ASPIRANT PROSECUTOR PROGRAMME

STUDY GUIDE

[ENTRY EXAMINATION]

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AIM OF THE STUDY GUIDE – ENTRY EXAMINATION

The aim of this Study Guide is to set a *curriculum* for the entry examination of Aspirant Prosecutors.

The contents of this Guide consist of extracts from:

LAWSA: Criminal Law (Volume 11 - Third Edition) SV Hoctor

LAWSA: Evidence (Volume 18 - Third Edition) DP Van Der Merwe

The Criminal Procedure Act, 1977 (Act 51 of 1977) as amended.

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STUDY MATERIAL

PART 1: LAW OF EVIDENCE (CAPITA SELECTA)

SCOPE AND SOURCES OF THE LAW OF EVIDENCE

The law of evidence. The law of evidence is part of adjective law or the law of procedure in its widest sense, in other words the law governing litigation. It regulates the proof of facts in a court of law. Whereas substantive law lays down what has to be proved in any given issue and by whom, the rules of evidence relate to the manner of its proof.

It has been held that the burden of proof, estoppel by representation, estoppel *per rem iudicatam* and the parol evidence rule, though they are usually treated in works on evidence, fall within the purview of substantive law and that, although it is a rule of evidence that a vicarious admission is admissible if an identity of interest exists between declarant and litigant, the question whether in fact such identity exists is determined by the substantive law.

ADMISSIBILITY OF EVIDENCE

RELEVANCE

General rule In its negative aspect, the general rule is that no evidence as to any fact, matter or thing is admissible if it is immaterial or irrelevant; in its positive aspect, all facts of sufficient probative force are relevant and admissible unless their reception is prohibited by an exclusionary rule.

Relevance and admissibility A fact will not be admissible merely because it is logically relevant: evidence which is inadmissible because it falls within the ambit of an exclusionary rule may be logically relevant but, despite any probative force that it may have, it is not received. Again, evidence may be rejected although it is both logically relevant and untouched by an exclusionary rule when its probative force is insufficient to warrant its reception. It is thus not *legally relevant* because its *degree of relevance*, although conducive to rational persuasion, is not sufficient to countervail the disadvantages that its admission may cause. The Constitution has also affected the question of discretionary admissibility of illegally obtained evidence. In *S v Melani*, the court held that there were three different ways in which the Constitution could be interpreted as to the question of what the "appropriate relief" would be in terms of section 7(4)(a) in respect of non-compliance with a provision such as section 25(2)(a), dealing with the rights of an arrested person to be informed of his or her rights. The first was the rigidly inclusionary rule as followed by British law and our own common law, provided the evidence was relevant. The second was the rigidly exclusionary rule followed by the United States courts which required that all evidence acquired in an unauthorised manner be excluded. The third, of which Canada is an example, constituted a compromise approach in terms of which a discretion was given to the judge to exclude such evidence depending on the circumstances of the case. In the opinion of the court, the latter offered the best opportunity to find a proper balance between the legitimate interests of an accused and those of the community at large. It was therefore decided to admit the evidence, so as not to let the law fall into disrepute in the eyes of the public, particularly since the events took place before the interim Constitution had come into force. As the police officer had acted in good faith and in a manner which would have been justified before the coming into operation of the Constitution and the relevant non-compliance with the latter was, in the particular circumstances of the case, not of a particularly serious nature, the exclusion of the evidence as to the alleged pointing out would have brought the administration of justice into discredit and dishonour. The view that relevance and admissibility are distinct concepts is artificial. To argue that relevancy depends on reasoning, while admissibility depends on law, would ignore the fact that irrelevant evidence is excluded as a matter of law. Such a view rests also on the false inarticulate premise that the determination of relevancy in legal proceedings depends on rational considerations only, that is to say, on pure logic. It is true that evidence will be irrelevant if it is incapable of inducing rational

persuasion and that, in this aspect, legal relevance is purely a matter of reason, but to be legally relevant (in the sense outlined above) evidence has to be sufficiently relevant to warrant its reception, in the circumstances, despite any disadvantages that may arise from its admission. Legal relevance is, therefore, a juridical concept that involves both rational and practical considerations.

Weight and relevance Questions of the weight and the admissibility of evidence are distinct and should never be confused. This principle signifies, first, that a fact will not be excluded for irrelevance simply because it is inconclusive and, second, that the judicial officer has initially to decide whether evidence materially tends to prove, or disprove, a fact or thing in issue and whether it is affected by an exclusionary rule. It is only after the judicial officer has decided that evidence is admissible that he or she (with assessors, if applicable) may determine its weight, that is to say, the extent to which it fulfils its probative purpose. This does not derogate from the fact that, to be relevant and admissible, evidence must have sufficient probative force. Evidence that has no (or very little) weight can have no probative value and must necessarily be irrelevant. Again, the judicial officer, when making the initial decision to receive (or not to receive) evidence, has a discretion to exclude any fact or thing the probative force of which is insufficient to warrant its reception in the light of the practical difficulties that would arise were it to be admitted. To say this is not to confuse weight and admissibility; the former comes down to a further refining of the exact probative value of admitted evidence.

Legal relevance. The word "relevance" does not mean the same thing to the lawyer and the logician. To the lawyer, relevancy is based on a blend of logic and experience. The law starts with this practical or common-sense relevancy and then adds material to it or, more usually, excludes material from it, the result being what is legally relevant and admissible. The first requisite of legal relevance is that evidence has to be conducive to rational persuasion. This means that evidence must have some "logical" relevance. It is precisely because relevancy has to be looked at with the eye of a lawyer rather than a logician that few, if any, of the definitions of relevance that have been propounded by legal writers or the courts would satisfy the semanticist or the philosopher. Thus, to the lawyer, a fact is logically relevant when inferences may properly be drawn from it as to the existence, or non-existence, of a fact in issue. It has been said that relevancy exists when any two facts are so closely related to each other that according to the common course of events one, either taken by itself, or in connection with other facts, proves or renders improbable the past, present or future existence, or non-existence, of the other. It matters not that the logician may easily fault this definition: relevance, to the lawyer, is a state which is determined by common sense and experience – taking into account prevailing standards of reason that vary in time and place. It is generally correct to say that the law affords no test of relevancy. This follows from the fact that relevancy exists, and can only exist, in the circumstances of a particular case. A decision on the relevancy of evidence

in that particular case will depend, first, on whether the evidence is capable of inducing rational persuasion and, then, on whether there are any legal rules or considerations of policy that would lead to its rejection as being legally irrelevant. But the law, in certain instances, does provide a test of relevance: a decision that evidence is relevant may lay down criteria that can guide, or even be authoritative, in subsequent cases; and the law may expressly declare that, in certain circumstances, evidence is presumed to be relevant. Again, a legal rule may exclude certain categories of logically relevant evidence that it regards, for reasons of fundamental judicial policy, as being legally irrelevant. Thus, for instance, evidence whose sole relevance is to show that an accused is a bad person and, therefore, likely to be guilty, is logically relevant to the question of the accused's guilt; but it is not legally relevant. Similarly logically relevant evidence might have been obtained in ways that offend constitutional values to such an extent that it is considered to be legally inadmissible To be legally relevant evidence must be sufficiently relevant to warrant its being received in the circumstances of a particular case. The concept involves the idea that it has to be worthwhile to admit the evidence. To determine whether evidence is relevant, in the sense that it is worthwhile to receive it, its value as evidence has to be considered. If its probative force is such that, despite any disadvantages that may attach to admitting it, it would be worthwhile to receive it, it is relevant; if the disadvantages outweigh its probative force, it is legally irrelevant even though it may be logically relevant. Thus evidence may be excluded as legally irrelevant, despite its being logically relevant in the sense that an inference might be drawn from it as to the existence of a fact in issue, when to admit it would be unduly prejudicial, or when it would create side issues that would unduly distract the trier of fact from the main issues, or where its proof and counterproof would take up an undue time, or where to admit it would take the other side by surprise. Where the presence of one, or more, or all of these factors leads the court to conclude that, in the circumstances, and taking into account the strength of its probative force, it is not worthwhile to receive evidence, that evidence is irrelevant in law. In other words, although the evidence is such that it could ground an inference as to the existence, or non-existence, of a fact in issue, such an inference would not, in the legal sense, be properly drawn.

Procedural aspects. Since the relevancy of evidence may often become apparent after other evidence has been led, evidence may be received even though its relevance is not manifest when it is tendered. If its relevance does not become apparent at a later stage, it can then be rejected. The legal advisers of the parties are, in practice, sometimes asked to indicate in advance what subsequent evidence will be led in order to enable the court to determine whether the evidence will ultimately be relevant; but a party who calls a witness is not obliged to indicate in advance the relevancy of the testimony that is to be given by the witness.

Classification of relevant evidence Evidence may be relevant:

(a) as constituting a fact in issue;
(b) as evidence from which the existence (or non-existence) of a fact in issue may properly be drawn;
(c) as a requisite for the admissibility of other evidence; and
(d) as regards the reliability of other evidence and the credibility of witnesses.

The facts in issue Direct evidence, that is to say, direct assertions that a fact in issue (a *factum probandum*) exists, or does not exist, is always relevant. In civil proceedings, any fact that is alleged by a party in a pleading that has either been denied by the other party in his or her pleadings, or which the latter is deemed to have denied in terms of the rules relating to civil procedure, is a fact in issue. When, in criminal proceedings, an accused pleads not guilty, he or she puts all the facts that have been alleged against him or her in issue. But the law relating to criminal procedure may have the effect of reducing the number of issues that are raised by a plea of not guilty. When an accused pleads not guilty at a summary trial, the court may ask the accused whether he or she wishes to make a statement indicating the nature of his or her defence. Where the accused does not make such a statement, or when the accused does and it is not clear from the statement to what extent he or she denies the issues raised by the plea, the court is entitled to question the accused in order to establish which allegations are in dispute. It is required to ask 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 and, if the accused consents, it constitutes a waiver of proof. A similar procedure applies when a charge is put to an accused at the end of the evidence for the prosecution at a preparatory examination and the accused, who has not pleaded before, pleads not guilty; and where an accused is asked to plead in the magistrate's court in a matter triable in the High Court. The whole procedure with regard to admissions made during the plea procedure has been given a new dimension in the light of the Constitution's guarantee to the accused that he or she has the right to remain silent during plea proceedings. Even though the Constitutional Court in *S v Zuma* dealt with confessions and the court specifically refused to comment on "the right to silence during trial", certain inferences may be drawn from that decision. The court found that the "right to silence" contains a "disparate group of immunities", containing *inter alia* the privilege against self-incrimination as well as the right not to be a compellable witness against oneself. This is based on a 300-year old tradition which has become one of the values by which the Constitution has to be interpreted and which came about as a result of revulsion against the tortures practiced by England's Star Chamber.Even though this is a fundamental right, according to the Canadian two-stage procedure approved of in *S v Zuma*, it would still be open to the state to prove that it was necessary for the public's right to be infringed in a higher cause and that section 115 of the Criminal Procedure Act must remain on the statute book. More recent cases have shed further light on this vexed question of the constitutional right to silence. In *S v Brown*, *Osman v Attorney-General*, *Transvaal* and *S v Boesak* the courts

have decided that an accused who refuses to testify is not convicted on the basis of silence alone, but because of a strong *prima facie* case for the state which stands unrebutted. In recent works by leading authors on evidence this problem is discussed under disparate headings. Thus Schmidt deals with it in the chapter on criteria and weight of evidence; Schwikkard deals with the matter under private privilege and the evaluation of evidence and Zeffertt under the privilege against self-incrimination and the right of the accused to remain silent. While similar principles are involved, it should always be borne in mind that only a witness may make use of the privilege against self-incrimination and that it only relates to one specific question at a time. On the other hand, the right to remain silent applies to a person having been arrested or arraigned as the accused during a trial. These matters will be further clarified under the respective headings mentioned earlier in this paragraph. Where an accused pleads guilty he or she in theory disposes of the facts in issue by admitting all the allegations against him or her. But, since the prosecutor is entitled, on the question of sentence, either in a summary trial or where the accused has been arraigned for sentence or trial, to lead, and the court to hear, evidence, there may still be facts in issue despite the plea. In both civil and criminal proceedings the number of facts in issue at the beginning of a case may be reduced by subsequent formal admissions. The essential quality of a fact in issue is that, if it is not proved, the party who relies upon it will necessarily fail in his or her claim or defence. Thus, although a disputed circumstantial fact (a fact from which the existence, or non-existence, of a fact in issue may be inferred) resembles a fact in issue because it may be proved by direct or circumstantial evidence, it differs from a fact in issue in its essential nature.

Circumstantial evidence A circumstantial fact is one from which an inference may properly be drawn as to the existence, or non-existence, of a fact in issue. Any fact which tends to prove that the existence of a fact in issue is more probable, or less probable, will be logically relevant as will any fact that tends to deny a reasonably probable alternative hypothesis to the existence, or non-existence, of a fact in issue. To be admissible, circumstantial evidence must be more than merely logically relevant: its probative force must be sufficient to afford a reasonable inference as to a fact in issue and to warrant its reception despite the disadvantages that may be caused by its reception. Since relevancy cannot exist in a vacuum, and since it is a variable standard, little purpose would be served by listing the many instances in which evidence has been held to be relevant or irrelevant. At best these decisions may constitute illustrations of the application of a general principle; at worst they may be erroneously regarded as having created categories of admissibility or inadmissibility and thus obfuscate the true inquiry, namely, whether a fact is sufficiently relevant to be admitted in the circumstances of the particular case before the judicial officer. A good practical example of a court dealing with circumstantial evidence is the case of *R v Blom*. A relevant two-part criterion has been held to lie in the following two cardinal rules of logic: first, that the inference sought to be drawn must be consistent with all the proved facts and, second, that the proved facts should be such that they exclude every

reasonable inference from them save the one sought to be drawnA relevant circumstantial fact that has been tendered by one party may be disputed by the other, in which event it may itself be proved by direct or relevant circumstantial evidence.

The relative worth of direct and circumstantial evidence It is sterile to compare the intrinsic value of direct and circumstantial evidence: there is no principle that says that direct evidence is inherently more reliable than circumstantial evidence (or vice versa). The cogency of direct and circumstantial evidence depends on its nature in the circumstances of each particular case and may vary from being of the highest to the lowest in value. It is undesirable for a presiding officer to record his or her subjective observations as opposed to objectively determinable facts, and if the defence disagrees with such observations, these have no evidential value and should be ignored.3 With regard to circumstantial evidence the cumulative effect is important and a court should not consider each circumstance in isolation.

CHARACTER

Introduction When, in everyday life, an assessment is made about a person's character, various factors are taken into account: personal opinion; general reputation; rumour and specific acts from which an inference may be drawn about disposition. Evidence as to character is admissible in South African law in criminal and civil proceedings if it were to have been admissible on 30 May 1961 This, in effect, enjoins the courts to apply the English law as it was on that critical date. According to the rules of English law, character evidence (in theory, at least) means evidence of general reputation. When character evidence is admissible in evidence in chief it has to take the form of a witness's testimony about another person's reputation, that is to say, that person's general character. The witness may not give a personal opinion. Nor may a witness refer to rumour or specific acts. Of course, evidence of general reputation must necessarily rest on hearsay opinion, but this theoretical difficulty is disregarded. Again, in practice, it is not always possible to confine evidence of character to reputation. Just as the word "character" means different things in everyday speech, it is not always used to mean the same thing in the law of evidence. For instance, when the Criminal Procedure Act refers to "evidence as to character" in section 227 it means evidence of general reputation.

General rule Evidence of character, that is to say, of general reputation, is exceptionally admissible. Normally character evidence is irrelevant and therefore inadmissible. The mere fact that character evidence is logically relevant to an issue will not render it admissible: it is admissible only if the law regards it as relevant, that is to say, if it is legally relevant in the circumstances.

Evidence in chief by character witnesses in criminal proceedings The prosecution may not lead character evidence (evidence of general reputation), or evidence of particular acts of misconduct by the accused, for the purpose of showing that the accused is of bad character and therefore likely to have committed the offence with which he or she has been charged. Evidence may, however, be adduced by the prosecution, despite its tendency to show that the accused is of bad character, if it is admissible under the similar fact rule; evidence that the accused has previously been convicted of an offence is, necessarily, admissible if it is an essential part of the subsequent offence with which the accused is charged. In cases of receiving stolen property, the accused's previous convictions may be proved at any stage of the proceedings, in certain circumstances. The accused is entitled to lead evidence of his or her own good character either by calling witnesses to testify to it or by testifying to it him- or herself. A witness who testifies to the accused's good character may, in theory, speak only of the accused's reputation When the accused testifies, however, he or she cannot give evidence relating to what others say about his or her reputation: the accused may only say that his or her own conduct has been good in certain respects. Evidence of the accused's good character has been said to be mainly relevant to the accused's credibility; but it may be taken equally into account as being relevant to the likelihood of the accused's being guilty. If the accused attacks the character of the complainant (or any other prosecution witness), the prosecution is not entitled to lead evidence showing that the accused is of bad character, but if the accused gives evidence in his or her own defence, his or her character may be attacked in cross-examination. However, if the accused (or his or her witnesses) should testify as to the accused's good character, the prosecution may lead evidence in rebuttal. This evidence is in theory confined to evidence of bad reputation, but evidence of the accused's previous convictions may be received. Where witnesses volunteer evidence that the accused is of good character, the accused's character is not put in issue.

Cross-examination of character witnesses in criminal proceedings In England it has been held that a witness who testifies that the accused is of good character may be asked in cross-examination about the accused's previous convictions. The admission of evidence of the accused's bad character now falls to be decided at the hand of the 2009 Criminal Justice Act. The matter is open in South Africa. but, when it falls to be decided, English precedent should be treated with great care.

The accused as a witness In terms of section 197 of the Criminal Procedure Act an accused who gives evidence cannot be asked or required to answer any question tending to show that he or she has committed or has been convicted of or has been charged with any offence other than the offence with which he or she has been charged or that the accused is of bad character, unless the accused (or his or her legal representative) asks any question of any witness with a view to establishing his or her own good character, or unless the nature and conduct of

the defence is such as to involve imputation of the character of the complainant or any other witness for the prosecution; or unless he or she gives evidence against any other person charged with the same offence or an offence in respect of the same facts; or unless the proceedings are such as described in section 240 or section 241 of the Act; or unless the proof that the accused has committed or has been convicted of such other offence is admissible evidence to show that he or she is guilty of the offence with which he or she has been charged. The section proscribes questions that have a mere tendency to expose the accused to character attack. The approach is objective: what is important is the effect of the question and not the motive for asking it. "Tending to show" means "tending to make known" or "to reveal". The section, except in certain special cases, prohibits questions that are relevant only to the accused's bad character; it does not prohibit questions that are relevant to an issue. An accused gives evidence of his or her good character when the accused asserts, or elicits, that he or she is of good character independently of his or her giving an account of what happened. The accused must endeavour (by means of questions or his or her evidence) to refer to his or her good character independently of the facts, specifically in order to have it taken into account as something in his or her favour. A mere canvassing of the relevant facts is insufficient to penalise the accused even if the facts may incidentally show the accused's character in a good light. Where an accused puts his or her character in issue, such accused may be cross-examined on his or her general reputation, disposition and specific acts of misconduct like any witness called by the accused to prove good character. Character is indivisible. There is some authority that, once his or her good character has been put in issue, the accused may be cross-examined on all aspects of it that may be relevant to the accused's credibility even if they are irrelevant to any issue. The accused does not incur the procedural penalty of being exposed to cross-examination relating to his or her bad character if he or she does no more than properly develop the merits of the case, that is to say, where what the accused does is relevant to the question of his or her guilt. Although it has been held that the accused does not put his or her character in issue by an act which is "an essential portion of the proof that the conduct of the accused is not criminal", the weight of South African judicial authority suggests that the matter should be formulated thus: the mere fact that the nature or conduct of the defence involves, expressly or by implication, a serious imputation on the character of the complainant (or any other witness for the prosecution) does not put the accused's character in issue (if the accused should testify as a witness in his or her own defence) when what was done by the accused (or his or her legal representative or witnesses) is relevant to the question of the accused's guilt, but where the attack on the character of a prosecution witness is relevant to that witness's credibility only, the accused will be exposed to such procedural penalisation. South African law differs from the English law in this regard. An imputation on the character of a prosecution witness may sometimes not be regarded as sufficient to expose the accused to having his or her character attacked in cross-examination unless it is sufficiently an imputation of his or her veracity to warrant this drastic consequence. In any event, the court

has a discretion to exclude cross-examination, even if the accused has technically exposed him- or herself to character attack under the proviso, where it would be unfair to the accused. The fact that the imputation was not of a serious nature would be a relevant factor in the exercise of such a discretion. The prosecutor should not by his or her questions tempt, or drive, the accused to do something which might put the accused's character in issue and it is good practice to warn an accused (particularly if the accused is unrepresented or ineptly defended) against exposing him- or herself to attack. Where counsel who appears on behalf of a number of accused attacks the character of a prosecution witness, such counsel should make it clear, initially, on behalf of which of the accused he or she is making the imputation lest he or she puts the character of all the accused in jeopardy. When one co-accused cross-examines another, who is charged with the same offence or in respect of the same facts, on his or her character, he or she exercises a right and therefore the co-accused is not the victim of a procedural penalty Consequently there is no judicial discretion to stop such a cross-examination. The fact that an accused's character is in issue because the accused has impugned the character of a witness for the prosecution does not entitle the prosecution to adduce character evidence against him or her in evidence-in-chief.

