer alone shall decide on any question of law or on a decision whether a particular issue constitutes a question of law, and for this purpose he may sit alone.



(4) A judge presiding at a criminal trial in a superior court shall give reasons for his decision where he decides any question of law or whether any matter constitutes a question of law or of fact. The judge shall also give the reasons for the decision or finding of the court upon any question of fact or whether he sits alone.

As soon as an assessor receives information detrimental to the accused which has not been proved in evidence, he must retire from the case.

The assessor must exhibit absolute impartiality. His expressing an opinion about a particular witness before the accused had stated his case was held to be irregular \_ *Mayekiso* 1996 (1) SACR 510.

The duties of assessors are limited to the adjudication of the trial up to the verdict. They play no part in the imposition of sentence, although it may not be irregular for the presiding officer to seek their advice on sentence.

The presiding officer may, at any stage before the completion of the proceedings, order the recusal of the assessor from the if he is satisfied that:

(1) The assessor has a personal interest in the proceedings concerned

(2) There are reasonable grounds for believing that there is likely to be a conflict of interests as a result of the assessor's participation in the proceedings concerned

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

(4) The assessor is (for any reason) absent or

(5) The assessor has died

## 2) Indicate the content of the concept justice

The concept of 'justice' in its procedural sense is closely related to the idea of legality which assumes impartiality and fairness on the side of the presiding officer during the proceedings. Discuss the concept of justice. (8)

Apart from constitutional rights in s 35(3) embracing fair conduct towards an accused during trial, Mabuza summarised the essence of proper judicial conduct as a component or element of justice. See chapter 17 for other components of justice  
Mabuza case:

- a) The court should not conduct its questioning in a manner in which its impartiality can be questioned.
- b) The court should not enter the arena.
- c) The court should not upset or intimidate a witness so that his answers or credibility is weakened.
- d) The court should control the trial in a way which guarantees impartiality and fairness.
- e) The court must be fair to both prosecution and defence – Jacobs case
- f) Audi alterum partem must be applied.
- g) Decisions must be based on evidence given under oath.
- h) The accused must be made aware of his rights.

## QUESTION 7

1) Discuss the diversion of trial procedures in terms of the Child Justice Act relating to the child offender in court and accused of committing a **schedule 1 or 2 offence**.

(12)

2) Discuss also diversion of trial of child offender **in relation to Schedule 3 offences**

(15)

NOTE THE FOLLOWING: RELEVANT TO ANY DISCUSSION ON DIVERSION OF CHILD OFFENDER IRRESPECTIVE OF SCHEDULE:

- a. Diversion is defined in sec 1 of the CJA as the diversion of a matter involving a child away from the formal court procedures; the child does not undergo a trial but admits responsibility and thereafter completes a diversion option (as referred to hereunder). The CJA is steeped in the concept of restorative justice, which it defines as an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.

b. Diversion is split into two levels:

- i) Level 1 – applies to schedule 1 offences and may not, if a time period is applicable, exceed 12 months in the case of a child under 14 or 24 months for a child over 14 year of age. This level presents diversion option ranging from the mild (such as writing a letter of apology to the victim) to the formal (such as attendance of a programme, restitution, compensation service to the victim).

ii) Level 2 – applies to schedule 2 and 3 offences and may not, if a time period is applicable, exceed 24 months in the case of a child under 14 or 48 months for children older than 14. Level two diversion options are seen as more serious in nature. The options for level 1 offence are still available but are then supplemented with more serious consequences (such as placement in a vocational programme, intensive therapy and restriction of movement under the supervision of a probation officer).

c. IF A CHILD COMMITS A COMBINATION OF SCHEDULE 1, 2 & 3 OFFENCES THE PROCEDURE IS BASED ON THE MOST SERIOUS OFFENCE CHARGED

d. There are 3 stages at which diversion may be ordered

A) Prosecutorial diversion- Schedule 1

Determined under section 41 of the Act prosecutors can divert certain matters before the preliminary enquiry only if it involves a schedule 1 offence and it may only be diverted to a level 1 diversion option. Diversion may occur if the prosecutor is satisfied that the child acknowledges responsibility for the offence, there is a *prima facie* case against the child, the child has not been unduly influenced and the child, parent, guardian or appropriate adult consent to the diversion. If the child is between 10 and 14 years the prosecutor must also be satisfied that the child has criminal capacity. Please note that diversion is not automatic for a schedule 1 offence and the prosecutor may decline diversion even if it has been recommended in a pre-trial assessment report. In terms of sec 42 the diversion decision must be made an order of court and the child and his caregiver must appear before a magistrate in chambers to certify the order.

B) Diversion by order of the presiding officer at a preliminary inquiry- Schedule 1 and 2 Offences

Section 52(1) provides that a matter may be diverted at a preliminary enquiry if:

- ❖ The child acknowledges responsibility for the offence,
- ❖ The child has not been unduly influenced,
- ❖ There is a *prima facie* case against the child,
- ❖ The child, parents, guardian or appropriate adult has consented to the diversion and;
- ❖ The prosecutor indicates that the matter may be diverted.

In terms of section 52(2) of the CJA a prosecutor can recommend the diversion of a schedule 1 or 2 offence if the views of the victim (or any other person who has interest in the affairs of the victim) are considered and where the prosecutor concerned has consulted with the police officer responsible for investigating the matter.

- NB In terms of section 52(3) the DPP who has jurisdiction over the matter may indicate that diversion is an option in a matter involving a schedule 3 offence (note that these matters can only be diverted where exceptional circumstances exist).