The complainant. Although an accused is entitled to adduce evidence that a witness would not believe the complainant, who gives evidence, on oath, the complainant's character is, normally, irrelevant and the accused has in general no right to lead evidence that the complainant has a bad general character; and the complainant's good character is similarly irrelevant. The accused may attack the complainant's character in cross-examination and when the accused does so, he or she is not, of course, confined to suggesting to the complainant that he or she has a bad general character: specific acts of misconduct may be put. The complainant who testifies is a witness like any other witness. It follows that the complainant's answers to questions in cross-examination that are solely relevant to credibility may, in general, not be rebutted. As amended, the Criminal Procedure Act in section 227(2) provides that evidence regarding sexual intercourse by, or any sexual experience of, any female against or in connection with whom any offence of a sexual nature is alleged to have been committed, may not be adduced, and such female may not be questioned regarding such sexual intercourse or sexual experience, except with the leave of the court, which leave will not be granted unless the court is satisfied that such evidence or questioning is relevant, provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried. Sec-tion 227(3) provides that, before an application for leave contemplated in sec-tion 227(2) is heard, the court must direct that any person whose presence is not necessary may not be present at the proceedings, and the court may direct that a female referred to in section 227(2) may not be present. In terms of section 227(4) the provisions of section 227(2) to (3) apply *mutatis mutandis* in respect of a male against or in connection with whom any offence of an indecent nature is alleged to have been committed. That the accused has had intercourse with the

complainant on previous occasions is relevant to the issue of consent and, accordingly, testimony by the accused to this effect is not, strictly speaking, "character evidence": it constitutes a relevant and admissible circumstantial fact. Where the charge is criminal *iniuria*, the fact that the complainant lacks *dignitas* is a defence. The complainant's character is, therefore, in issue and evidence may be adduced to show that the complainant has the reputation of lacking dignity. It has been suggested that previous conduct showing that the complainant lacks dignity may be received. As regards charges of criminal defamation, evidence that the complainant is generally reputed to lack *fama* should, in principal, be received. Where the charge is common assault, the complainant's lack of dignity or *fama* would not be a defence and the complainant's reputation in these respects would be irrelevant and inadmissible. If the accused were to set up self-defence, the complainant's general reputation for violence and depravity could be relevant. Where the charge is indecent assault, the complainant's reputation may be as relevant as in a rape case.

SIMILAR FACT EVIDENCE

Introduction The same considerations apply to the reception or exclusion of similar fact evidence in criminal and civil cases except that, in civil proceedings, the courts have not been so wary of admitting such evidence. In essence, the criminal courts have been very careful not to admit similar fact evidence unless its value as proof warrants its reception in the interests of justice and its reception does not operate unfairly against the accused. Traditionally the similar fact rule, as applies to criminal cases, is expressed by the juxtaposition of two principles: similar fact evidence cannot be used to show that the accused is the kind of person likely to have committed the crime with which he or she is charged, but it may be used when it is relevant to an issue before the court provided that this is not a relevance that rests solely on character. This means that similar facts can only be admissible as relevant to an issue once they have not been excluded because of being relevant solely by way of character. It is a chain of reasoning that is prohibited and not necessarily a statement of fact. If evidence is adduced to further the conclusion, by a process of reasoning, that the accused is a bad person and, therefore, likely to have committed the offence, the evidence is excluded; if there is some relevant, probative purpose for it other than for the prohibited form of reasoning, it may be received but, when it is received, the trier of fact must eschew the forbidden reasoning. This traditional approach was formulated by Lord Hershell in *John Makin and Sarah Makin v Attorney-General for New South Wales*. His remarks in that decision, which is regarded as the leading case, have been applied again and again and are considered to be of crystal clarity. They explain satisfactorily the reception or rejection of similar evidence in many instances, but there are some instances where they do not. At times an accused's criminal propensity itself becomes so highly relevant to the question of his or her guilt in the circumstances of a particular case that it would be absurd not to use it. Put in another way, justice demands its reception because of its strong

probative force. Thus, sometimes, an accused's abnormal propensity may be a means of identification. It is specious casuistry to say, when such evidence is received, that it has a relevance going beyond a relevance based on propensity. Be that as it may, the courts are reluctant to say explicitly that they admit such evidence because propensity itself is, in the circumstances, of great probative force. It has been suggested that, because of this factor, the tendency of late in South Africa has been to avoid the *Makin* formulation and rather to ask whether there is a *nexus* in time, or place, or circumstance between similar facts and the facts in issue. This is unhelpful and "seems to be only another way of saying that similar fact evidence must be highly relevant to the issue of guilt" if it is to be received. To the *Makin* formulation is added a rider: even where similar fact evidence is technically admissible it may, as a matter of practice, be excluded when its potentiality to prejudice an accused outweighs its probative value. Such a residual discretionary rule serves only to obfuscate matters. If evidence is of such a nature that it is not worthy of being admitted because its probative force is not so strong as to warrant its admission in the light of the disadvantages of admitting it, it is not legally relevant and is, therefore, inadmissible. Such a discretionary rule might serve a purpose where there is a jury system (the court might feel that the evidence would have a probative value, *vis-à-vis* a lawyer, that outweighs its potentiality to prejudice an accused but that, *vis-à-vis* a layman, its potentiality to cause prejudice outweighs its probative value) but it is of no use in South Africa which has done away with juries. A proper formulation of the similar fact rule demands that a stress should be placed on the fact that the admissibility of such evidence depends upon its degree of relevance; that in the determination of this much depends on the experience and common sense of the judge; that relevance does not exist in a vacuum and that there is no closed list of areas in which similar fact evidence is admissible.

Criminal proceedings: general rule The admission of similar fact evidence in criminal proceedings is exceptional and requires a strong degree of probative force. Its admissibility depends upon its degree of relevance in the circumstances and the determination of this much depends on the experience and common sense of the judicial officer. The reception of similar facts has to be warranted by their having so strong a probative value, in the circumstances, that they should be received in the interests of justice despite any disadvantages that there may be in admitting them. Thus if their probative value is not so great as to outweigh the prejudice they may cause the accused, they should be excluded because their reception would operate unfairly against the accused. Although there is a plethora of authority for the proposition that similar fact evidence is inadmissible if its sole relevance is to show that the accused's character is such as to make his or her guilt likely, there are instances where evidence of the accused's criminal propensity has been of so strong a probative value as to warrant its reception.

Application of the general rule in criminal proceedings In deciding whether similar fact evidence is probative of an issue, experience plays as large a part as logic. The judge has to take into account current mores: what is striking in one age is normal in another. Evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt. The evidence has to be of sufficient probative value, having regard to the purpose to which it is directed, to make it desirable in the interests of justice that it should be admitted. Various tests of relevancy have been laid down: is there a nexus in time, in method or in circumstance? Is there such an underlying unity between the evidence as to make coincidence an affront to common sense? But these tests say nothing more than that the evidence must be highly relevant and it is better to look at the circumstances of each case and then to decide whether the advantages of admitting the evidence outweigh, or do not outweigh, the disadvantages of excluding it. It is an error to attempt to draw up a closed list of the sort of general application. The danger of illustrating the application of the principle by the categorisation of instances is that it may lead to an erroneous approach in which categories of admissibility are regarded as exceptions. Such an approach leads to casuistry, to insoluble metaphysical problems as to the confines of the categories, and to the error of thinking that, because evidence slots into a category, it will be admissible. With this warning in mind the illustrations of the application of the principle, below, may be looked to. The list of examples cannot, by definition, be exhaustive. *Similar fact evidence has been admitted to prove the commission of the* actus reus It will not usually be necessary for the prosecution to have to resort to similar fact evidence for this purpose: the nature of the act will appear clearly from a description of the act itself. But, when an act is equivocal, similar fact evidence may resolve the ambiguity, that is to say, show the true nature of the act done by the accused. This has been taken by the Appellate Division to signify that evidence of the repetition of acts may not be used to prove the commission of an act in issue but only its nature once its commission has been proved by the other admissible evidence. It has been said that, normally, similar conduct shows only propensity and is therefore inadmissible to prove the *actus reus* in question. But this approach is unsound in principle. There are other decisions of the Appellate Division, also, that are inconsistent with the view that similar fact evidence cannot be used to prove the *actus reus*. The House of Lords has held that evidence that a brother and sister had an illicit relationship was in the circumstances of a particular case relevant to whether they had committed incest on a subsequent occasion. In other words, their propensity to commit incest was highly relevant to whether the *actus reus*, incest, had taken place. Evidence of similar facts, here, was used to show that equivocal conduct was guilty conduct. These decisions indicate that, if similar fact evidence is relevant, if it has sufficient probative force in the circumstances, it may be used to prove the *actus reus*. Thus evidence of the accused's systematic conduct and of the repetition of strikingly similar instances, has been received as relevant to such an issue. *Similar fact evidence has been resorted to in order to prove identity*, *or to link the accused with the commission of the offence* A person with a motive is more likely to

commit an offence than a person without a motive and, accordingly, there are instances in which similar fact evidence has been admitted because of its probative force in this regard. Similar fact evidence may also be relevant if it is sufficiently probative of means and opportunity, preparation, special skill and knowledge, method, plan, system or design. It does not follow that such evidence will necessarily be admissible merely because it is probative of these matters: it will be admissible if, in the circumstances of the case, its probative force is sufficiently strong to warrant its reception despite any prejudice it may cause the accused. It will be inadmissible if its use is merely to deepen suspicion. Again, these are not the only ways in which similar fact evidence may be relevant to identity. When the perpetrator of an offence must have been someone with an aberrant or bizarre personality, the fact that the accused has such a personality is obviously a relevant factor to link the accused with the commission of the offence. It is not that offences of this kind form a special category. There is nothing "special", for instance, in perversion; but, in the circumstances of a particular case, the fact that an accused has an aberrant disposition *may* be so highly relevant to the question of guilt as to warrant the admission of evidence of his or her aberrant personality despite the disadvantages that there may be in admitting it. In other words, although the decisions invariably say that one cannot use similar fact evidence to show that an accused had character attributes that may make it likely that he or she committed the offence, it is inescapable that evidence of an accused's criminal propensity may sometimes, in the circumstances of a particular case, be so highly relevant to guilt as to permit its reception. *Similar fact evidence has been used to prove* mens rea The repetition of strikingly similar evidence has been received to show that the accused's conduct was designed and not accidental, or that the accused's possession of something was guilty and not innocent. The basis for the reception of this kind of evidence has been explained as resting on the doctrine of chances: the repetition of instances makes an innocent construction of the accused's actions or possession statistically unlikely. Again, where guilty knowledge has to be proved by the prosecution, similar fact evidence may be relevant to show that it is unlikely that the accused did not have such knowledge. Here the admission of the evidence rests upon the theory that the happening of a previous event may serve as a warning to the accused of the need to be prescient about the nature of a subsequent event. *Similar fact evidence has been used as corroboration* when it is relevant to confirm testimony. *When similar fact evidence is admitted to prove negligence* it is received because it is relevant. It will be relevant where there is a nexus such as may arise because of an inference (or "presumption") of continuity.

Different charges Evidence on one count is not relevant and admissible to an issue on another count unless it would have been relevant to that issue if the latter had been the only issue to be tried and there had been one count in the indictment or charge. In other words, the similar fact rule applies.

Statutory provisions Section 211 of the Criminal Procedure Act provides that, except where otherwise provided by the Act or where the fact of a previous conviction is an element of the offence with which an accused has been charged, evidence that the accused was previously convicted of any offence (whether in the Republic or elsewhere), is not receivable. Nor may an accused, if called as a witness, be asked whether he or she has been so convicted. This provision does not exclude the admission of evidence of the fact of an accused's previous conviction if it is relevant to an issue under the similar fact rule. The effect of section 252 of the Criminal Procedure Act is to allow the proof of similar facts (including the fact of a criminal conviction) according to the rules of English law, as they were on 30 May 1961. Again, in terms of section 197(d) the accused who gives evidence may be asked questions tending to show that he or she has been convicted of such other offence where "the proof that he [or she] has committed or been convicted of such other offence is admissible evidence to show that he [or she] is guilty of the offence with which he [or she] has been charged". The fact that the accused has been convicted of a criminal offence, when it is strongly probative of his or her guilt in respect of the charge, would be admissible evidence to show that the accused is guilty. Previous convictions may be proved after an accused has been convicted but before sentence has been passed. Where an accused is charged with receiving stolen property which the accused knew to be stolen, then, if it is proved that such property was found in the accused's possession, evidence may be led at any stage of the proceedings that he or she had been convicted of an offence involving fraud or dishonesty within five years immediately preceding the date on which he or she first appeared in the magistrate's court in respect of the receiving charge. This evidence may be taken into account for the purpose of proving that the accused knew the property to have been stolen. Not less than three days' notice in writing has to be given to the accused that the prosecution intends to adduce such evidence. Evidence is also admissible, when the accused is charged with receiving stolen property, that the accused has been, within the period of 12 months immediately preceding the date on which he or she first appeared in a magistrate's court in respect of the charge, found in possession of other stolen property. Not less than three days' notice in writing has to be given before evidence of this kind may be received. The evidence may be taken into consideration for the purpose of proving that the accused knew that the property, which forms the subject of the charge, was stolen.

OPINION

Introduction That a person holds, or does not hold, an opinion may be a fact in issue and this may be proved like any other relevant fact. Where the opinion of the community is in issue, evidence of "reputation" is receivable. Here, a different aspect of opinion evidence is considered: the reception, or rejection, of a witness's opinion relating to the facts in issue or circumstantial facts. Traditionally, it is said that a witness must confine him- or herself to the "facts", that a witness must not

resort to, or state, inferences unless he or she is allowed to do so by some "exception" to the general rule such as the "exception" relating to expert evidence. This approach cannot stand analysis – it rests on the premise that a clear distinction exists between "fact" and "inference" when there is no clear distinction.The true inquiry is to determine what inferential testimony is objectionable and what is unobjectionable.

General rule Opinion evidence is admissible if it is relevant; inadmissible if it is irrelevant. If a witness's perceptions would be of assistance to the court, and if the witness can only communicate these perceptions adequately by summarising his or her impressions by resorting to and stating inferences, such a summarisation will be relevant and admissible. Conversely, if the witness can adequately communicate his or her perceptions without summarising his or her impressions by resorting to and stating inferences, a summarisation will be irrelevant and inadmissible. The true inquiry relates to the extent to which a witness may properly be allowed to summarise his or her impressions. In one context it may be permissible, for instance to say that X looked "upset" or "angry"; in another, where X's appearance is a material or disputed issue, it would be improper: the witness should be asked to list his or her impressions. At times it may be impossible for a witness to say anything at all without summarising his or her impressions. The evidence of experts (in the narrow sense) and laymen is received when it is relevant, in the sense of its being able materially to assist the court. It is rejected when it is supererogatory: when it cannot assist the court it is irrelevant and inadmissible.

Procedure In civil trials and criminal proceedings opinion evidence generally has to be given *viva voce*. There are instances where, in criminal proceedings, opinion may be received on affidavit or certificate, as *prima facie* evidence. Whenever any fact established by an examination or process requiring any skill in biology, chemistry, physics, astronomy, geography, anatomy, pathology, or the identification of finger- or body-prints is relevant, an affidavit alleging that it has been made by a person in the service of the state, a provincial administration, the South African Institute for Medical Research, a university in the Republic or of any other body designated by the president of the Republic is, upon its mere production, *prima facie* proof of that fact. Section 212(4)(a) of the Criminal Procedure Act has been amended to include any fact established by any examination or process requiring any skill in human behavioural science. Section 212(5) has been amended to provide that, whenever the question as to the existence and nature of a precious metal or any precious stone is at issue, the submission of an affidavit by a state appraiser of precious metals or stones constitutes *prima facie* proof that it is a precious metal or a precious stone of a particular kind and that the appearance and the mass or value of the precious metal or precious stone is as specified. A certificate may be received *in lieu* of an affidavit in any case where skill is required in chemistry, anatomy or pathology. Affidavits by appraisers of precious metals or stones, who are in the

service of the state, also constitute, on their production, *prima facie* proof of the mass and value of precious metal or stones. The court may require, before an affidavit or certificate is produced as *prima facie* proof, that the person who made the affidavit or issued the certificate give oral evidence or it may cause written interrogatories to be sent to that person. The interrogatories, and the purported replies to them, are also admissible

Ultimate issues In principle there is no rule that a witness cannot give his or her opinion on an issue that the court has ultimately to decide. A witness may give an opinion on an ultimate issue if his or her opinion is relevant, that is to say, if it would be impossible for the witness to render assistance to the court without giving the opinion. It follows from the principle that opinion evidence is admissible if it is relevant that the theory that a witness cannot "usurp the function of the court" by testifying on an ultimate issue is untenable. The function of the court is not usurped by opinion on an ultimate issue, since the court is never bound by what a witness says and the true inquiry is to determine when it will be right, and when it will be wrong, to admit opinion on an ultimate inquiry. This inquiry will be determined by the view that the court takes of the relevance of the evidence – its ability to be of appreciable help to the court. Opinion evidence on an ultimate issue will more readily tend to be relevant when the subject is one upon which the court is usually quite incapable of forming an unassisted conclusion. And, in the nature of things, opinion evidence will less readily tend to be relevant on matters directly in issue than upon other relevant facts. Many decisions, however, still speak in terms of inadmissible opinion that "usurps" the function of the court. It is not experts (in the narrow sense) only who may give their opinions on ultimate issues but, in practice, there is a strong tendency to regard the evidence of lay persons on ultimate issues as constituting *prima facie* evidence only, which, if unchallenged, may be of greater significance. A witness is not allowed to give an opinion upon the *general* or legal merits of the case.

Expert evidence The opinion of an expert is admissible if it is relevant. It will be relevant if the witness's skill, training or experience enable him or her materially to assist the court on matters in which the court itself does not usually have the necessary knowledge to decide. Where the topic is one in which the ordinary judicial officer could be expected to be able, unassisted, to draw an inference, expert evidence is supererogatory. Where a witness does not have the necessary qualifications to draw an inference, his or her inference has no probative value and is, therefore, irrelevant and inadmissible. A substantive body of South African case law has been built around this concept. In this regard it has been held that expert evidence should be excluded if it does not exclude other reasonable possibilities. An expert witness is supposed to provide the court with an objective and unbiased opinion and should not assume the role of a "hired gun", or assume the role of the advocate for the party represented. The court should always bear in mind that in reconstructing an accident scene an expert has to rely on calculations that are based on imperfect human observation. Often each of the

opposing parties would have its own expert and a court should clearly indicate why it preferred the one opinion over the other. In *Louwrens v Olwage* the court laid down a useful test in this regard. Logical reasoning is an important touchstone to evaluate expert evidence.

Qualification of an expert An expert must be qualified. This means that the expert must satisfy the court that he or she possesses sufficient skill, training or experience to assist it. The concept of what constitutes adequate qualification is elastic. It is not generally a *sine qua non* that an expert must have had theoretical training or practical experience: the expert's qualifications must be measured against the evidence the expert has to give in order to determine whether they are sufficient to enable him or her to give relevant evidence.

The subject matter of expert evidence There is no closed list of topics on which expert evidence is admissible. At a given moment in time there are some subjects upon which a court is usually quite incapable of forming an opinion unassisted, and other upon which it could come to some sort of independent conclusions, but the help of an expert would be useful. It is impossible to list all the areas where a judicial officer is usually quite incapable of forming an unassisted conclusion, particularly if one bears in mind that the state of communal (and, therefore, judicial) knowledge changes with time. They include, for instance, fingerprints; medicine, psychiatry, chemistry, mathematics and engineering and the proof of foreign law. Expert opinion is, in general, required to explain the workings and reliability of mechanical devices; but the stage may be reached when the reliability of an instrument has so frequently been demonstrated to the courts that judicial notice may be taken of its reliability. Where evidence would be useful, but not essential, to assist the judicial officer, it will be admitted or rejected according to the view that the court takes of its relevance. Although laymen are often permitted, for instance, to estimate age, speed and value, such topics, when they are of great importance in a case, may demand evidence of greater moment and the circumstances may be such that the court is quite incapable of reaching a conclusion unassisted by an expert in the strict sense. Thus a layman may be permitted to estimate the speed of a vehicle, but when it is necessary to prove that the accused has transgressed a speed limit and recourse is had to mechanical or electronic timing devices, then, in the absence of any statutory presumption to the contrary, expert testimony is essential Similarly lay witnesses may estimate age but, where it is necessary to prove age in order to establish guilt, expert, direct or real evidence is essential. Any witness may identify the handwriting of a person whose handwriting is familiar to the witness, but only an expert may be permitted to compare the handwriting of persons unknown to him or her. The owner of a thing may be permitted to estimate its value, but, where the estimate is challenged or where the circumstances are such that only an expert could assist the court, then, obviously, only an expert's testimony would carry weight. Laymen may testify that a person was drunk, but the circumstances may demand expert testimony. An expert may testify on an ultimate issue if his or her evidence would

be relevant in the sense that it would be of real assistance to the court. An expert cannot testify on the legal or general merits of the case.

The basis of the opinion The opinion of an expert may be given on facts within his or her personal knowledge or on hypothetical facts. It is essential for the court to know what facts have been relied on as the basis of the opinion. It follows that the court should be made aware of the expert's assumed premises and the facts within the expert's personal knowledge on which he or she is relying. Bald statements of opinion may have little, if any, value; the weight to be attached to them will depend on the circumstances. An expert may refer to data garnered from the experience of others, provided that he or she has the necessary qualifications to evaluate the data and to know where to find reliable sources of information It follows that an expert may refer to the writings of others (either to refresh his or her memory or to support the opinion) if he or she has sufficient personal knowledge of the subject to be able to express a relevant opinion. It is only that part of the writing to which the witness refers that is in evidence and the court cannot have regard to other passages that have not been canvassed by the witness. Expert evidence should be presented in such a way that the court itself is in a position to make the observations on which the expert has relied for his or her conclusion. Opinion evidence that is not linked to the facts is mere abstract theory. An expert cannot base his or her opinion, for instance, on documents that are not before the court. Although a witness may refer to experiments that have become part of the generally accepted body of scientific knowledge, the hearsay rule would prevent the witness from relying on assertions made by others in individual cases. An expert may refresh his or her memory from a report that has been made by that expert when his or her recollection of the events that it records was fresh. The expert may hand in the report with the consent, express or tacit, of the other side. A party may insist that his or her opponent's witness testifies *viva voce* but, as a matter of convenience, reports of experts are often handed in by consent as an embodiment of the witness's testimony. The opposite party may insist on their being reproduced in the form of *viva voce* evidence and on their not being handed in during the examination in chief. If the witness does not confirm this report it is not evidence despite being handed in. It seems that a failure to motivate an opinion adequately goes to weight rather than admissibility but, although weight and admissibility should never be confused, testimony that has no probative value is irrelevant and therefore inadmissible.

The weight of expert evidence It is for the court ultimately to decide whether an expert's opinion is to be relied on or not and to determine what weight (if any) has to be given to it. The court must not blindly accept expert testimony. It is obliged, even where expert evidence is so technical that the average judicial officer would not be able properly to reach an unassisted conclusion, still to decide whether it would be safe to accept the opinion or not. This is so even in the case of the comparison of fingerprints. The court must not play the role of an expertand therefore when dealing with fingerprint evidence it must, when scrutinising the

points of identity, do so with the intention of determining whether the expert's opinion can be safely relied on; its inquiry is not made to satisfy itself that there are the requisite number of points of identity. If an expert on foreign law refers to a foreign statute, the court is entitled to interpret it and reach its own conclusion. Certain kinds of expert evidence are regarded with more circumspection than others. Thus handwriting evidence has been treated with some, perhaps unwarranted, suspicion. Footprint identification has been said not to differ from the requirements of fingerprint and palm-print identification. Some courts have looked with unwarranted circumspection at ballistic and toolmark evidence. There has been some reluctance to convict an accused solely on the uncorroborated evidence of an expert, but there is no rule that a court cannot make a finding solely on the evidence of an expert. When proof of the accused's guilt is dependent on the result of scientific analysis, such as DNA evidence, the testing process, including control measures applied, have to be executed and recorded with so much care that it can later be verified by any objective scientist, and *a fortiori* also by the trial court.

Lay opinion The opinion of a layman is admissible if it is relevant. It will be relevant if it would be of material assistance to the court to allow the witness to resort to and state inferences where the witness's perceptions would be of assistance to the court and the witness could not conveniently and adequately convey his or her perceptions without doing so. It will be relevant also if the witness possesses some attribute that would enable him or her materially to assist the court in reaching a conclusion (even on an ultimate issue if it would be of appreciable help to allow the witness to do so) and if it would be impossible for the witness to render such assistance without giving his or her opinion. There is a strong tendency in practice, certainly in criminal proceedings, to regard lay opinion, when it is received, as constituting *prima facie* evidence only: its effect is often said to depend on whether or not it has been challenged.

PRIVILEGE

PRIVATE PRIVILEGE

Introduction Private privilege is a right that is vested in a natural or juristic person (including the state) to prevent the disclosure of admissible evidence. It has to be claimed by the person in whom it vests. The privilege against self-incrimination, marital privilege and, possibly in KwaZulu-Natal in civil actions, against questions tending to show that a witness has been guilty of adultery or other *stuprum*, is available to the witness only. However, professional privilege has a wider ambit: a party with a right to such a privilege may not only claim it when such party testifies, but the party may prevent his or her legal adviser or agent (but not an independent third party) from making disclosure. A claim to privilege is not confined to the time of trial, but obtains also when discovery has to be made. It does not entitle a witness to refuse to testify The witness (or, in

the case of professional privilege, the party) must claim the privilege, at the appropriate time, during his or her testimony. An adverse inference may not be drawn against a party because he or she, or one of his or her witnesses, has exercised a privilege. If another person obtains knowledge of a privileged communication or a copy of a privileged document, the privilege may be defeated: the communication or the copy may be proved in evidence. In a criminal case, the judge or magistrate has a discretion to uphold the privilege if disclosure would operate unfairly against an accused. When private privilege is claimed in respect of a document, the court has a right to inspect it in order to determine whether or not to uphold the claim. It is an essential characteristic of private privilege that, while it is for the judge or magistrate to determine whether a valid claim has been made, since the privilege is a personal right, it may be waived. A claim to privilege may also be made before an administrative tribunal or official. Although privileged documents may be seized in terms of chapter II of the Criminal Procedure Act, the privilege has been said not to be consequently defeated. Statements that have been expressly or impliedly made "without prejudice" are not, strictly speaking, excluded because of private privilege: a person has a right to make an inadmissible admission in a "without prejudice" statement; it is not a right to prevent the disclosure of admissible evidence. They will, however, for the sake of convenience, be dealt with here. The privilege created by section 4(1) of the Income Tax Act may properly be regarded as a private one and other statutory privileges will also be mentioned. The so-called "privileges" of an accused when giving evidence have nothing to do with a personal right to prevent the disclosure of otherwise admissible evidence and are dealt with elsewhere. Evidence which is excluded because of the dictates of the public interest or the security of the state is dealt with below.

Self-incrimination The privilege against self-incrimination is intended to encourage witnesses to testify by removing their fear that, if they were to enter the witness box, they might incriminate themselves. The position in criminal law is governed by section 203 of the Criminal Procedure Act which provides that no witness in criminal proceedings may, except as provided by that Act or any other law, be compelled to answer any question which he or she would not, on 30 May 1961, have been compelled to answer because the answer might expose him or her to a criminal charge. The law that applied in this regard was, by virtue of previous legislation, the English law, but the South African privilege would seem to be more limited than that previously applicable: section 203 confines the privilege to answers to questions that might expose a witness to a criminal charge, whilst in the past it extended to a penalty or a forfeiture as well. Thus, it would appear that the privilege would not apply where a witness's answer would merely expose the witness to an administrative penalty such as a "banning" order. The privilege may be claimed, however, when a magistrate takes evidence under section 205 of the Criminal Procedure Act from any person likely to give material or relevant information as to any alleged offence and, usually, in administrative and *quasi*-judicial proceedings. The South African

Constitution requires that statutory provisions which infringe upon constitutional rights, such as the privilege against self-incrimination, have to pass the test as to whether such limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

The privilege has to be claimed by the witness in respect of each question which implies that the witness has to be aware of his or her right to refuse to answer. But this is tempered by the fact that there is a general rule of practice in South Africa in terms of which a judicial officer has a duty to warn a witness in criminal proceedings that he or she is not obliged to give evidence that might have a tendency to expose him or her to a criminal charge. The requirement that the accused must be warned is applicable only to *viva voce* evidence before a judicial tribunal; the absence of a warning before the making of a written statement does not render the statement inadmissible in subsequent criminal proceedings against the deponent. The duty arises whenever it appears that the witness might well be about to give such evidence, whether or not a specific question has been asked. It is the duty of a prosecutor to warn the court that he or she intends to put an incriminating question. Thus, where a prosecution witness made a confession at a previous trial, and it appeared that he had not been aware of his right to claim privilege, it was held that his confession was inadmissible against him at his subsequent trial. It would seem that there is nothing in principle to confine this rule of practice to criminal proceedings. A witness's reply will also be inadmissible in subsequent criminal proceedings if, after standing on the right not to incriminate him- or herself, the witness was wrongly made to answer an incriminating question. The privilege remains that of the witness and, once the witness is aware of his or her rights, it is for the witness to decide whether or not to answer. It is for the judicial officer to decide whether or not a question is incriminating and the judicial officer is not bound by the fact that a witness has said, under oath, that his or her answer would be incriminating: the court is entitled to inquire cautiously into the matter and to infer from the circumstances whether or not the answer would have such a tendency. If a witness's previous testimony indicates that the witness could not incriminate him- or herself if he or she were to answer, the claim to privilege will be dismissed unless, possibly, the witness states that his or her previous testimony was false. Some questions may obviously be incriminating; others, seemingly bland and innocuous, may nevertheless constitute a link in a chain of incriminating circumstances. Such questions are also to be regarded as incriminating. There must always be, however, a genuine and reasonable danger that the questions may expose the witness to a criminal charge. It is uncertain whether a witness may be protected against answering a question that would expose him or her to a criminal charge in a foreign country. Once a witness has already incriminated him- or herself, the privilege in that regard falls away. A witness cannot refuse to testify by virtue of his or her having claim to the privilege – as has been said, objection has to be taken to specific questions. The scope of the privilege itself is modified in criminal proceedings by section 204 of the Criminal Procedure Act. Whenever the prosecutor informs the court that any witness called on behalf of the prosecution will be required by the prosecution to

answer questions which may incriminate the witness with regard to an offence specified by the prosecutor, the court, if satisfied that the witness is a competent witness, must tell him or her that he or she is obliged to give evidence, that questions might be put to him or her which might incriminate him or her in regard to the specified offence, that the witness will be obliged to answer any question that may be put to him or her (whether by the prosecution, the accused or the court) despite the fact that the answer might incriminate him or her in respect of the specified offence (or of any other offence for which the witness could be found guilty on a charge relating to the specified offence), and that, if the witness answers frankly and honestly all questions put to him or her, he or she will be discharged from prosecution in respect of the specified offence (or from any other offence for which he or she could be found guilty on being charged with it). The witness is then obliged to give evidence and cannot refuse to answer any question that might incriminate him or her on the specified charge or any other charge in respect of which a verdict of guilty would be competent. A witness who, in the opinion of the court, answers frankly and honestly, will be discharged from prosecution, but discharge from prosecution will be of no force and effect if it is given at a preparatory examination and the witness does not answer questions honestly and frankly at the ensuing trial. Even if the witness is not discharged from prosecution, his or her incriminating answers in respect of the specified offence (or in respect of any other offence for which he or she could be found guilty on being charged with it), will, except on a charge of perjury or statutory perjury, be inadmissible. A person who, in a manner other than that envisaged by section 204, is freed from the risk of prosecution, is also not entitled to the protection of the privilege as regards the offence in respect of which the person has been indemnified. No one may be compelled to answer any question or give any evidence that his wife (or her husband) would not be compelled to answer if she (or he) were to give evidence. A witness may, therefore, refuse to answer a question if the answer would incriminate his or her spouse except, possibly, if the one were to be a compellable witness against the other. A witness, either in criminal or civil proceedings, may not refuse to answer a question merely on the ground that the answer might show that he or she is liable to a civil claim or that he or she owes a debt. Nor may an accused who gives evidence in his or her own defence refuse to answer a question that tends to incriminate him or her as regards the offence with which he or she has been charged.

Professional privilege Legal professional privilege is a right necessary for the proper functioning of the adversarial system and can be claimed not only in actual litigation but also to prevent seizure by warrant; the provisions of the Prevention of Organised Crime Act do not override such privilege. This privilege, which rests on what Wigmore calls "the necessity of *providing subjectively for the client's freedom of apprehension* in consulting his legal adviser" is based on the rationale that it is in the public interest to aid the ends of litigation. It is in the public interest to regard communications between a professional legal adviser and his or her client as being, in certain circumstances, inviolate; similarly, the privilege extends

to communications between third parties and lawyers if the communications were made in confidence for the primary purpose of being laid before the adviser at a time when litigation was pending or contemplated whether or not there are other purposes; it need not be the sole dominant purpose since it is in the public interest to facilitate the obtaining and preparation of evidence. Professional privilege is a substantive rule of law and not merely a rule of evidence; privileged documents may not be seized in terms of a search warrant. As a corollary to the proposition that privilege is conceived as an aid to litigation and in the interests of the public, the privilege is the client's and not the lawyer's. No privilege attaches to communications that have been made to a doctor, a clergyman, an accountant, a journalist, a banker (except in a limited way, by virtue of statute), an insurer, or, for that matter, to anyone other than a lawyer.Once a communication is privileged, it remains privileged: the privilege is for the benefit of the client and it does not matter what the nature of the subsequent proceedings may be. The right to resist disclosure, in other words, serves to prevent the legal representative from betraying a confidential communication in a subsequent trial even if a different lawyer were to be employed. It may also pertain to the client's successor-in-title. If a third party (including a potential witness) overhears or reads what has been said, that party may testify to what he or she has heard or read. The party cannot be stopped by the client or his or her legal representative. There is, however, a suggestion of dubious value that, if a document should be duly obtained under a search warrant, the privilege is retained. The better approach would be to say that, in criminal proceedings, the court has a discretion to prevent the disclosure of evidence if it would be unjust to the accused not to do so; it is doubtful whether such a discretion exists in civil proceedings. The law of professional privilege is the English law as it was on 30 May 1961. The Criminal Procedure Act states that a legal adviser is incompetent to give evidence against his or her client if he or she could not have done so on that date. It does not cover the whole field of the privilege: it does not deal with the situation where the client is not a party to litigation or with communication by the client him- or herself or by agents of the client and the legal adviser. But there can be no doubt that the section does not replace the common law. The Civil Proceedings Evidence Act does not deal specifically with the privilege, but the effect of section 42 is to apply the English law indirectly by freezing the position as it was on 30 May 1961 when the Act came into force on 30 June 1967. Various old colonial laws applied the English law.

(a) *Communication between a legal adviser and his or her client*

The mere fact that a person is an advocate or an attorney does not give rise to the conclusion that everything that such person might say, or that might be said to him or her, for the purpose of obtaining his or her advice will be privileged. For privilege to obtain, the person must be an adviser in a professional capacity. This is a question of fact. What it means is that the advice must not have been sought, or given, on a friendly basis only. But when is a lawyer a professional lawyer? Clearly, when he or she is acting in the course of independent practice. But many

qualified lawyers are, today, employed as full-time, salaried legal advisers by corporations or statutory bodies. Whether they may be regarded as acting in their professional capacities must be considered to be an open question. *The communication has to have been made in confidence* Thus, a client's instructions to an attorney to act on his or her behalf and to obtain a specific settlement is not privileged: it lacks the element of confidentiality precisely because it was intended to be disclosed to the client's opponent. Similarly, where an attorney acts on behalf of both parties, this element may be absent. *It has to be made either for the purpose of advice or litigation* Thus, if a lawyer hears a confession when he or she consults with a possible witness in a case, the communication will not be privileged at a subsequent trial of the witness because the witness had not sought legal advice when he or she had made it. Again, a written statement made at a time when the obtaining of legal advice was not contemplated will not be privileged. When a party gives evidence and, in so doing, testifies to facts that were put to that party's opponent's witnesses, the party may be asked whether he or she gave his or her version of the facts to his or her legal representatives: the party is not being asked what he or she told the legal adviser or to disclose the nature of the communication to the legal adviser. It is the state of the legal representative's knowledge that is being tested. On the other hand, the privilege extends not only to prevent the disclosure of the nature of what was said to the legal representative in confidence, but also to prevent the disclosure of what was not said. If a document is not privileged, privilege cannot be created merely by handing it, in a confidential manner, to the legal adviser: it will not be a communication for the purpose of obtaining legal advice *The privilege*, *which is a right of the client*, *has to be claimed* either by the client, the client's agent, or the client's legal representative on his or her behalf. If the client wishes to make disclosure, neither his or her representative nor the court is entitled to frustrate him or her: a judicial officer may inform the client of his or her rights (and indeed should do so particularly when the client is unrepresented), but cannot *mero motu* prevent disclosure. As regards the legal adviser, it is his or her duty to claim the privilege, but when the legal adviser does so (or when he or she waives the privilege) he or she is acting for the client and not in his or her own right. Privilege may be waived expressly or by implication. The client's intention to waive the privilege may be inferred when, for instance, he or she relies on what was communicated as a defence, or when there is an element of publication that warrants an inference that a privileged person no longer regards the contents of a communication as secret. *The privilege does not apply if the client sought advice for the purpose of committing a crime or fraud* even if the legal adviser is unaware of the client's intention. In civil cases where fraud is alleged, the privilege may be defeated only once there is at least *prima facie* evidence that the client intended to obtain advice to facilitate the dishonest purpose. In civil proceedings there is no requirement that litigation has to have been contemplated: it suffices if legal advice was sought in confidence. *Special rules apply to criminal proceedings* A legal practitioner is competent and compellable to give evidence as to any fact, matter or thing which relates to, or is connected with, the commission of any

offence with which his or her client is charged if such a fact, matter or thing came to the practitioner's knowledge before he or she had been professionally employed or consulted "with reference to the defence of the person concerned".