- The DPP concerned must give a written indication (including the reasons why) he has decided to divert a schedule 3 offence.
- This is handed to the magistrate and forms part of the record and the magistrate makes the order for diversion.
- The diversion order is NOT made by the prosecutor or DPP in this instance but either of these parties may recommend diversion.
- The presiding officer is however the party who makes or declines the order.

C) During trial in a child justice court

A matter **can be diverted at any time before the conclusion of the state's case**. In effect, the trial proceedings are postponed pending the child's compliance with the diversion order. This can affect the child negatively as follows: in order to be considered for diversion the child must acknowledge responsibility for his actions and if he then subsequently breaches the conditions of the diversion order his acknowledgement may be recorded as an admission (since the trial will then proceed). If the child completes the diversion programme, the court orders that the court proceedings are stopped (see the distinction between stopping and withdrawal of prosecution in the CPA). It must be kept in mind that a child justice court is not an entirely separate court but simply a court, which is child orientated and applies the provisions of the Act. One of the distinctions between the CJA and the CPA is found in the public nature of the trial. A trial of a child is held behind closed doors and the public is excluded unless the presiding officer determines that certain persons be present as an aid to the court. Additionally the identity of the child may not be published. Section 65 of the CJA determines that a child must be assisted by a parent, guardian or appropriate adult in the child justice court (please note that assistance is not akin to legal representation. A child appearing in a child justice court who cannot afford the service of a private practitioner will have representation from the Legal Aid Board South Africa appointed to him).

IF A CHILD COMMITS A COMBINATION OF SCHEDULE 1, 2 & 3 OFFENCES THE PROCEDURE IS BASED ON THE MOST SERIOUS OFFENCE CHARGED

the schedules determined by the CJA. **They are as follows in respect of Schedules 1 and 2:**

SCHEDULE 1 - this schedule contains a list of crimes, which are viewed as the least serious of those contained in all of the schedules. You will find five offences listed hereunder but for a more complete list of the schedule refer to Annexure A.	SCHEDULE 2 – this schedule contains a list of crimes, which are not trivial but are not as serious as those in schedule 3. You will find five offences listed hereunder but for a more complete list of the schedule refer to Annexure A.	<b>SCHEDULE 3- most serious offences. Complete- see study guide and workbook</b>
<b>Theft (including receipt of stolen goods) valued below R2500.</b>	<b>Theft (including receipt of stolen goods) valued over R2500</b>	
<b>Fraud, extortion, forgery and uttering or an offence referred to in the Prevention and Combating of Corrupt Activities Act 12/04 below a value of R1500.</b>	<b>Fraud, extortion, forgery and uttering or an offence referred to in the Prevention and Combating of Corrupt Activities Act 12/04 exceeding a value of R1500.</b>	

Malicious injury to property below the value of R1500.	Robbery, other than robbery with aggravating circumstances.	
Common assault.	Malicious injury to property above the value of R1500	
Perjury.	Assault GBH	

**Diversion in respect of Schedule 3 Offence? COMPLETE in respect of schedule 3 offences the requirements for diversion. If Schedule 3 is asked, do not include discussion in respect of Schedule 1 or 2. However, note that level 2 diversion includes schedule 2 or 3 offences**

- ❖ The child acknowledges responsibility for the offence,
- ❖ The child has not been unduly influenced,
- ❖ There is a *prima facie* case against the child,
- ❖ The child, parents, guardian or appropriate adult has consented to the diversion and;
- ❖ diversion is an option in a matter involving a schedule 3 offence where exceptional circumstances exist
- ❖ The DPP concerned must give a written indication (including the reasons why) he has decided to divert a schedule 3 offence.

## QUESTION 8

Discuss the calling or recalling of witnesses and questioning by the court

- In terms s 186 the court may, at any stage of the criminal proceedings subpoena or cause to be subpoenaed a witness whose evidence appears to be essential to the just decision of the case.
- S 167, on the other hand, affords the court the discretion to examine or recall any subpoenaed person if his or her evidence appears be essential to the just decision of the case.
- The discretion afforded to the court is not meant to address deficiencies in the defence or prosecution case, but is essentially aimed substantive truth.
- The refusal to recall a witness who was used in the preparatory examination may result in an irregularity \_ D 1951 (4) SA 450 (A).

- A presiding officer who orders, during the course of a trial, that the case should be investigated afresh to obtain evidence exceeds his or her powers under s 167 \_ *Khumalo* 1972 (4) SA 500 (O).
- Where a presiding officer is convinced that a witness's evidence is essential to the just decision of the case, the calling of such witness does not seem to be a discretionary matter at all, as failure to call such witness constitutes an error in law under s 186.
- If the court does call a witness under s 167, the party which is adversely affected by the evidence of such witness must be afforded the opportunity of rebuttal and cross-examination.
- S 167 brings to the fore some of the inquisitorial features of our legal system, although the implication is that its accusatorial nature remains firmly intact.
- The questions which are posed by the court to witnesses who are called under s 167 are merely intended to clarify issues or to eliminate uncertainty. Questioning of the accused by the court, which leads to self-incrimination is irregular unless the accused chose to testify.
- The court may, in the case of an unrepresented accused person assist the latter in the cross-examination of witnesses. The court may also, for the purposes of sentence, endeavour to elicit information which is favourable to the accused.
- The court may only recall or re-examine an accused person who has, in fact, testified in the proceedings.
- Where neither the accused nor the state has adduced any evidence and the accused, in the absence of any evidence, should be acquitted and discharged, it is irregular for the presiding officer to call a witness in terms of s 167 or 186.