(b) *Independent witnesses*

A statement by a potential independent witness is privileged if it is obtained for the purpose of contemplated litigation, that is to say, at a time when litigation was likely or probable. It matters not that it was obtained by the client, the legal adviser or the agent of either of them. The ambit of the privilege is narrower than that of a privileged communication that was made by an agent: the client cannot prevent an independent witness from disclosing what he or she said, or what had been said to him or her, when he or she made the statement; he or she may be asked what he or she said or did, or what was shown to him or her (other than a document which is itself privileged) at any consultation or interview with the client's legal adviser or representative. It is not a requirement that a third party should have contemplated litigation

(c) *Witnesses' statements and* "*police docket privilege*"

A litigant is entitled to refuse to discover a privileged document. Professional privilege, therefore, is a ground, indeed the most usual ground, for such a refusal. A litigant may, therefore, refuse to disclose a privileged statement by a witness when he or she is called upon to make discovery. Information as to the manner in which the statement was taken, that is to say, the questions that were asked and what was said to the witness, is also protected. The privilege is not confined only to the final statement, but includes everything called into existence for incorporation in the communication in its completed form. When a party has been legally represented, his or her refusal to discover a document will normally be based on professional privilege. A litigant who conducts his or her case in person, however, may also refuse to disclose a statement by a witness. Although the matter is mixed up with public privilege in the shape of police privilege, especially with regard to the identity of informers, the privilege of witnesses in criminal trials with regard to their statements (the so-called "docket privilege") which existed since 1954 has now come to an end. This was effected by the Constitutional Court in its decision in *Shabalala v Attorney-General of the Tvl* wherein Mahomed J decided that this privilege was not consistent with the accused's constitutional right to a fair trial. The accused therefore has the right to access to these statements but the state can refuse to disclose these, if disclosure is not necessary for a fair trial. This depends upon several factors, such as: "The simplicity of the case, either on the law or on the facts or both; the degree of particularity furnished in the indictment or the summary of substantial facts in terms of section 144 of the Criminal Procedure Act; the particulars furnished pursuant to section 87 of the Criminal Procedure Act; the details of the charge read with such particulars in the Regional and District Courts, might be such as to justify the denial of such access. The accused may, however, be entitled to have access to the relevant parts of the police docket even in cases where the particularity furnished might be sufficient

to enable the accused to understand the charge against him or her but, in the special circumstances of a particular case, it might not enable the defence to prepare its own case sufficiently, or to properly exercise its right to adduce and challenge evidence; or to identify witnesses able to contradict the assertions made by the State witnesses; or to obtain evidence which might sufficiently impact upon the credibility and motives of the State witnesses during cross-examination; or to properly instruct expert witnesses to adduce evidence which might similarly detract from the probability and the veracity of the version to be deposed to by the State witnesses; or to focus properly on significant matters omitted by the State witnesses in their depositions; or to properly deal with the significance of matters deposed to by such witnesses in one statement and not in another or deposed to in a statement and not repeated in evidence; or to hesitations, contradictions and uncertainties manifest in a police statement but overtaken by confidence and dogmatism in *viva voce* testimony." It was also decided that the accused does not have the right to consult with state witnesses if they themselves object, or if the state can prove that it has reasonable grounds to believe such consultation might lead to the intimidation of the witness or a tampering with the witness's evidence, or that it might lead to the disclosure of state secrets or the identity of informers, or that it might otherwise prejudice the proper ends of justice. Even then the court can still exercise a discretion to permit consultation The Constitution has affirmed the right of an accused to relevant information held by the state. This right has been given further definition by the Promotion of Access to Information Act. A number of cases have expounded upon what Zeffertt calls "the collision between the fundamental rights embodied within the privilege and the right that every person has of access to any information held by the state" Although a witness's statement is privileged (at least in civil cases), and although the client, the legal adviser or their agents are not obliged to answer questions about what an independent witness may have said, such a witness may be cross-examined as to what he or she said. And, if the independent witness wishes to disclose what he or she said, or what was said to him or her, the client cannot stop this.

PUBLIC POLICY

Introduction In this section the so-called "privileges", by means of which public policy and the public interest are protected, will be discussed. Except as provided by the Criminal Procedure Act or any other law, no witness in criminal proceedings is compellable or permitted to give evidence as to any fact, matter or thing or as to any communication made to or by the witness if he or she would not have been compelled or permitted to do so on 30 May 1961 on the ground of the public policy or with regard to the public interest. This has the effect of applying the rules of the English law of evidence (to the extent that they have not been altered by any South African law) as they were on 30 May 1961. The same effect has been achieved by virtue of section 42 of the Civil Proceedings Evidence Act. These privileges differ from private privilege in that secondary evidence is not generally

admissible to prove matter that is protected. Again, the court may, in a proper case, enforce such a privilege *mero motu*. This is quite different from the position as regards private privilege.

The identity of informers The privilege that leads, generally, to the prevention of the identity of informers and the content of their information being disclosed, rests on the foundation that communications that have been made by them ought to receive encouragement and that the confidence that will lead to such communications being made can be created only by preventing the disclosure of their identity. Public policy, then, demands that the identity of an informer and the content of the information given by the informer should be kept a secret, but this exclusionary privilege operates only when public policy requires that the name of the informer, or his or her information, should be kept secret because the informer's information relates to matters in respect of which persons might not inform if they were not protected, or for the reason that the candour and completeness of the informer's communication might be prejudiced if he or she were not protected, or for some other good reason. The privilege, therefore, is not intended only to protect informers against the revenge of the criminals that they may implicate. An informer's identity is also protected so as to enable the state to combat crime. It follows that the informer cannot waive the privilege if public policy demands secrecy: it is not the informer's privilege but one that is conceived in the interests of the public. Ever since South Africa became a constitutional democracy, the right to privacy, as guaranteed by the Constitution, will also play a role in this regard. An informer, in this context, is one who gives information of a kind prejudicial to others whose enmity he or she might provoke by doing so. In addition, the information has to be of a kind which is, or might be, the cause of a criminal prosecution and it must have been given to officers of justice. It would be impossible to give a comprehensive definition that would include all cases in which a person acts as an informer. The rule against disclosure of the identity of informers does not apply to every person who makes a statement to the police in connection with a prosecution, but only to informers properly so called whose identity is kept secret in the public interest. The following instances of persons who would not be informers may profitably be given. A complainant who avers that an offence has been committed against his or her person or property is not an informer; nor is a person who, having been involved in an accident, makes a statement about it. The identity of a witness who observes an offence and who makes a statement to the police about it will not ordinarily be protected by the privilege. Thus a person who by chance happens to see an accident and who gives the police a statement relating to it cannot ordinarily be regarded as an informer. A police officer who makes a statement about his or her observations does not fall within the ambit of the privilege because the police do not have to be encouraged to set the law in motion by keeping their identity secret. But this would certainly be the case if the police officer had been acting secretly in disguise in order to bring criminals to justice and where the detection of further crime requires the police officer to continue to act in a covert fashion. The rule that

keeps an informer's identity secret is relaxed, that is to say, an informer's identity may be revealed when public policy demands disclosure. In the leading case on the subject the Appellate Division gave three examples where the rule preventing the disclosure of informers is relaxed:

(a) when it is material to the ends of justice;

(b) if it is necessary or right to do so in order to show the prisoner's innocence;
(c) when the reason for secrecy no longer exists.

These examples are not, however, exhaustive. In all cases the fundamental inquiry is whether it can properly be said that it appears, from the circumstances, that the public policy requires the name of the informer to be kept secret. Thus the court may order the privilege to fall away *in favorem innocentiae* and it does not apply where the identity of the informer is admitted or known. It would appear, however, that the mere fact that a civil claim has been brought against a person, in which it is averred that he or she made a false statement to the police, will not lead to the privilege being defeated. The privilege is not confined to the person who sets the law in motion by reporting the occurrence of an offence: a person who identifies an offender after the commission of an offence has already become known may also be an informer. The rules of English practice lack relevance to the South African situation because virtually all prosecutions here, unlike those in England, are at the public instance. Therefore, although section 202 of the Criminal Procedure Act enjoins us to apply the English law, English principles relating to the definition of an informer cannot be usefully adopted here and South African law has developed independently in a manner that is appropriate to local conditions. It would seem that the proviso to section 202 of the Criminal Procedure Act, which lays down that any person may in criminal proceedings adduce evidence of any communication alleging the commission of an offence if the making of that communication *prima facie* constitutes an offence, relates to informers. The only offences to which the proviso can apply are criminal defamation, perjury, treason and a contravention of certain provisions of the Internal Security Act. Thus, when the state requires the evidence of an informer to prove that such a criminal communication had been made, an informer cannot rely on the privilege against the disclosure of his or her identity.

MEANS OF PROOF

WITNESSES

Competence and compellability generally. In both civil and criminal proceedings the general rule is that every person is competent and compellable to give evidence. The exceptions are dealt with below.In criminal proceedings any question concerning the competence or compellability of a witness is decided by the court in which the proceedings are conducted. This means that the parties cannot agree to the admission of evidence by an incompetent witness. A question

of competence is decided in the same way as a question of admissibility by the judge alone (though the assessors will normally be allowed to remain present) and, if necessary, a trial within a trial may have to be held to decide the issue.The failure to attend as a witness, the refusal to be sworn, and the refusal, without just excuse, to answer questions or produce documents, are punishable offences.

REAL EVIDENCE

Nature of real evidence Real evidence is presented when a material object is produced for inspection by the court. The term is usually applied to exhibits such as clothing, a knife or a fingerprint, but it has also been extended to cover a document presented as a chattel (as opposed to a statement) or a person in so far as his or her appearance or demeanour is to be observed.

Presentation of real evidence Real evidence, in its normal sense of an object or chattel, is adduced through a witness who can identify the object. The witness may be required to give opinion evidence about the object to establish its relevance. There are, however, other ways of presenting real evidence. A person may be viewed by the court to establish, for instance, the person's race or age, without calling him or her or another person as a witness. The court may also adjourn to the scene of an event for an inspection *in loco* – in which case the scene viewed by the court becomes real evidence.

Finger-, body- and footprints Prints are used to connect the accused with the crime. The court is informed that the accused's prints were taken and that they are identical with those found at the scene of the crime or found on some object with which the case is concerned. The comparison of fingerprints and body-prints should be made by an expert, who may give his or her evidence either *viva voce* or by affidavit. If the court is satisfied that the witness or deponent is indeed an expert and that he or she may be relied upon, it must accept his or her opinion. Footprints, on the other hand, do not require analysis and explanation by an expert, and the court is not bound by the witness's opinion. Evidence of a fingerprint expert that the accused's fingerprints which the expert him- or herself had taken on the morning of the trial and identified in relation to a set of fingerprints bearing the accused's name (which the expert had previously received), is admissible and it has to be accepted *prima facie* that the expert had done all that was necessary. The state does not discharge its onus of proving identity beyond a reasonable doubt, if the photocopies of the SAP 76 form are of such poor quality that the court cannot assess the expert's evidence.

Handwriting Comparison of a disputed writing with any writing proved to be genuine may be made by a witness, and such writings and the evidence of any witness with respect thereto may be submitted as proof of genuineness or otherwise of the writing in dispute. The writing so submitted for comparison is real evidence. Although a handwriting expert will usually be called upon to give

evidence, a layman or the court itself can compare the writing and the court is not bound by an expert's opinion.

Inspection in loco In both civil and criminal proceedings the court, whether it is an inferior or superior court, a court of first instance or a court of appeal, may, if it deems it necessary or expedient, adjourn to a place other than the place where the court is sitting in order to inspect an object that cannot conveniently be brought to court, or to view the locus in quo. The decision to hold an inspection lies within the discretion of the court; a court of appeal will be most reluctant to hold that such decision was wrongly taken. It is preferable to hold the inspection in the presence of all the parties concerned. To hold it in the presence of one of the parties but not the other would constitute an irregularity, but the court may, it seems, hold it in the absence of both parties. Though witnesses may attend the inspection and make statements, pointing out objects for example, whatever a witness has to say only becomes evidence if it is confirmed during examination under oath. The court must place its observations on record and give the parties an opportunity of agreeing with them or challenging them and, if they wish, of leading evidence to correct them.

Appearance of a person The appearance of a person, whether the person is a witness or not, is real evidence if it is observed and noted by the court to establish a relevant fact. This can occur where, for example, identity is in issue,1 the nature and extent of an injury, race, and age The court should record its views and apprise the parties thereof.It is probably correct to say that a witness's demeanour, in so far as it reflects upon his or her credibility, also constitutes real evidence.

DOCUMENTARY AND RELATED EVIDENCE

Proof of a document: general principles The definition of "document" is discussed in the next paragraph, but there also seems to be some confusion concerning the concept of "documentary evidence". A common-sense definition would seem to be "evidence by means of document", but this is by no means universally accepted. It is suggested that greater clarity will obtain if a few distinctions are borne in mind. In the first place, some documents (type one) are created to express the statement of intention of the creator. For instance, many documents (in the form of contracts) are created to archive the consensus obtained between two parties; a will (as the name indicates) serves to archive the expression of will of the testator, and so on. As opposed to this, other documents (type two) are created to express a statement of fact, to relate a sequence of events, and so on. If this type of document is tendered to a court simply to prove that the statement of fact has in fact been made, it is being tendered circumstantially and will not be inadmissible as constituting hearsay evidence. If it is tendered in an attempt to prove that its contents are true, it is being tendered testimonially; this will constitute hearsay, and the evidence will therefore be

inadmissible. The above distinction is quite likely to survive the hearsay dispensation brought into being by the Law of Evidence Amendment Act of 1988, but the statutory change has caused some confusion in the world of documentary evidence. This is because of the phrase: "evidence, whether oral or in writing" in the statutory definition contained in section 3(4) of the Act. De Vos and Van der Merwe criticise Schmidt for confusing written and documentary hearsay and for assuming that the Act would also be applicable to "documentary evidence", which they define as "nie getuienis vervat in skrif nie, maar getuienis, meesal mondeling, wat oor die inhoud van 'n dokument handel". They contrast this with "written evidence", defining it as "die gepaste begrip om na die mededelings vervat in 'n beëdigde verklaring te verwys". It is submitted that most affidavits used during litigation would constitute the "type two" document described above, since they are statements of fact, tendered to prove the truth of their contents, and would obviously also be hearsay evidence. Statements of fact not tendered to prove the truth of their contents and statements of intention (the "type one" document described in the previous paragraph) still constitute documentary evidence, however, although not considered to be hearsay, simply because they are not being tendered testimonially, in other words to prove the "truth" of their contents. Thus the prohibition against documentary hearsay potentially applies to all documents, but its operation has always been limited by the purpose with which the document is tendered. "Documentary evidence" simply means "evidence by means of document", which should include affidavits. Leaving aside the question of hearsay, according to Zeffertt, all documents have to comply with three conditions before the court will accept them. These relate to the "best evidence" rule, the document's authenticity and whether the Stamp Duties Act of 1968 has been complied with. The author re-emphasises that "type two" documents additionally have to pass the hearsay test.

Proof of authenticity Statutory exceptions apart, the usual method of proving a document which has not been discovered or admitted by the opponent is through a witness who can testify to its authenticity. A document is authentic if it is what it is alleged to be by the party tendering it. Proof of authenticity is usually supplied by the author, executor or signatory of the document; by a person who witnessed the making or signing of the document; or by a person who can identify the handwriting or signature of the author. In certain circumstances it will be sufficient to call a person who found the document in the opponent's possession or custody. Where an agreement is embodied in writing, the written document is the final authority as to its terms. "Ancient" documents (which are more than 20 years old) do not require proof of authenticity if they are produced from proper custody.Although foreign documents may be proved to be authentic in the ordinary way, they may be admitted upon mere production if authenticated abroad in accordance with certain rules of the High Court. A document that has not been authenticated where authentication is necessary, is inadmissible, and may not be used for purposes of cross-examination.

Public documents A distinction is drawn in common law between public and private documents. A public document is a document made by a public officer in the execution of a public duty; it is intended for public use; and the public has a right of access. Such documents are admissible to prove the truth of the facts stated therein and they are received in evidence upon their mere production from proper custody, without further proof of authenticity. Although various statutes deal with specific categories of documents that would be classed as public under the above definition, there are two provisions (the one relating to civil proceedings and the other to criminal proceedings) which provide in general terms that, if a document (including a book) is of such a public nature as to be admissible in evidence upon its mere production from proper custody, any copy thereof or extract therefrom will be admissible if it is proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted.

Official documents An official document is a document kept in the custody or under the control of a state official. It therefore may or may not be a public document. An original document can at civil proceedings be produced only upon the order of the head of the department in whose custody or under whose control the document is or of any officer in the service of the state authorised by such head, and at criminal proceedings only upon the order of the director of public prosecutions. If the original is produced it is not necessary for the head of the department to appear in person: it may, at civil proceedings, be produced by any person authorised by the person ordering the production thereof and, at criminal proceedings, by any person authorised by the head of the department concerned. It is, however, more usual to make use of a copy of the original or an extract therefrom. Such copy or extract is admissible in lieu of the original if it is certified as a true copy or extract by the head of the department concerned or by any state official authorised thereto by such head.

APPLIANCES AND DEVICES

Product of appliances and devices – evidential principles The argument has been mooted that the law of evidence should no longer endeavour to force the products of modern technology into the limited categories of either real or documentary evidence. This seems to have been the case with videotapes where different provincial divisions of the Supreme Court (now called the Superior Court) have variously applied the rules of documentary and real evidence to this form of evidence. Schmidt makes the point that the present rules of discovery, reliability and authenticity have all developed around traditional paper documents, with occasional patchwork in an effort to accommodate the products of photography, cinematography, audio and video magnetic tapes, mechanical data recording devices and, finally, the computer. The computer has placed the law of evidence under greater strain than any of its technological predecessors since it no longer works with analogue data, but with data in a digital form, which makes it very

susceptible to manipulation. The new form of data has also led to a dramatic overhaul of telecommunications, broadcasting and even publishing. The law of evidence has not yet been able to deal convincingly with even relatively dated technical phenomena such as electronic data interchange (EDI). Thus the optical storage of documents or documents obtained from worldwide networks such as the Internet are likely to present a much bigger legal headache. The paragraphs below will endeavour to find the present legal position, but since this field changes so rapidly, will also endeavour to give some guidance with regard to likely future developments.

Photographs Photographs may sometimes constitute real evidence, where the physical photograph itself is the "centre of attraction", either because it contains fingerprints on its surface (the subject of the photograph being immaterial), or because it is a very rare historical photograph which is the corpus delicti in a theft from a museum, or because it has been adjudged to be pornographic and someone possessed it in contravention of some statutory measure. The situation is arguably quite different when the photograph is simply used to represent some situation and that situation is the subject matter of the particular court case. It now serves a documentary function and both the dictionary and judicial definitions of "document" are wide enough to include a photograph. The wording of rules 35(1) and 36(4) of the Uniform Rules of Court also seems to lead, by necessary implication, to the fact that a photograph may be considered to be a document. The fact that the subject of a photograph is subject to human interpretation by the photographer by making use of telephoto lenses, lighting and the like, should go to weight rather than to admissibility.

Cinematographic film One is constrained to agree with the obiter judgment in S v Mpumlo that a cine film is akin to a photograph, since "[a] cine film is a series of images which can be visually observed by the naked eye, although the detail thereon would normally require enlarged reproduction, either as prints of individual frames or as a moving picture on a screen". Although the learned judge found this type of medium "difficult to categorize", it is submitted that, like photographs, it should be considered to be documentary evidence, if the subject matter is what is really in issue. In practice, its importance is likely to diminish with the increasing use of magnetic videotape over developed film.

Audio- and videotape Audio- and videotape differ from the previous categories in that they are not decipherable by the human eye in their native state and have to be "translated" by a tape player which converts the magnetic particles into sound or light impulses. They differ from computer magnetic media in that the latter stores the data in a digital form, which is even more susceptible to manipulation than analogue data. Evidence in the form of tapes therefore has to be scrutinised with great care. Schmidt remarks upon the fact that a more liberal attitude was taken towards videotapes in S v Mpumlo and S v Baleka (1) than was adopted in S v Singh and S v Ramgobin. In the former two cases videotapes

were considered to constitute real evidence and not documentary evidence, and therefore it was decided that the tapes did not have to comply with the (stricter) requirements of documentary evidence. At any rate it was felt that any possible deficiencies should go to weight rather than admissibility. In S v Singhand S v Ramgobin a more conservative approach was adopted. Here it was felt that both audio- and videotapes should comply with documentary requirements with regard to originality and authenticity before they could even be admitted as evidence. A tape recording of a conversation between a suspect and accused, made at the instigation of the suspect, would under the circumstances not be inadmissible because of the provisions of the Interception and Monitoring Prohibition Act; obtaining the evidence does not infringe the accused's right of privacy. However, in a majority judgment in Pillay v S the court refused to accept clandestine telephone recordings made on the appellant's premises without first having obtained a court's permission in this regard.

Computer evidence Computers should be distinguished from simple "counting machines" and calculators since the latter can be isolated from human intervention and interpretation and their working may be demonstrated to the court fairly easily. In this way, it has been possible to avoid hearsay objections by categorising evidence as real and getting it admitted in that way, for instance, a radar trace of the movements of a ship, which was working without human intervention. Hearsay objections would be unfounded, since recording is automatic and the only human mind through which the information had passed was that of witnesses to its operation, and these were present in court and subject to cross-examination. Evidence of what appeared on the visual display of a breath-testing device has been accepted as being real evidence. By analogy, the same argument should apply to a speed measuring device. Matters were thrown into confusion, however, when a court refused to accept computer print-outs with regard to the serial numbers of stolen British banknotes, holding that no personal knowledge had been proven. Even academics, such as Smith,5 have adopted the real evidence argument: "Hearsay invariably relates to information which has passed through a human mind. Thus (sic) information never did so." In coming to terms with digital data, UK courts have made use of several logical distinctions as far as the subject matter is concerned. Concepts such as "primary" and "secondary" evidence have been illustrated at the hand of a camera operating with a roll of physical film (or plate, in certain instances). A reverse image (the "negative") on one of the latter constitutes the true primary image, but is of little evidentiary use. A print made from the negative has to be used in court, but this constitutes secondary evidence. The degree of care taken with this process might affect the weight of the evidence. The distinction between admissibility and weight of evidence is conceptually clear, but not always easy to apply in practice.The same applies to formerly clear terms such as "document", "article" "instrument", "writing", "record" and "authentication". "Authentication" is especially problematic, being traditionally associated with ink, pen and paper. The UK has attempted to rectify this by means of the Electronic Signatures Regulations.The programmable nature of a computer

and the digital9 nature of its data, which allows its workings and its output to be constantly modified by human intervention, strains the analogy with real evidence, however. Countries have either passed special legislation to make computer-generated evidence admissible, or have amended general civil and criminal procedure Acts to also make provision for this type of evidence, usually with analogy to documents. Schmidt's call for a third category of evidence, namely that produced by appliances and devices, would seem to accord well with the first solution. After lengthy investigations by the South African Law Commission and the Department of Communications, South Africa has led the way for Africa with a first, computer-oriented, Electronic Communications and Transactions Act. A signature may now be performed electronically and be admissible as part of a data message. If it complies with certain technical requirements, it constitutes an "advanced electronic signature" and is presumed to be valid unless the contrary is proved. The requirement of originality can also be met by a data message and it may not be excluded from evidence simply because of its format or the fact that it is no longer in its original form. In assessing the evidential weight of such data message the court may have regard to various factors, but, if made in the ordinary course of business, it will be admissible in evidence as rebuttable proof of any fact contained in it. A "data message" means data generated, sent, received or stored by electronic means and includes voice, where the voice is used in an automated transaction and a stored record. The new Act has repealed the Computer Evidence Act,19 since it did not seem to work at all in practice. It is assumed that documentary evidence need not in future be handed up in hard-copy paper format. Hopefully judges and magistrates will be equipped with electronic terminals or computers so as to be able to deal with these cases. A steadily increasing array of court decisions have formed around computers and information and communications technology. S v Ndiki was probably the first South African case to get to grips with the new technology and the (then) recent legislation in that regard. The court categorised the relevant legal principles according to the purpose for which the evidence was tendered. If specific evidence simply turned on the reliability and accuracy of the computer itself, or its operating system or application programs, it should be treated as real evidence. Section 15 of the ECT Act would then be applicable. If the computer simply served as a tool for human communication it should probably be classified as documentary, rather than real evidence. The Law of Evidence Amendment Act inserts another test into the latter "communication test", one by means of which the court has to determine whether a statement amounts to hearsay evidence or not. In Le Roux v Honourable Magistrate Viana an Anton Piller order was used to confiscate the hard drive from the computer of an insolvent party and was handed to a neutral attorney for safekeeping. The Anton Piller order lapsed and the present proceedings turned on an unsuccessful attempt to make use of the provisions of the Promotion of Administrative Justice Act. In Ndlovu v Minister of Correctional Services it was held that, for documentary evidence to be admissible, the statements contained in the document had to be relevant and otherwise admissible; the authenticity of the document had to be proven and the original document should normally be

produced. Those three requirements are not dispensed with by section 15(1) of the ECT Act. It was also held that the probative value of each entry in the record depended upon the credibility of the person who made that entry. Two of the persons who made entries on the printout gave evidence before the court and their entries did not amount to hearsay evidence. The other entries, the authors of which were not called to give evidence, did however amount to hearsay evidence. The court had a discretion in terms of section 3 of the Law of Evidence Amendment Act to admit such evidence if it was of the opinion that it should be admitted in the interests of justice after having regard to certain factors. After considering each of the applicable factors, the court ruled the hearsay evidence admissible. In MTN Service Provider (Pty) Ltd v LA Consortium & Vending CC t/a LA Enterprises29 section 15(4) of the ECT Act was utilised to admit documents because these had been created "in the ordinary course of business". An objection was made against the head of the administrative department giving evidence on the grounds that this would be hearsay evidence, but the objection was overruled by the court. To have held otherwise would have entailed calling several members of the administrative department – an absurd result in the opinion of the court. In Trustees for the time being of the Delsheray Trust v ABSA a similar problem was solved by making use of the Supreme Court Rules. The court also invoked a type of common-law presumption of reliability in order to have the relevant documents accepted into evidence. The case was not based on the Electronic Communications and Transactions Act but in terms of the common law (which had not been excluded by that Act). The court distinguished between two classes of evidence, each coming into existence at a separate stage of the functioning of the computer. The first stage comprised the human input into the computer and the second the generation and storing of the information by the computer itself. Evidential problems arising during the latter stage could be taken care of adequately by a presumption of reliability mentioned above. Problems arising during the first stage could be taken care of either by the statutory hearsay exception contained in the Law of Evidence Amendment Act or also by means of a presumption of regularity. The court seemed to apply the latter approach, finding support in a British decision.

PRESUMPTIONS

Nature and classification A presumption is a method of reasoning or a legal device whereby the existence of a fact is assumed. It usually, but not invariably, comes into operation upon proof of a basic fact giving rise to the assumption. Presumptions have traditionally been classified as irrebuttable presumptions of law, rebuttable presumptions of law and (rebuttable) presumptions of fact. This terminology and classification is still recognised in South African decisions. Irrebuttable presumptions of law are generally considered to fall outside the law of evidence. They are, in fact, rules of substantive law clothed in the form of rules of evidence. Rebuttable presumptions of law are rules of law (within the law of evidence) compelling the provisional assumption of a fact. They are provisional in

the sense that the assumption will stand unless it is destroyed by countervailing evidence. Presumptions of fact, on the other hand, are not rules of law, but are ordinary inferences drawn by the courts from the facts presented to them. It follows that they are also provisional in the sense referred to above.

SUFFICIENCY

CORROBORATION AND CAUTIONARY RULES

Introduction A distinction is drawn between a rule requiring corroboration and a cautionary rule. The former (which has always been of statutory origin) demands that the evidence to be corroborated be supported in some material respect by evidence from another source; the latter (which is not statutory, but developed as a usus fori) may merely require that the particular evidence be treated with due caution. The present Criminal Procedure Act2 conforms to the movement away from formalistic proof in that it contains only one requirement of formal corroboration, that pertaining to a confession,3 whereas its predecessors contained various such provisions.4 There is no statutory provision requiring corroboration in civil cases.

Formal corroboration: confessions The Criminal Procedure Act, like its predecessors, permits the conviction of an accused person on the single evidence of a confession that the accused committed the offence, provided that it is confirmed in a material respect or, if not so confirmed, that the commission of the offence be proved by evidence other than a confession. Confirmation has been found to exist, on a charge of murder, in the presence of arsenic in the body of the deceased; on a charge of unlawfully entering an urban area, in the accused's presence within that area; and on a charge of stock theft, in the fact that stock was missing from an enclosed paddock. Confirmation may also be furnished by statements (other than the confession) made by the accused in or out of court. Whereas confirmation of the confession can be furnished by any evidentiary matter, including therefore formal admissions of the accused, proof aliunde of the commission of the offence can only be supplied by "evidence, other than such confession", which excludes formal admissions. Proof aliunde of the offence can be furnished by the evidence of an accomplice. If an accused pleads not guilty and then in clarification of his or her plea in effect confesses to the crime, the abovementioned provision is not applicable; the accused may be found guilty on his or her uncorroborated statement.

BURDEN OF PROOF

Distinction between burden of proof and evidential burden The burden or onus of proof determines the result if at the end of the trial the evidence is so evenly balanced that the court is unable to come to a definite conclusion. In order to convict, the evidence must establish the guilt of the accused beyond a

reasonable doubt, which will be so only if there is no reasonable possibility that an innocent explanation, which has been put forward, might be true; this test must be established upon a consideration of all the evidence. The party bearing the burden on any particular issue then fails to establish its claim or defence, as the case may be. This burden, which is a matter of substantive law and is determined by the pleadings, must be distinguished from the purely evidential burden of combating the opponent's evidence. The former is fixed at the commencement of the trial as soon as the issues are determined and is not shifted during the course of the trial; the latter arises as soon as the evidence casts on a litigant the risk of failure and may shift in the course of the trial as the risk shifts from one party to the other.A court does not base its decision whether to convict or acquit on only a portion of the evidence; the decision has to take into account all the evidence.

ASSESSMENT OF EVIDENCE

Circumstantial evidence The assessment of circumstantial or presumptive evidence, namely evidence from which inferences are drawn about facts in issue, is in a criminal case governed by two rules which flow logically from the standard of proof applicable to such cases. These are:

- the inference sought to be drawn must be consistent with all the proved facts;

- the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn.

In applying these rules, however, it is necessary to look at the totality of the evidence adduced in support of an inference: it is not each proved fact which must exclude all other inferences, but the facts as a whole. When an inference is drawn from circumstantial evidence in a civil case, the first rule mentioned above is applicable (the inference must be consistent with all the proved facts), but the second rule is not. The conclusion need not be the only reasonable one: it is sufficient if it is the more natural or plausible conclusion from amongst several conceivable ones.

Failure to give or lead evidence Where there is direct evidence in a criminal trial that the accused committed the crime, the accused's failure to testify (whatever the reason) in general ipso facto tends to strengthen the state case, since there is no testimony to contradict it and therefore less occasion or material for doubting it,but it must also be borne in mind that uncontradicted evidence is not necessarily acceptable evidence – a principle which applies in both civil and criminal cases, but is of greater importance in criminal cases where the failure to testify is that of the accused.Before the interim Constitution came into effect, the failure to testify may have led the court to draw an inference of guilt. The Constitution guarantees the right to a fair trial, which includes the fundamental right of the accused to remain silent after arrest, not to be compelled to make a

confession and not to be a compellable witness against him- or herself. In S v Zuma these were all connected with the presumption of innocence, which means that a conviction should not follow in spite of a reasonable doubt. Kentridge AJ applied the so-called "two stage" Canadian approach, first finding that a fundamental right of the accused had been infringed, and, second, that this could not be justified in terms of section 33 of the Constitution. This presumption of innocence probably entails that no inference of guilt may be drawn from the silence of the accused alone. The fact that the state evidence stands uncontroverted, as explained in the previous paragraph, is probably not covered by the presumption of innocence, but any inference from the silence of the accused should not be added to the fact of uncontroverted evidence to strengthen the state's case even further. In civil cases the failure to adduce or give evidence is usually looked upon as a strong indication that such evidence would be to the detriment of the party concerned. Consequently it would entitle the court to select from alternative inferences that which favours the opposite party. But this principle does not apply when the inference sought to be drawn is less probable than the other; or when the opposite party's case is so weak that it does not call for a reply; or when other evidence has been given which would lead the party to believe that what he or she has offered would suffice. If both parties could have been expected to call a witness and refrained from doing so, the inference can be drawn against both of them though it may be stronger against the one than the other. The failure to testify can only be a factor in the case if the opposing party has adduced evidence calling for a reply. The accused's omission to enter the witness box cannot, for instance, serve to supply a deficiency in the case for the state.

PART 2: CRIMINAL PROCEDURE (CAPITA SELECTA)
[Act = Criminal Procedure Act]

1 **Definitions**
(1) In this Act, unless the context otherwise indicates-
'aggravating circumstances', in relation to-
.....
[Para. *(a)* deleted by s. 1 of Act 107 of 1990 (wef 27 July 1990).]
robbery or attempted robbery, means-
the wielding of a fire-arm or any other dangerous weapon;
the infliction of grievous bodily harm; or
a threat to inflict grievous bodily harm,
by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence;

6 Power to withdraw charge or stop prosecution

An attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may-
before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto.
[NB: A para. *(c)* and a sub-s. (2) have been added by s. 36 of the Correctional Services and Supervision Matters Amendment Act 122 of 1991, a provision which will be put into operation by proclamation. See PENDLEX.**]**

18 Prescription of right to institute prosecution

The right to institute a prosecution for any offence, other than the offences of-
murder;
treason committed when the Republic is in a state of war;
robbery, if aggravating circumstances were present;
kidnapping;
child-stealing;
rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;4

[Para. *(f)* substituted by s. 8 *(a)* of Act 8 of 2017 (wef 2 August 2017).]

genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;

[Para. *(g)* substituted by s. 8 *(a)* of Act 8 of 2017 (wef 2 August 2017).]

any contravention of section 4, 5 or 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act 7 of 2013);

[Para. *(h)* substituted by s. 48 of Act 7 of 2013 (wef 9 August 2015) and by s. 8 *(a)* of Act 8 of 2017 (wef 2 August 2017).]

trafficking in persons for sexual purposes by a person as contemplated in section 71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;

[Para. *(h*A*)* inserted by s. 8 *(b)* of Act 8 of 2017 (wef 2 August 2017).]

using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20 (1) and 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

[Para. *(i)* amended by s. 8 *(c)* of Act 8 of 2017 (wef 2 August 2017).]

torture as contemplated in section 4 (1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013 (Act 13 of 2013),

[Para. *(j)* added by s. 8 *(d)* of Act 8 of 2017 (wef 2 August 2017).]

shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

[S. 18 substituted by s. 27 (1) of Act 105 of 1997 (wef 27 April 1994), amended by s. 39 of Act 27 of 2002 (wef 16 August 2002) and substituted by s. 68 of Act 32 of 2007 (wef 16 December 2007).]

4 In *NL and Others v Estate Late Frankel and Others* 2018 (2) SACR 283 (CC) (14 June 2018) s. 18 was declared to be unconstitutional and invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences, other than those listed in s. 18 *(f)*, *(h)* and *(i)*, after the lapse of a period of 20 years from the time when the offence was committed. The order was suspended for 24 months to afford Parliament an opportunity to enact remedial legislation. During the period of suspension s. 18 *(f)* is to be read as though the words 'and all other sexual offences whether in terms of common law or statute' appear after the words 'the Criminal Law

(Sexual Offences and Related Matters) Amendment Act, 2007, respectively.' Should Parliament fail to enact remedial legislation within the period of suspension, the interim reading-in remedy shall become final. The declaration of invalidity is retrospective to 27 April 1994.

21 Article to be seized under search warrant

(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued-
by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or
by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.

(2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorize such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.

(3) *(a)* A search warrant shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night.

(b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.

(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant.

22 Circumstances in which article may be seized without search warrant

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-
if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
if he on reasonable grounds believes-
that a search warrant will be issued to him under paragraph *(a)* of section 21 (1) if he applies for such warrant; and
that the delay in obtaining such warrant would defeat the object of the search.

36A Interpretation of Chapter 3

(1) For the purposes of this Chapter, unless the context indicates otherwise-
'appropriate person' means any adult member of a child's family, or a care-giver of the child, which includes any person other than a parent or guardian who factually cares for a child, including-
a foster parent;
a person who cares for a child with the implied or express consent of a parent or guardian of the child;
a person who cares for a child whilst the child is in temporary safe care;
the person at the head of a child and youth care centre where a child has been placed;
the person at the head of a shelter;
a child and youth care worker, who cares for a child who is without appropriate family care in the community; and

a child at the head of a child-headed household, if such a child is 16 years or older;

'authorised officer' means the police officer commanding the Division responsible for forensic services within the South African Police Service, or his or her delegate;

[Definition of 'authorised officer' inserted by s. 1 *(a)* of Act 37 of 2013 (wef 31 January 2015).]

'authorised person' means-

with reference to photographic images, fingerprints or body-prints, any police official or a member of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act, in the performance of his or her official duties; and

with reference to buccal samples, any police official or member of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act, who is not the crime scene examiner of the particular case, but has successfully undergone the training prescribed by the Minister of Health under the National Health Act, in respect of the taking of a buccal sample;

[Definition of 'authorised person' substituted by s. 1 *(b)* of Act 37 of 2013 (wef 31 January 2015).]

'body-prints' means prints other than fingerprints, taken from a person and which are related to a crime scene, but excludes prints of the genitalia, buttocks or breasts of a person;

'bodily sample' means intimate or buccal samples taken from a person;

[Definition of 'bodily sample' inserted by s. 1 *(c)* of Act 37 of 2013 (wef 31 January 2015).]

'buccal sample' means a sample of cellular material taken from the inside of a person's mouth;

[Definition of 'buccal sample' inserted by s. 1 *(c)* of Act 37 of 2013 (wef 31 January 2015).]

'child' means a person under the age of 18 years;

'Child Justice Act' means the Child Justice Act, 2008 (Act 75 of 2008);

'comparative search' means the comparing by the authorised officer of-

fingerprints, body-prints or photographic images, taken under any power conferred by this Chapter, against any database referred to in Chapter 5A of the South African Police Service Act; and

forensic DNA profiles derived from bodily samples, taken under any power conferred by this Chapter, against forensic DNA profiles contained in the different indices of the NFDD referred to in Chapter 5B of the South African Police Service Act;

[Definition of 'comparative search' substituted by s. 1 *(d)* of Act 37 of 2013 (wef 31 January 2015).]

'crime scene sample' means physical evidence which is retrieved from the crime scene or any other place where evidence of the crime may be found, and may include physical evidence collected from the body of a person, including a sample taken from a nail or from under the nail of a person;

[Definition of 'crime scene sample' inserted by s. 1 *(e)* of Act 37 of 2013 (wef 31 January 2015).]

'DNA' means deoxyribonucleic acid which is a bio-chemical molecule found in the cells and that makes each species unique;

[Definition of 'DNA' inserted by s. 1 *(e)* of Act 37 of 2013 (wef 31 January 2015).]

'forensic DNA analysis' means the analysis of sections of the DNA of a bodily sample or crime scene sample to determine the forensic DNA profile: Provided that this does not relate to any analysis pertaining to medical tests or for health purposes or mental characteristic of a person or to determine any physical information of the person other than the sex of that person;

[Definition of 'forensic DNA analysis' inserted by s. 1 *(e)* of Act 37 of 2013 (wef 31 January 2015).]

'forensic DNA profile' means the results obtained from forensic DNA analysis of bodily samples taken from a person or samples taken from a crime scene, providing a unique string of alpha numeric characters to provide identity reference: Provided this

does not contain any information on the health or medical condition or mental characteristic of a person or the predisposition or physical information of the person other than the sex of that person;

[Definition of 'forensic DNA profile' inserted by s. 1 *(e)* of Act 37 of 2013 (wef 31 January 2015).]

'Independent Police Investigative Directorate Act' means the Independent Police Investigative Directorate Act, 2011 (Act 1 of 2011);

[Definition of 'Independent Police Investigative Directorate Act' inserted by s. 1 *(e)* of Act 37 of 2013 (wef 31 January 2015).]

'intimate sample' means a sample of blood or pubic hair or a sample taken from the genitals or anal orifice area of the body of a person, excluding a buccal sample;

[Definition of 'intimate sample' inserted by s. 1 *(e)* of Act 37 of 2013 (wef 31 January 2015).]

'National Health Act' means the National Health Act, 2003 (Act 61 of 2003);

[Definition of 'National Health Act' inserted by s. 1 *(e)* of Act 37 of 2013 (wef 31 January 2015).]

'NFDD' means the National Forensic DNA Database of South Africa, established in terms of section 15G of the South African Police Service Act; [and]

[Definition of 'NFDD' inserted by s. 1 *(e)* of Act 37 of 2013 (wef 31 January 2015).]

'South African Police Service Act' means the South African Police Service Act, 1995 (Act 68 of 1995).

(2) Any police official who, in terms of this Act or any other law takes the fingerprints, a body-print or buccal sample or ascertains any bodily feature of a child must-

have due regard to the personal rights relating to privacy, dignity and bodily integrity of the child;

do so in a private area, not in view of the public;

ensure the presence of a parent or guardian of the child, a social worker or an appropriate person; and

treat and address the child in a manner that takes into account his or her gender and age.

[Sub-s. (2) amended by s. 1 *(f)* of Act 37 of 2013 (wef 31 January 2015).]

(3) Buccal samples must be taken by an authorised person who is of the same gender as the person from whom such sample is required with strict regard to decency and order.

[Sub-s. (3) added by s. 1 *(g)* of Act 37 of 2013 (wef 31 January 2015).]

(4) Notwithstanding any other law, an authorised person may take a buccal sample or cause the taking of any other bodily sample with the consent of the person whose sample is required or if authorised under-

section 36D; or

section 36E.

[Sub-s. (4) added by s. 1 *(g)* of Act 37 of 2013 (wef 31 January 2015).]

(5) Any authorised person who, in terms of this Chapter or in terms of any other law takes a buccal sample from any person, must do so-

in accordance with the requirements of any regulation made by the Minister of Police; and

in a designated area deemed suitable for such purposes by the Departmental Heads: Police, Justice and Constitutional Development or Correctional Services in their area of responsibility.

[Sub-s. (5) added by s. 1 *(g)* of Act 37 of 2013 (wef 31 January 2015).]

[S. 36A inserted by s. 2 of Act 6 of 2010 (wef 18 January 2013).]

38 Methods of securing attendance of accused in court

(1) Subject to section 4 (2) of the Child Justice Act, 2008 (Act 75 of 2008), the methods of securing the attendance of an accused who is eighteen years or older in

court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.

[Sub-s. (1) substituted by s. 4 of Act 42 of 2013 (wef 22 January 2014).]

(2) The methods of securing the attendance of an accused who is under the age of eighteen years at a preliminary inquiry or child justice court are those contemplated in section 17 of the Child Justice Act, 2008.

[S. 38 substituted by s. 99 (1) of Act 75 of 2008 (wef 1 April 2010).]

40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person-

who commits or attempts to commit any offence in his presence;

whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

who has escaped or who attempts to escape from lawful custody;

who has in his possession any implement of housebreaking or carbreaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;

[Para. *(d)* substituted by s. 41 of Act 129 of 1993 (wef 1 September 1993).]

who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;

who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;

who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;

who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;

who is found in any gambling house or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance;

who wilfully obstructs him in the execution of his duty;

who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;

who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic;

who is reasonably suspected of being a deserter from the South African National Defence Force;

[Para. *(m)* amended by s. 4 of Act 18 of 1996 (wef 1 April 1997).]

who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;

who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act;

who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons;

who is reasonably suspected of having committed an act of domestic violence as contemplated in section 15 of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.

[Para. *(q)* added by s. 20 of Act 116 of 1998 (wef 15 December 1999).]

(2) If a person may be arrested under any law without warrant and subject to conditions or the existence of circumstances set out in that law, any peace officer may without warrant arrest such person subject to such conditions or circumstances.

5 In the Afrikaans text of para. *(q)* the reference is to no particular section of Act 116 of 1998 but rather to the Act as a whole

50 Procedure after arrest

(1)*(a)* Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph *(a)* shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph *(d)*, if such an arrested person is not released by reason that-

no charge is to be brought against him or her; or

bail is not granted to him or her in terms of section 59 or 59A,

he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires-

outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day;

or will expire at, or if the time at which such period is deemed to expire under subparagraph (i) or (iii) is or will be, a time when the arrested person cannot, because of his or her physical illness or other physical condition, be brought before a lower court, the court before which he or she would, but for the illness or other condition, have been brought, may on the application of the prosecutor, which, if not made before the expiration of the period of 48 hours, may be made at any time before, or on, the next succeeding court day, and in which the circumstances relating to the illness or other condition are set out, supported by a certificate of a medical practitioner, authorise that the arrested person be detained at a place specified by the court and for such period as the court may deem necessary so that he or she may recuperate and be brought before the court: Provided that the court may, on an application as aforesaid, authorise that the arrested person be further detained at a place specified by the court and for such period as the court may deem necessary; or

[Sub-para. (ii) substituted by s. 3 *(a)* of Act 34 of 1998 (wef 1 August 1998).]

at a time when the arrested person is outside the area of jurisdiction of the lower court to which he or she is being brought for the purposes of further detention and he or she is at such time in transit from a police station or other place of detention to such court, the said period shall be deemed to expire at the end of the court day next succeeding the day on which such arrested person is brought within the area of jurisdiction of such court.

[Sub-s. (1) amended by s. 1 of Act 56 of 1979 (wef 1 June 1979) and substituted by s. 1 *(a)* of Act 85 of 1997 (wef 1 August 1998).]

(2) For purposes of this section-

'a court day' means a day on which the court in question normally sits as a court and 'ordinary court day' has a corresponding meaning; and

'ordinary court hours' means the hours from 9:00 until 16:00 on a court day.

[Sub-s. (2) substituted by s. 1 *(a)* of Act 85 of 1997 (wef 1 August 1998).]

(3) Subject to the provisions of subsection (6), nothing in this section shall be construed as modifying the provisions of this Act or any other law whereby a person under detention may be released on bail or on warning or on a written notice to appear in court.

[Sub-s. (3) substituted by s. 1 *(a)* of Act 75 of 1995 (wef 21 September 1995) and by s. 8 (1) *(a)* of Act 62 of 2000 (wef 23 March 2001).]

(4) and (5) .....
[Sub-ss. (4) and (5) added by s. 37 of Act 122 of 1991 (wef 15 August 1991) and deleted by s. 99 (1) of Act 75 of 2008 (wef 1 April 2010).]
(6) *(a)* At his or her first appearance in court a person contemplated in subsection (1) *(a)* who-
was arrested for allegedly committing an offence shall, subject to this subsection and section 60-
be informed by the court of the reason for his or her further detention; or
[Item *(aa)* substituted by s. 3 *(b)* of Act 34 of 1998 (wef 1 August 1998).]
be charged and be entitled to apply to be released on bail,
and if the accused is not so charged or informed of the reason for his or her further detention, he or she shall be released; or
was not arrested in respect of an offence, shall be entitled to adjudication upon the cause for his or her arrest.
(b) An arrested person contemplated in paragraph *(a)* (i) is not entitled to be brought to court outside ordinary court hours.
(c) The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's court: Provided that the Director of Public Prosecutions concerned, or a prosecutor authorised thereto in writing by him or her may, if he or she deems it expedient or necessary for the administration of justice in a particular case, direct in writing that the application must be considered by a regional court.
[Para. *(c)* substituted by s. 8 (1) *(b)* of Act 62 of 2000 (wef 23 March 2001).]
(d) The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if-
the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;
the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60 (11A);
.....
[Sub-para. (iii) deleted by s. 8 (1) *(c)* of Act 62 of 2000 (wef 23 March 2001).]
it appears to the court that it is necessary to provide the State with a reasonable opportunity to-
procure material evidence that may be lost if bail is granted; or
perform the functions referred to in section 37; or
it appears to the court that it is necessary in the interests of justice to do so.
[Sub-s. (6) added by s. 1 *(b)* of Act 75 of 1995 (wef 21 September 1995) and substituted by s. 1 *(b)* of Act 85 of 1997 (wef 1 August 1998).]
(7) .....
[Sub-s. (7) added by s. 1 *(b)* of Act 75 of 1995 (wef 21 September 1995) and deleted by s. 1 *(c)* of Act 85 of 1997 (wef 1 August 1998).]

54 Summons as method of securing attendance of accused in magistrate's court

(1) Where the prosecution intends prosecuting an accused in respect of any offence and the accused is not in custody in respect of that offence and no warrant has been or is to be issued for the arrest of the accused for that offence, the prosecutor may secure the attendance of the accused for a summary trial in a lower court having jurisdiction by drawing up the relevant charge and handing such charge, together with information relating to the name and, where known and where applicable, the residential address and occupation or status of the accused, to the clerk of the court who shall-

issue a summons containing the charge and the information handed to him by the prosecutor, and specifying the place, date and time for the appearance of the accused in court on such charge; and

deliver such summons, together with so many copies thereof as there are accused to be summoned, to a person empowered to serve a summons in criminal proceedings.

(2) *(a)* Except where otherwise expressly provided by any law, the summons shall be served by a person referred to in subsection (1) *(b)* by delivering it to the person named therein or, if he cannot be found, by delivering it at his residence or place of employment or business to a person apparently over the age of sixteen years and apparently residing or employed there.

(b) A return by the person who served the summons that the service thereof has been effected in terms of paragraph *(a)*, may, upon the failure of the person concerned to attend the relevant proceedings, be handed in at such proceedings and shall be *prima facie* proof of such service.

(3) A summons under this section shall be served on an accused so that he is in possession thereof at least fourteen days (Sundays and public holidays excluded) before the date appointed for the trial.

55 Failure of accused to appear on summons

(1) Subject to section 4 (2) of the Child Justice Act, 2008, an accused who is eighteen years or older and who is summoned under section 54 to appear at criminal proceedings and who fails to appear at the place and on the date and at the time specified in the summons or who fails to remain in attendance at such proceedings, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).

[Sub-s. (1) substituted by s. 99 (1) of Act 75 of 2008 (wef 1 April 2010).]

(1A) The provisions of section 46 of the Child Justice Act, 2008, apply to an accused who is under the age of eighteen years and who fails to appear at a preliminary inquiry in terms of a summons issued under that Act.

[Sub-s. (1A) inserted by s. 99 (1) of Act 75 of 2008 (wef 1 April 2010).]

(2) The court may, if satisfied from the return of service referred to in paragraph *(b)* of section 54 (2) that the summons was served on the accused in terms of paragraph *(a)* of that section and that the accused has failed to appear at the place and on the date and at the time specified in the summons, or if satisfied that the accused has failed to remain in attendance at the proceedings in question, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and unless the accused satisfies the court that his failure was not due to any fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months: Provided that where a warrant is issued for the arrest of an accused who has failed to appear in answer to the summons, the person executing the warrant-

may, where it appears to him that the accused received the summons in question and that the accused will appear in court in accordance with a warning under section 72; or

shall, where it appears to him that the accused did not receive the summons in question or that the accused has paid an admission of guilt fine in terms of section 57 or that there are other grounds on which it appears that the failure of the accused to appear on the summons was not due to any fault on the part of the accused, for which purpose he may require the accused to furnish an affidavit or affirmation,

release the accused on warning under section 72 in respect of the offence of failing to appear in answer to the summons, whereupon the provisions of that section shall *mutatis mutandis* apply with reference to the said offence.

[Sub-s. (2) amended by s. 5 *(a)* of Act 33 of 1986 (wef 4 April 1986).]

(2A) *(a)* If the court issues a warrant of arrest in terms of subsection (2) in respect of a summons which is endorsed in accordance with section 57 (1) *(a)*-

an endorsement to the same effect shall be made on the warrant in question;
the court may make a further endorsement on the warrant to the effect that the accused may admit his guilt in respect of the failure to appear in answer to the summons or to remain in attendance at the criminal proceedings, and that he may upon arrest pay to a clerk of the court or at a police station a fine stipulated on the warrant in respect of such failure, which fine shall not exceed the amount to be imposed in terms of subsection (2), without appearing in court.
[NB: Para. *(a)* has been substituted by s. 5 of the Judicial Matters Amendment Act 66 of 2008, a provision which will be put into operation by proclamation. See PENDLEX.**]**

(b) The fine paid in terms of paragraph *(a)* at a police station or to a clerk of a magistrate's court other than the magistrate's court which issued the warrant of arrest, shall, as soon as is expedient, together with the warrant of arrest in question, be forwarded to the clerk of the court which issued that warrant, and such clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of such admission of guilt in the criminal record book for admission of guilt, whereupon the accused concerned shall be deemed to have been convicted by the court in respect of the offence in question.

[Sub-s. (2A) inserted by s. 5 *(b)* of Act 33 of 1986 (wef 4 April 1986) and substituted by s. 3 of Act 4 of 1992 (wef 11 March 1992).]

(3) *(a)* If, in any case in which a warrant of arrest is issued, it was permissible for the accused in terms of section 57 to admit his guilt in respect of the summons on which he failed to appear and to pay a fine in respect thereof without appearing in court, and the accused is arrested under such warrant in the area of jurisdiction of a magistrate's court other than the magistrate's court which issued the warrant of arrest, such other magistrate's court may, notwithstanding any provision of this Act or any other law to the contrary, and if satisfied that the accused has, since the date on which he failed to appear on the summons in question, admitted his guilt in respect of that summons and has paid a fine in respect thereof without appearing in court, in a summary manner enquire into his failure to appear on such summons and, unless the accused satisfies the court that his failure was not due to any fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

[Para. *(a)* substituted by s. 14 of Act 59 of 1983 (wef 11 May 1983) and by s. 5 *(c)* of Act 33 of 1986 (wef 4 April 1986).]

(b) In proceedings under paragraph *(a)* before such other magistrate's court, it shall be presumed, upon production in such court of the relevant warrant of arrest, that the accused failed to appear on the summons in question, unless the contrary is proved.

56 Written notice as method of securing attendance of accused in magistrate's court

(1) If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount 6 determined by the Minister from time to time by notice in the *Gazette*, such peace officer may, whether or not the accused is in custody, hand to the accused a written notice which shall-
specify the name, the residential address and the occupation or status of the accused;
call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question;
contain an endorsement in terms of section 57 that the accused may admit his guilt in respect of the offence in question and that he may pay a stipulated fine in respect thereof without appearing in court; and
contain a certificate under the hand of the peace officer that he has handed the original of such written notice to the accused and that he has explained to the accused the import thereof.

[Sub-s. (1) amended by s. 2 of Act 109 of 1984 (wef 1 September 1984) and by s. 5 of Act 5 of 1991 (wef 1 May 1992).]

[NB: Sub-s. (1) has been substituted by s. 6 of the Judicial Matters Amendment Act 66 of 2008, a provision which will be put into operation by proclamation. See PENDLEX.**]**

(2) If the accused is in custody, the effect of a written notice handed to him under subsection (1) shall be that he be released forthwith from custody.

[NB: Sub-s. (2) has been substituted by s. 6 of the Judicial Matters Amendment Act 66 of 2008, a provision which will be put into operation by proclamation. See PENDLEX.**]**

(3) The peace officer shall forthwith forward a duplicate original of the written notice to the clerk of the court which has jurisdiction.

(4) The mere production to the court of the duplicate original referred to in subsection (3) shall be *prima facie* proof of the issue of the original thereof to the accused and that such original was handed to the accused.

(5) The provisions of section 55 shall *mutatis mutandis* apply with reference to a written notice handed to an accused under subsection (1).

6 R5 000 - GN R62 in *GG* 36111 of 30 January 2013

59A Attorney-general may authorise release on bail

(1) An attorney-general, or a prosecutor authorised thereto in writing by the attorney-general concerned, may, in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorise the release of an accused on bail.

(2) For the purposes of exercising the functions contemplated in subsections (1) and (3) an attorney-general may, after consultation with the Minister, issue directives.

(3) The effect of bail granted in terms of this section is that the person who is in custody shall be released from custody-

upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his or her bail at his or her place of detention contemplated in section 50 (1) *(a)*;

subject to reasonable conditions imposed by the attorney-general or prosecutor concerned; or

the payment of such sum of money or the furnishing of such guarantee to pay and the imposition of such conditions.

(4) An accused released in terms of subsection (3) shall appear on the first court day at the court and at the time determined by the attorney-general or prosecutor concerned and the release shall endure until he or she so appears before the court on the first court day.

(5) The court before which a person appears in terms of subsection (4)-

may extend the bail on the same conditions or amend such conditions or add further conditions as contemplated in section 62; or

shall, if the court does not deem it appropriate to exercise the powers contemplated in paragraph *(a)*, consider the bail application and, in considering such application, the court has the jurisdiction relating to the powers, functions and duties in respect of bail proceedings in terms of section 60.

(6) The provisions of section 64 with regard to the recording of bail proceedings by a court apply, with the necessary changes, in respect of bail granted in terms of this section.

(7) For all purposes of this Act, but subject to the provisions of this section, bail granted in terms of this section shall be regarded as bail granted by a court in terms of section 60.

[S. 59A inserted by s. 3 of Act 85 of 1997 (wef 1 August 1998).]

60 Bail application of accused in court

(1)*(a)* An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

[Para. *(a)* substituted by s. 9 *(a)* of Act 62 of 2000 (wef 23 March 2001).]

(b) Subject to the provisions of section 50 (6) *(c)*, the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time.

[Para. *(b)* substituted by s. 4 *(a)* of Act 85 of 1997 (wef 1 August 1998) and by s. 5 *(a)* of Act 34 of 1998 (wef 1 August 1998).]

(c) If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court.

(2) In bail proceedings the court-

may postpone any such proceedings as contemplated in section 50 (6);

may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;

may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced;

shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection (11) *(a)* and *(b)*, require of the prosecutor to place on record the reasons for not opposing the bail application.

[Sub-s. (2) substituted by s. 4 *(b)* of Act 85 of 1997 (wef 1 August 1998).]

(2A) The court must, before reaching a decision on the bail application, take into consideration any pre-trial services report regarding the desirability of releasing an accused on bail, if such a report is available.

[Sub-s. (2A) inserted by s. 4 of Act 55 of 2003 (wef 31 March 2005).]

(2B) *(a)* If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum.

(b) If, after an inquiry referred to in paragraph *(a)*, it is found that the accused is-

unable to pay any sum of money, the court must consider setting appropriate conditions that do not include an amount of money for the release of the accused on bail or must consider the release of the accused in terms of a guarantee as provided for in subsection (13) *(b)*; or

able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances.

[Sub-s. (2B) inserted by s. 9 *(a)* of Act 66 of 2008 (wef 17 February 2009).]

(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.

(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or

[Para. *(a)* substituted by s. 4 *(c)* of Act 85 of 1997 (wef 1 August 1998).]

where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or
where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

[Para. *(e)* added by s. 4 *(d)* of Act 85 of 1997 (wef 1 August 1998).]

[Sub-s. (4) amended by s. 9 *(b)* of Act 62 of 2000 (wef 23 March 2001).]

(5) In considering whether the ground in subsection (4) *(a)* has been established, the court may, where applicable, take into account the following factors, namely-
the degree of violence towards others implicit in the charge against the accused;
any threat of violence which the accused may have made to any person;
any resentment the accused is alleged to harbour against any person;
any disposition to violence on the part of the accused, as is evident from his or her past conduct;
any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;
the prevalence of a particular type of offence;
any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or
any other factor which in the opinion of the court should be taken into account.

(6) In considering whether the ground in subsection (4) *(b)* has been established, the court may, where applicable, take into account the following factors, namely-
the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
the assets held by the accused and where such assets are situated;
the means, and travel documents held by the accused, which may enable him or her to leave the country;
the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;
the nature and the gravity of the charge on which the accused is to be tried;
the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
any other factor which in the opinion of the court should be taken into account.

(7) In considering whether the ground in subsection (4) *(c)* has been established, the court may, where applicable, take into account the following factors, namely-
the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
whether the witnesses have already made statements and agreed to testify;
whether the investigation against the accused has already been completed;
the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
whether the accused has access to evidentiary material which is to be presented at his or her trial;
the ease with which evidentiary material could be concealed or destroyed; or
any other factor which in the opinion of the court should be taken into account.

(8) In considering whether the ground in subsection (4) *(d)* has been established, the court may, where applicable, take into account the following factors, namely-
the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
whether the accused is in custody on another charge or whether the accused is on parole;
any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
any other factor which in the opinion of the court should be taken into account.

(8A) In considering whether the ground in subsection (4) *(e)* has been established, the court may, where applicable, take into account the following factors, namely-
whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
whether the shock or outrage of the community might lead to public disorder if the accused is released;
whether the safety of the accused might be jeopardized by his or her release;
whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or
any other factor which in the opinion of the court should be taken into account.

[Sub-s. (8A) inserted by s. 4 *(e)* of Act 85 of 1997 (wef 1 August 1998).]

(9) In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely-
the period for which the accused has already been in custody since his or her arrest;
the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
any financial loss which the accused may suffer owing to his or her detention;
any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
the state of health of the accused; or
any other factor which in the opinion of the court should be taken into account.

(10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice.

(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-
in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

[Sub-s. (11) substituted by s. 4 *(f)* of Act 85 of 1997 (wef 1 August 1998).]

(11A)*(a)* If the attorney-general intends charging any person with an offence referred to in Schedule 5 or 6 the attorney-general may, irrespective of what charge is noted on the charge sheet, at any time before such person pleads to the charge, issue

a written confirmation to the effect that he or she intends to charge the accused with an offence referred to in Schedule 5 or 6.

(b) The written confirmation shall be handed in at the court in question by the prosecutor as soon as possible after the issuing thereof and forms part of the record of that court.

(c) Whenever the question arises in a bail application or during bail proceedings whether any person is charged or is to be charged with an offence referred to in Schedule 5 or 6, a written confirmation issued by an attorney-general under paragraph *(a)* shall, upon its mere production at such application or proceedings, be *prima facie* proof of the charge to be brought against that person.

[Sub-s. (11A) inserted by s. 4 *(g)* of Act 85 of 1997 (wef 1 August 1998).]

(11B) *(a)* In bail proceedings the accused, or his or her legal adviser, is compelled to inform the court whether-

the accused has previously been convicted of any offence; and

there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.

(b) Where the legal adviser of an accused on behalf of the accused submits the information contemplated in paragraph *(a)*, whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not.

(c) The record of the bail proceedings, excluding the information in paragraph *(a)*, shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.

(d) An accused who wilfully-

fails or refuses to comply with the provisions of paragraph *(a)*; or

furnishes the court with false information required in terms of paragraph *(a)*,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

[Sub-s. (11B) inserted by s. 4 *(g)* of Act 85 of 1997 (wef 1 August 1998).]

(12) The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice.

(13) The court releasing an accused on bail in terms of this section may order that the accused-

deposit with the clerk of any magistrate's court or the registrar of any High Court, as the case may be, or with a correctional official at the correctional facility where the accused is in custody or with a police official at the place where the accused is in custody, the sum of money determined by the court in question; or

shall furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the amount that has been set as bail, or that has been increased or reduced in terms of section 63 (1), in circumstances in which the amount would, had it been deposited, have been forfeited to the State.

[Sub-s. (13) substituted by s. 9 *(b)* of Act 66 of 2008 (wef 17 February 2009).]

(14) Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.

[Sub-s. (14) added by s. 4 *(h)* of Act 85 of 1997 (wef 1 August 1998) and amended by s. 5 *(b)* of Act 34 of 1998 (wef 1 August 1998).]

[S. 60 amended by s. 2 of Act 56 of 1979 (wef 1 June 1979) and by s. 2 of Act 64 of 1982 (wef 21 April 1982) and substituted by s. 3 of Act 75 of 1995 (wef 21 September 1995).]

65A Appeal by attorney-general against decision of court to release accused on bail

(1) *(a)* The attorney-general may appeal to the superior court having jurisdiction, against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail as contemplated in section 65 (1) *(a)*.

(b) The provisions of section 310A in respect of an application or appeal referred to in that section by an attorney-general, and the provisions of section 65 (1) *(b)* and *(c)* and (2), (3) and (4) in respect of an appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals in terms of paragraph *(a)* of this subsection.

(2)*(a)* The attorney-general may appeal to the Appellate Division against a decision of a superior court to release an accused on bail.

(b) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals in terms of paragraph *(a)* of this subsection.

(c) Upon an appeal in terms of paragraph *(a)* or an application referred to in paragraph *(b)* brought by an attorney-general, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court.

(3) If the appeal of the attorney-general in terms of subsection (1) *(a)* or (2) *(a)* is successful, the court hearing the appeal shall issue a warrant for the arrest of the accused.

[S. 65A inserted by s. 7 of Act 75 of 1995 (wef 21 September 1995).]

66 Failure by accused to observe condition of bail

(1) If an accused is released on bail subject to any condition imposed under section 60 or 62, including any amendment or supplementation under section 63 of a condition of bail, and the prosecutor applies to the court before which the charge with regard to which the accused has been released on bail is pending, to lead evidence to prove that the accused has failed to comply with such condition, the court shall, if the accused is present and denies that he or she failed to comply with such condition or that his or her failure to comply with such condition was due to fault on his or her part, proceed to hear such evidence as the prosecutor and the accused may place before it.

[Sub-s. (1) substituted by s. 8 of Act 75 of 1995 (wef 21 September 1995).]

(2) If the accused is not present when the prosecutor applies to the court under subsection (1), the court may issue a warrant for the arrest of the accused, and shall, when the accused appears before the court and denies that he failed to comply with the condition in question or that his failure to comply with such condition was due to fault on his part, proceed to hear such evidence as the prosecutor and the accused may place before it.

(3) If the accused admits that he failed to comply with the condition in question or if the court finds that he failed to comply with such condition, the court may, if it finds that the failure by the accused was due to fault on his part, cancel the bail and declare the bail money forfeited to the State.

(4) The proceedings and the evidence under this section shall be recorded.

67 Failure of accused on bail to appear

(1) If an accused who is released on bail-

fails to appear at the place and on the date and at the time-
appointed for his trial; or
to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or
fails to remain in attendance at such trial or at such proceedings,
the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.

(2)*(a)* If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.

(b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.

(c) If the accused does not appear before court within fourteen days of the issue under subsection (1) of the warrant of arrest or within such extended period as the court may on good cause determine, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.

(3) The court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded.

75 Summary trial and court of trial

(1) When an accused is to be tried in a court in respect of an offence, he shall, subject to the provisions of sections 119, 122A and 123, be tried at a summary trial in-

(a) a court which has jurisdiction and in which he appeared for the first time in respect of such offence in accordance with any method referred to in section 38;

(b) a court which has jurisdiction and to which he was referred to under subsection (2); or

(c) any other court which has jurisdiction and which has been designated by the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, for the purposes of such summary trial.

[Para. *(c)* substituted by s. 9 of Act 33 of 1986 (wef 4 April 1986).]

(2) *(a)* If an accused appears in a court which does not have jurisdiction to try the case, the accused shall at the request of the prosecutor be referred to a court having jurisdiction.

(b) If an accused appears in a magistrate's court and the prosecutor informs the court that he or she is of the opinion that the alleged offence is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court but not of the jurisdiction of a regional court, the court shall if so requested by the prosecutor refer the accused to the regional court for summary trial without the accused having to plead to the relevant charge.

[Para. *(b)* added by s. 3 of Act 86 of 1996 (wef 1 September 1997).]

(3) The court before whom an accused appears for the purposes of a bail application shall, at the conclusion of the bail proceedings or at any stage thereafter, but before the accused has pleaded, refer such accused to a court designated by the prosecutor for purposes of trial.

[Sub-s. (3) added by s. 8 of Act 85 of 1997 (wef 1 August 1998).]

[S. 75 substituted by s. 3 of Act 56 of 1979 (wef 1 June 1979).]

77 Capacity of accused to understand proceedings

(1) If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or intellectual disability not capable of understanding the

proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

[Sub-s. (1) substituted by s. 1 *(a)* of Act 4 of 2017 (wef 29 June 2017).]

(1A) At proceedings in terms of sections 77 (1) and 78 (2) the court may, if it is of the opinion that substantial injustice would otherwise result, order that the accused be provided with the services of a legal practitioner in terms of section 22 of the Legal Aid South Africa Act, 2014.

[Sub-s. (1A) inserted by s. 3 *(a)* of Act 68 of 1998 (wef 28 February 2002) and amended by s. 25 (1) of Act 39 of 2014 (wef 1 March 2015).]

(2) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the mental condition of the accused and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(3) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.

(4) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under section 79 has enquired into the mental condition of the accused.

(5) If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings shall be continued in the ordinary way.

(6)*(a)* If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court may direct that the accused-

in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be-

detained in a psychiatric hospital;

temporarily detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital and be transferred where a bed becomes available, if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to himself or herself or to members of the public,

pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

admitted to and detained in a designated health establishment stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

released subject to such conditions as the court considers appropriate; or

referred to a Children's Court as contemplated in section 64 of the Child Justice Act, 2008 (Act 75 of 2008), and pending such referral be placed in the care of a parent, guardian or other appropriate adult or, failing that, placed in temporary safe care as defined in section 1 of the Children's Act, 2005 (Act 38 of 2005); or

in the case where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence be-
admitted to and detained in a designated health establishment stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;
released subject to such conditions as the court considers appropriate;
released unconditionally; or
referred to a Children's Court as contemplated in section 64 of the Child Justice Act, 2008, and pending such referral be placed in the care of a parent, guardian or other appropriate adult or, failing that, placed in temporary safe care as defined in section 1 of the Children's Act, 2005,
and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106 (4) to be acquitted or to be convicted in respect of the charge in question.

(b) If the court makes a finding in terms of paragraph *(a)* after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside, and if the accused has pleaded guilty it shall be deemed that he or she has pleaded not guilty.

[Sub-s. (6) substituted by s. 10 of Act 33 of 1986 (wef 4 April 1986), amended by s. 9 of Act 51 of 1991 (wef 29 April 1991), by s. 42 *(a)* of Act 129 of 1993 (wef 1 September 1993), by s. 3 *(b)* of Act 68 of 1998 (wef 28 February 2002) and by s. 12 of Act 55 of 2002 (wef 18 February 2005) and substituted by s. 68 of Act 32 of 2007 (wef 16 December 2007) and by s. 1 *(b)* of Act 4 of 2017 (wef 29 June 2017).]

(7) Where a direction is issued in terms of subsection (6) or (9), the accused may at any time thereafter, when he or she is capable of understanding the proceedings so as to make a proper defence, be prosecuted and tried for the offence in question.

[Sub-s. (7) amended by s. 9 of Act 51 of 1991 (wef 29 April 1991) and substituted by s. 42 *(b)* of Act 129 of 1993 (wef 1 September 1993) and by s. 3 *(c)* of Act 68 of 1998 (wef 28 February 2002).]

(8) *(a)* An accused against whom a finding is made-
under subsection (5) and who is convicted;
under subsection (6) and against whom the finding is not made in consequence of an allegation by the accused under subsection (1),
may appeal against such finding.

(b) Such an appeal shall be made in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence.

(9) Where an appeal against a finding in terms of subsection (5) is allowed, the court of appeal shall set aside the conviction and sentence and remit the case to the court which made the finding, whereupon that court must deal with the person concerned in accordance with the provisions of subsection (6).

[Sub-s. (9) amended by s. 9 of Act 51 of 1991 (wef 29 April 1991) and substituted by s. 42 *(c)* of Act 129 of 1993 (wef 1 September 1993), by s. 3 *(d)* of Act 68 of 1998 (wef 28 February 2002) and by s. 1 *(c)* of Act 4 of 2017 (wef 29 June 2017).]

(10) Where an appeal against a finding under subsection (6) is allowed, the court of appeal shall set aside the direction issued under that subsection and remit the case to the court which made the finding, whereupon the relevant proceedings shall be continued in the ordinary way.

78 Mental illness or intellectual disability and criminal responsibility

[Heading substituted by s. 2 *(a)* of Act 4 of 2017 (wef 29 June 2017).]

(1) A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or intellectual disability which makes him or her incapable-
of appreciating the wrongfulness of his or her act or omission; or

of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,
shall not be criminally responsible for such act or omission.

[Sub-s. (1) substituted by s. 5 *(a)* of Act 68 of 1998 (wef 28 February 2002) and amended by s. 2 *(b)* of Act 4 of 2017 (wef 29 June 2017).]

(1A) Every person is presumed not to suffer from a mental illness or intellectual disability so as not to be criminally responsible in terms of section 78 (1), until the contrary is proved on a balance of probabilities.

[Sub-s. (1A) inserted by s. 5 *(b)* of Act 68 of 1998 (wef 28 February 2002) and substituted by s. 2 *(c)* of Act 4 of 2017 (wef 29 June 2017).]

(1B) Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.

[Sub-s. (1B) inserted by s. 5 *(b)* of Act 68 of 1998 (wef 28 February 2002).]

(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or intellectual disability or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or intellectual disability, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

[Sub-s. (2) substituted by s. 5 *(c)* of Act 68 of 1998 (wef 28 February 2002) and by s. 2 *(d)* of Act 4 of 2017 (wef 29 June 2017).]

(3) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the relevant mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(4) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under section 79 enquired into the mental condition of the accused.

(5) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under section 79 enquired into the mental condition of the accused.

(6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act-

the court shall find the accused not guilty; or

if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty,

by reason of mental illness or intellectual disability, as the case may be, and direct-

in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be-

detained in a psychiatric hospital;

temporarily detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital and be transferred where a bed becomes available, if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to himself or herself or to members of the public,

pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

admitted to and detained in a designated health establishment stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;
released subject to such conditions as the court considers appropriate;
released unconditionally; or
referred to a Children's Court as contemplated in section 64 of the Child Justice Act, 2008, and pending such referral be placed in the care of a parent, guardian or other appropriate adult or, failing that, placed in temporary safe care as defined in section 1 of the Children's Act, 2005; or
in any other case than a case contemplated in subparagraph (i), that the accused be-
admitted to and detained in a designated health establishment stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;
.....

[Item *(bb)* omitted by s. 2 *(e)* of Act 4 of 2017.]

released subject to such conditions as the court considers appropriate;
released unconditionally; or
referred to a Children's Court as contemplated in section 64 of the Child Justice Act, 2008, and pending such referral be placed in the care of a parent, guardian or other appropriate adult or, failing that, placed in temporary safe care as defined in section 1 of the Children's Act, 2005.

[Sub-s. (6) substituted by s. 11 of Act 33 of 1986 (wef 4 April 1986), amended by s. 9 of Act 51 of 1991 (wef 29 April 1991) and by s. 43 of Act 129 of 1993 (wef 1 September 1993) and substituted by s. 5 *(d)* of Act 68 of 1998 (wef 28 February 2002), by s. 13 of Act 55 of 2002 (wef 18 February 2005), by s. 68 of Act 32 of 2007 (wef 16 December 2007) and by s. 2 *(e)* of Act 4 of 2017 (wef 29 June 2017).]

(7) If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or intellectual disability, the court may take the fact of such diminished responsibility into account when sentencing the accused.

[Sub-s. (7) substituted by s. 2 *(f)* of Act 4 of 2017 (wef 29 June 2017).]

(8) *(a)* An accused against whom a finding is made under subsection (6) may appeal against such finding if the finding is not made in consequence of an allegation by the accused under subsection (2).

(b) Such an appeal shall be made in the same manner and subject to the same conditions as an appeal against a conviction by the court for an offence.

(9) Where an appeal against a finding under subsection (6) is allowed, the court of appeal shall set aside the finding and the direction under that subsection and remit the case to the court which made the finding, whereupon the relevant proceedings shall be continued in the ordinary course.

81 Joinder of charges

(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.

(b) 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.

84 Essentials of charge

(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(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.

85 Objection to charge

(1) An accused may, before pleading to the charge under section 106, object to the charge on the ground-

that the charge does not comply with the provisions of this Act relating to the essentials of a charge;

that the charge does not set out an essential element of the relevant offence;

that the charge does not disclose an offence;

that the charge does not contain sufficient particulars of any matter alleged in the charge: Provided that such an objection may not be raised to a charge when he is required in terms of section 119 or 122A to plead thereto in the magistrate's court; or

[Para. *(d)* amended by s. 14 of Act 139 of 1992 (wef 7 August 1992).]

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

Provided that the accused shall give reasonable notice to the prosecution of his intention to object to the charge and shall state the ground upon which he bases his objection: Provided further that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(2) *(a)* If the court decides that an objection under subsection (1) is well-founded, the court shall make such order relating to the amendment of the charge or the delivery of particulars as it may deem fit.

(b) Where the prosecution fails to comply with an order under paragraph *(a)*, the court may quash the charge.

92 Certain omissions or imperfections not to invalidate charge

(1) A charge shall not be held defective-

for want of the averment of any matter which need not be proved;

because any person mentioned in the charge is designated by a name of office or other descriptive appellation instead of by his proper name;

because of an omission, in any case where time is not of the essence of the offence, to state the time at which the offence was committed;

because the offence is stated to have been committed on a day subsequent to the laying of the complaint or the service of the charge or on an impossible day or on a day that never happened;

for want of, or imperfection in, the addition of any accused or any other person;

for want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil in any case where the value or price or the amount of damage, injury or spoil is not of the essence of the offence.

(2) If any particular day or period is alleged in any charge to be the day on which or the period during which any act or offence was committed, proof that such act or offence was committed on any other day or during any other period not more than

three months before or after the day or period alleged therein shall be taken to support such allegation if time is not of the essence of the offence: Provided that-
proof may be given that the act or offence in question was committed on a day or during a period more than three months before or after the day or period stated in the charge unless it is made to appear to the court before which the proceedings are pending that the accused is likely to be prejudiced thereby in his defence on the merits;
if the court considers that the accused is likely to be prejudiced thereby in his defence on the merits, it shall reject such proof, and the accused shall be deemed not to have pleaded to the charge.

95 Rules applicable to particular charges

(1) A charge relating to a testamentary instrument need not allege that the instrument is the property of any person.

(2) A charge relating to anything fixed in a square, street or open place or in a place dedicated to public use or ornament, or relating to anything in a public place or office or taken therefrom, need not allege that the thing in question is the property of any person.

(3) A charge relating to a document which is the evidence of title to land or of an interest in land may describe the document as being the evidence of the title of the person or of one of the persons having an interest in the land to which the document relates, and shall describe the land or any relevant part thereof in a manner sufficient to identify it.

(4) A charge relating to the theft of anything leased to the accused may describe the thing in question as the property of the person who leased it to the accused.

(5) A charge against a person in the public service for an offence committed in connection with anything which came into his possession by virtue of his employment may describe the thing in question as the property of the State.

(6) A charge relating to anything in the possession or under the control of any public officer may describe the thing in question as being in the lawful possession or under the lawful control of such officer without referring to him by name.

(7) A charge relating to movable or immovable property whereof any body corporate has by law the management, control or custody, may describe the property in question as being under the lawful management or control or in the lawful custody of the body corporate in question.

(8) If it is uncertain to which of two or more persons property in connection with which an offence has been committed belonged at the time when the offence was committed, the relevant charge may describe the property as the property of one or other of those persons, naming each of them but without specifying which of them, and it shall be sufficient at the trial to prove that at the time when the offence was committed the property belonged to one or other of those persons without proving which of them.

(9) If property alleged to have been stolen was not in the physical possession of the owner thereof at the time when the theft was committed but in the physical possession of another person who had the custody thereof on behalf of the owner, it shall be sufficient to allege in a charge for the theft of that property that it was in the lawful custody or under the lawful control of that other person.

(10) A charge relating to theft from any grave need not allege that anything in the grave is the property of any person.

(11) In a charge in which any trade mark or forged trade mark is proposed to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that such trade mark or forged trade mark is a trade mark or forged trade mark.

(12) A charge relating to housebreaking or the entering of any house or premises with intent to commit an offence, whether the charge is brought under the common

law or any statute, may state either that the accused intended to commit a specified offence or that the accused intended to commit an offence to the prosecutor unknown.

103 Charge alleging intent to defraud need not allege or prove such intent in respect of particular person or mention owner of property or set forth details of deceit

In any charge in which it is necessary to allege that the accused performed an act with an intent to defraud, it shall be sufficient to allege and to prove that the accused performed the act with intent to defraud without alleging and proving that it was the intention of the accused to defraud any particular person, and such a charge need not mention the owner of any property involved or set forth the details of any deceit.

105 Accused to plead to charge

The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106.

[S. 105 substituted by s. 1 of Act 62 of 2001 (wef 14 December 2001).]

106 Pleas

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

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

that he is not guilty; or

that he has already been convicted of the offence with which he is charged; or

that he has already been acquitted of the offence with which he is charged; or

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

that the court has no jurisdiction to try the offence; or

that he has been discharged under the provisions of section 204 from prosecution for the offence charged; or

that the prosecutor has no title to prosecute; or

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

[Para. *(i)* added by s. 4 of Act 86 of 1996 (wef 1 September 1997).]

(2) Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge.

(3) An accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he bases his plea: Provided that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

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

110 Accused brought before court which has no jurisdiction

(1) Where an accused does not plead that the court has no jurisdiction and it at any stage-

after the accused has pleaded a plea of guilty or of not guilty; or

where the accused has pleaded any other plea and the court has determined such plea against the accused,
appears that the court in question does not have jurisdiction, the court shall for the purposes of this Act be deemed to have jurisdiction in respect of the offence in question.

(2) Where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.

112 Plea of guilty

(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-
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 11 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-
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
deal with the accused otherwise in accordance with law;

[Para. *(a)* substituted by s. 4 *(a)* of Act 109 of 1984 (wef 1 September 1984), by s. 7 *(a)* of Act 5 of 1991 (wef 1 May 1992) and by s. 2 of Act 33 of 1997 (wef 5 September 1997).]

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 12 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.

[Para. *(b)* amended by s. 4 *(b)* of Act 109 of 1984 (wef 1 September 1984) and substituted by s. 7 *(b)* of Act 5 of 1991 (wef 1 May 1992) and by s. 2 of Act 33 of 1997 (wef 5 September 1997).]

(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.

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113 Correction of plea of guilty

(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.

[Sub-s. (1) amended by s. 5 of Act 86 of 1996 (wef 1 September 1997).]

(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.

[Sub-s. (2) added by s. 8 of Act 5 of 1991 (wef 23 December 1991).]

114 Committal by magistrate's court of accused for sentence by regional court after plea of guilty

(1) If a magistrate's court, after conviction following on a plea of guilty but before sentence, is of the opinion-

that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court;

that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court; or

that the accused is a person referred to in section 286A (1),

[Para. *(c)* added by s. 18 *(b)* of Act 116 of 1993 (wef 1 November 1993).]

the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.

(2) Where an accused is committed under subsection (1) for sentence by a regional court, the record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court, and the plea of guilty and any admission by the accused shall stand unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(3)*(a)* Unless the regional court concerned-

is satisfied that a plea of guilty or an admission by the accused which is material to his guilt was incorrectly recorded; or

is not satisfied that the accused is guilty of the offence of which he has been convicted and in respect of which he has been committed for sentence,

the court shall make a formal finding of guilty and sentence the accused.

(b) If the court is satisfied that a plea of guilty or any admission by the accused which is material to his guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence of which he has been convicted and in respect of which he has been committed for sentence or that he has no valid defence to the charge, the court shall enter a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that any admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(4) The provisions of section 112 (3) shall apply with reference to the proceedings under this section.

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.

115A Committal of accused for trial by regional court

(1) Where an accused pleads not guilty in a magistrate's court, the court shall, subject to the provisions of section 115, at the request of the prosecutor made before any evidence is tendered, refer the accused for trial to a regional court having jurisdiction.

(2) The record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court.

[S. 115A inserted by s. 4 of Act 56 of 1979 (wef 1 June 1979).]

116 Committal of accused for sentence by regional court after trial in magistrate's court

(1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion-

that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court;

that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court; or

that the accused is a person referred to in section 286A (1),

[Para. *(c)* added by s. 19 *(b)* of Act 116 of 1993 (wef 1 November 1993).]

the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.

(2) The record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court.

(3)*(a)* The regional court shall, after considering the record of the proceedings in the magistrate's court, sentence the accused, and the judgment of the magistrate's court shall stand for this purpose and be sufficient for the regional court to pass any competent sentence: Provided that if the regional magistrate is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice he or she may request the presiding officer in the magistrate's court to provide him or her with the reasons for the conviction and if, after considering such reasons, the regional magistrate is satisfied that the proceedings are in accordance with justice he or she may sentence the accused, but if he or she remains of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice he or she shall, without sentencing the accused, record the reasons for his or her opinion and transmit such reasons and the reasons of the presiding officer of the magistrate's court, together with the record of the proceedings in the magistrate's court, to the

registrar of the provincial division having jurisdiction, and such registrar shall, as soon as possible, lay the same in chambers before a judge who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him or her under section 303.

[Para. *(a)* amended by s. 6 of Act 86 of 1996 (wef 1 September 1997).]

(b) If a regional magistrate acts under the proviso to paragraph *(a)*, he shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings, and, if the accused is in custody, the regional magistrate may make such order with regard to the detention or release of the accused as he may deem fit.

119 Accused to plead in magistrate's court on instructions of attorney-general

When an accused appears in a magistrate's court and the alleged offence may be tried by a superior court only or is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court, the prosecutor may, notwithstanding the provisions of section 75, on the instructions of the attorney-general, whether in general or in any particular case, put the charge, as well as any other charge which shall, in terms of section 82, be disposed of in a superior court, to the accused in the magistrate's court, and the accused shall, subject to the provisions of sections 77 and 85, be required by the magistrate to plead thereto forthwith.

[S. 119 substituted by s. 5 of Act 56 of 1979 (wef 1 June 1979), by s. 3 of Act 64 of 1982 (wef 21 April 1982) and by s. 16 of Act 59 of 1983 (wef 11 May 1983).]

122A Accused to plead in magistrate's court on charge to be tried in regional court

When an accused appears in a magistrate's court and the alleged offence may be tried by a regional court but not by a magistrate's court or the prosecutor informs the court that he is of the opinion that the alleged offence is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court but not of the jurisdiction of a regional court, the prosecutor may, notwithstanding the provisions of section 75, put the relevant charge, as well as any other charge which shall, in terms of section 82, be disposed of by a regional court, to the accused, who shall, subject to the provisions of sections 77 and 85, be required by the magistrate to plead thereto forthwith.

[S. 122A inserted by s. 7 of Act 56 of 1979 (wef 1 June 1979) and substituted by s. 18 of Act 59 of 1983 (wef 11 May 1983).]

122C Plea of guilty

(1) Where an accused under section 122A pleads guilty to the offence charged, the presiding magistrate shall question him in terms of the provisions of paragraph *(b)* of section 112 (1).

(2) *(a)* If the magistrate is satisfied that the accused admits the allegations stated in the charge, he shall adjourn the case for sentence by the regional court concerned.

(b) If the magistrate is not satisfied as provided in paragraph *(a)*, he shall record in what respect he is not so satisfied and enter a plea of not guilty and deal with the matter in terms of section 122D (1): Provided that an allegation with reference to which the magistrate is so satisfied and which has been recorded as an admission, shall stand at the trial of the accused as proof of such allegation.

(3)*(a)* The record of the proceedings in the magistrate's court shall, upon proof thereof in the regional court in which the accused is arraigned for sentence, be received as part of the record of that court against the accused, and the plea of guilty and any admission by the accused shall stand and form part of the record of that court

unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(b) Unless the accused satisfies the court that the plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his plea of guilty of the offence to which he has pleaded guilty, and impose any competent sentence.

(4) If the accused satisfies the court that the plea of guilty or an admission which is material to his guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that an admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(5) 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 purpose of determining an appropriate sentence.

[S. 122C inserted by s. 7 of Act 56 of 1979 (wef 1 June 1979).]

122D Plea of not guilty

(1) Where an accused under section 122A pleads not guilty to the offence charged, the court shall act in terms of section 115 and when that section has been complied with, the magistrate shall commit the accused for a summary trial in the regional court concerned on the charge to which he has pleaded not guilty or on the charge in respect of which a plea of not guilty has been entered under section 122C (2) *(b)*.

(2) The regional court may try the accused on the charge in respect of which he has been committed for a summary trial under subsection (1) or on any other or further charge which the prosecutor may prefer against the accused and which the court is competent to try.

(3) The record of proceedings in the magistrate's court shall, upon proof thereof in the regional court in which the accused is arraigned for a summary trial, be received as part of the record of that court against the accused, and any admission by the accused shall stand at the trial of the accused as proof of such an admission.

[S. 122D inserted by s. 7 of Act 56 of 1979 (wef 1 June 1979).]

150 Prosecutor may address court and adduce evidence

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

(2) *(a)* The prosecutor may then examine the witnesses for the prosecution and adduce such evidence as may be admissible to prove that the accused committed the offence referred to in the charge or that he committed an offence of which he may be convicted on the charge.

(b) Where any document may be received in evidence before any court upon its mere production, the prosecutor shall read out such document in court unless the accused is in possession of a copy of such document or dispenses with the reading out thereof.

151 Accused may address court and adduce evidence

(1) *(a)* If an accused is not under section 174 discharged at the close of the case for the prosecution, the court shall ask him whether he intends adducing any evidence

on behalf of the defence, and if he answers in the affirmative, he may address the court for the purpose of indicating to the court, without comment, what evidence he intends adducing on behalf of the defence.

(b) The court shall also ask the accused whether he himself intends giving evidence on behalf of the defence, and-

if the accused answers in the affirmative, he shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence; or

if the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.

(2) *(a)* The accused may then examine any other witness for the defence and adduce such other evidence on behalf of the defence as may be admissible.

(b) Where any document may be received in evidence before any court upon its mere production and the accused wishes to place such evidence before the court, he shall read out the relevant document in court unless the prosecutor is in possession of a copy of such document or dispenses with the reading out thereof.

153 Circumstances in which criminal proceedings shall not take place in open court

(1) In addition to the provisions of section 63 (5) of the Child Justice Act, 2008, if it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof.

[Sub-s. (1) substituted by s. 99 (1) of Act 75 of 2008 (wef 1 April 2010).]

(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct-

that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the court;

that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.

(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit-

any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person;

any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; or

extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage,

the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

[Sub-s. (3) substituted by s. 68 of Act 32 of 2007 (wef 16 December 2007).]

(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs *(a)* and *(b)* of subsection (3), shall not be admitted at such

proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person *in loco parentis*, requests otherwise.

[Sub-s. (3A) inserted by s. 2 of Act 103 of 1987 (wef 23 October 1987).]

(4) .....

[Sub-s. (4) deleted by s. 99 (1) of Act 75 of 2008 (wef 1 April 2010).]

(5) Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.

(6) The court may direct that no person under the age of eighteen years shall be present at criminal proceedings before the court, unless he is a witness referred to in subsection (5) and is actually giving evidence at such proceedings or his presence is authorized by the court.

155 Persons implicated in same offence may be tried together

(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.

156 Persons committing separate offences at same time and place may be tried together

Any number of persons charged in respect of separate offences committed at the same place and at the same time or at about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that evidence admissible at the trial of one of such persons will, in his opinion, also be admissible as evidence at the trial of any other such person or such persons.

157 Joinder of accused and separation of trials

(1) An accused may be joined with any other accused in the same criminal proceedings at any time before any evidence has been led in respect of the charge in question.

(2) Where two or more persons are charged jointly, whether with the same offence or with the different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of such accused.

159 Circumstances in which criminal proceedings may take place in absence of accused

(1) If an accused at criminal proceedings conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence.

(2) If two or more accused appear jointly at criminal proceedings and-
the court is at any time after the commencement of the proceedings satisfied, upon application made to it by any accused in person or by his representative-
that the physical condition of that accused is such that he is unable to attend the proceedings or that it is undesirable that he should attend the proceedings; or

that circumstances relating to the illness or death of a member of the family of that accused make his absence from the proceedings necessary; or
any of the accused is absent from the proceedings, whether under the provisions of subsection (1) or without leave of the court,
the court, if it is of the opinion that the proceedings cannot be postponed without undue prejudice, embarrassment or inconvenience to the prosecution or any co-accused or any witness in attendance or subpoenaed to attend, may-
in the case of paragraph *(a)*, authorize the absence of the accused concerned from the proceedings for a period determined by the court and on the conditions which the court may deem fit to impose; and
direct that the proceedings be proceeded with in the absence of the accused concerned.

(3) Where an accused becomes absent from the proceedings in the circumstances referred to in subsection (2), the court may, in lieu of directing that the proceedings be proceeded with in the absence of the accused concerned, upon the application of the prosecution direct that the proceedings in respect of the absent accused be separated from the proceedings in respect of the accused who are present, and thereafter, when such accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent, and the court shall not be required to be differently constituted merely by reason of such separation.

(4) If an accused who is in custody in terms of an order of court cannot, by reason of his physical indisposition or other physical condition, be brought before a court for the purposes of obtaining an order for his further detention, the court before which the accused would have been brought for purposes of such an order if it were not for the indisposition or other condition, may, upon application made by the prosecution at any time prior to the expiry of the order for his detention wherein the circumstances surrounding the indisposition or other condition are set out, supported by a certificate from a medical practitioner, order, in the absence of such an accused, that he be detained at a place indicated by the court and for the period which the court deems necessary in order that he can recover and be brought before the court so that an order for his further detention for the purposes of his trial can be obtained.

[Sub-s. (4) added by s. 9 of Act 5 of 1991 (wef 23 December 1991).]

160 Procedure at criminal proceedings where accused is absent

(1) If an accused referred to in section 159 (1) or (2) again attends the proceedings in question, he may, unless he was legally represented during his absence, examine any witness who testified during his absence, and inspect the record of the proceedings or require the court to have such record read over to him.

(2) If the examination of a witness under subsection (1) takes place after the evidence on behalf of the prosecution or any co-accused has been concluded, the prosecution or such co-accused may in respect of any issue raised by the examination, lead evidence in rebuttal of evidence relating to the issue so raised.

(3) *(a)* When the evidence on behalf of all the accused, other than an accused who is absent from the proceedings, is concluded, the court shall, subject to the provisions of paragraph *(b)*, postpone the proceedings until such absent accused is in attendance and, if necessary, further postpone the proceedings until the evidence, if any, on behalf of that accused has been led.

(b) If it appears to the court that the presence of an absent accused cannot reasonably be obtained, the court may direct that the proceedings in respect of the accused who are present be concluded as if such proceedings had been separated from the proceedings at the stage at which the accused concerned became absent from the proceedings, and when such absent accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent, and the court shall not be required to be differently constituted merely by reason of such separation.

(c) When, in the case of a trial, the evidence on behalf of all the accused has been concluded and any accused is absent when the verdict is to be delivered, the verdict may be delivered in respect of all the accused or be withheld until all the accused are present or be delivered in respect of any accused present and withheld in respect of the absent accused until he is again in attendance.

166 Cross-examination and re-examination of witnesses

(1) An accused may cross-examine any witness called on behalf of the prosecution at criminal proceedings or any co-accused who testifies at criminal proceedings or any witness called on behalf of such co-accused at criminal proceedings, and the prosecutor may cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings, and a witness called at such proceedings on behalf of the prosecution may be re-examined by the prosecutor on any matter raised during the cross-examination of that witness, and a witness called on behalf of the defence at such proceedings may likewise be re-examined by the accused.

(2) The prosecutor and the accused may, with leave of the court, examine or cross-examine any witness called by the court at criminal proceedings.

(3) *(a)* If it appears to a court that any cross-examination contemplated in this section is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevancy of any particular line of examination and may impose reasonable limits on the examination regarding the length thereof or regarding any particular line of examination.

(b) The court may order that any submission regarding the relevancy of the cross-examination be heard in the absence of the witness.

[Sub-s. (3) added by s. 8 of Act 86 of 1996 (wef 1 September 1997).]

168 Court may adjourn proceedings to any date

A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of this Act.

174 Accused may be discharged at close of case for prosecution

If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

179 Process for securing attendance of witness

(1) *(a)* The prosecutor or an accused may compel the attendance of any person to give evidence or to produce any book, paper or document in criminal proceedings by taking out of the office prescribed by the rules of court the process of court for that purpose.

(b) If any police official has reasonable grounds for believing that the attendance of any person is or will be necessary to give evidence or to produce any book, paper or document in criminal proceedings in a lower court, and hands to such person a written notice calling upon him to attend such criminal proceedings on the date and at the time and place specified in the notice, to give evidence or to produce any book, paper or document, likewise specified, such person shall, for the purposes of this Act, be deemed to have been duly subpoenaed so to attend such criminal proceedings.

(2) Where an accused desires to have any witness subpoenaed, a sum of money sufficient to cover the costs of serving the subpoena shall be deposited with the prescribed officer of the court.

(3) *(a)* Where an accused desires to have any witness subpoenaed and he satisfies the prescribed officer of the court-
that he is unable to pay the necessary costs and fees; and
that such witness is necessary and material for his defence,
such officer shall subpoena such witness.

(b) In any case where the prescribed officer of the court is not so satisfied, he shall, upon the request of the accused, refer the relevant application to the judge or judicial officer presiding over the court, who may grant or refuse the application or defer his decision until he has heard other evidence in the case.

(4) For the purposes of this section **'prescribed officer of the court'** means the registrar, assistant registrar, clerk of the court or any officer prescribed by the rules of court.

189 Powers of court with regard to recalcitrant witness

(1) If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.

[Sub-s. (1) substituted by s. 20 of Act 59 of 1983 (wef 11 May 1983) and by s. 4 of Act 126 of 1992 (wef 31 July 1992).]

(2) After the expiration of any sentence imposed under subsection (1), the person concerned may from time to time again be dealt with under that subsection with regard to any further refusal or failure.

(3) A court may at any time on good cause shown remit any punishment or part thereof imposed by it under subsection (1).

(4) Any sentence imposed by any court under subsection (1) shall be executed and be subject to appeal in the same manner as a sentence imposed in any criminal case by such court, and shall be served before any other sentence of imprisonment imposed on the person concerned.

(5) The court may, notwithstanding any action taken under this section, at any time conclude the criminal proceedings referred to in subsection (1).

(6) No person shall be bound to produce any book, paper or document not specified in any subpoena served upon him, unless he has such book, paper or document in court.

(7) Any lower court shall have jurisdiction to sentence any person to the maximum period of imprisonment prescribed by this section.

204 Incriminating evidence by witness for prosecution

(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor-
the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness-
that he is obliged to give evidence at the proceedings in question;
that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;
that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a

verdict of guilty would be competent upon a charge relating to the offence so specified;
that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and
such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him-
such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and
the court shall cause such discharge to be entered on the record of the proceedings in question.

(3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.

(4) *(a)* Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.

(b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

[Para. *(b)* amended by s. 1 of Act 49 of 1996 (wef 4 October 1996).]

212 Proof of certain facts by affidavit or certificate

(1) Whenever in criminal proceedings the question arises whether any particular act, transaction or occurrence did or did not take place in any particular department or sub-department of the State or of a provincial administration or in any branch or office of such department or sub-department or in any particular court of law or in any particular bank, or the question arises in such proceedings whether any particular functionary in any such department, sub-department, branch or office did or did not perform any particular act or did or did not take part in any particular transaction, a document purporting to be an affidavit made by a person who in that affidavit alleges-
that he is in the service of the State or a provincial administration or of the bank in question, and that he is employed in the particular department or sub-department or the particular branch or office thereof or in the particular court or bank;
that-
if the act, transaction or occurrence in question had taken place in such department, sub-department, branch or office or in such court or bank; or
if such functionary had performed such particular act or had taken part in such particular transaction,
it would in the ordinary course of events have come to his, the deponent's, knowledge and a record thereof, available to him, would have been kept; and
that it has not come to his knowledge-
that such act, transaction or occurrence took place; or

that such functionary performed such act or took part in such transaction,
and that there is no record thereof,
shall, upon its mere production at such proceedings, be *prima facie* proof that the act, transaction or occurrence in question did not take place or, as the case may be, that the functionary concerned did not perform the act in question or did not take part in the transaction in question.

(2) Whenever in criminal proceedings the question arises whether any person bearing a particular name did or did not furnish any particular officer in the service of the State or of a provincial administration with any particular information or document, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is the said officer and that no person bearing the said name furnished him with such information or document, shall, upon its mere production at such proceedings, be *prima facie* proof that the said person did not furnish the said officer with any such information or document.

(3) Whenever in criminal proceedings the question arises whether any matter has been registered under any law or whether any fact or transaction has been recorded thereunder or whether anything connected therewith has been done thereunder, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is the person upon whom the law in question confers the power or imposes the duty to register such matter or to record such fact or transaction or to do such thing connected therewith and that he has registered the matter in question or that he has recorded the fact or transaction in question or that he has done the thing connected therewith or that he has satisfied himself that the matter in question was registered or that the fact or transaction in question was recorded or that the thing connected therewith was done, shall, upon its mere production at such proceedings, be *prima facie* proof that such matter was registered or, as the case may be, that such fact or transaction was recorded or that the thing connected therewith was done.

[Sub-s. (3) substituted by s. 12 of Act 56 of 1979 (wef 1 June 1979).]

(4)*(a)* Whenever any fact established by any examination or process requiring any skill-
in biology, chemistry, physics, astronomy, geography or geology;
in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;
in computer science or in any discipline of engineering;
in anatomy or in human behavioural sciences;
in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or
in ballistics, in the identification of fingerprints or body-prints or in the examination of disputed documents,
is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the *Gazette*, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be *prima facie* proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate.

[Para. *(a)* amended by ss. 46 and 47 of Act 97 of 1986 (wef 3 October 1986), by s. 40 of Act 122 of 1991 (wef 15 August 1991) and by s. 9 of Act 86 of 1996 (wef 1 September 1997) and substituted by s. 6 of Act 34 of 1998 (wef 15 January 1999) and by s. 4 *(a)* of Act 6 of 2010 (wef 18 January 2013).]

(b) Any person who issues a certificate under paragraph *(a)* and who in such certificate wilfully states anything which is false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury.

(5) Whenever the question as to the existence and nature of a precious metal or any precious stone is or may become relevant to the issue in criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is an appraiser of precious metals or precious stones, that he is in the service of the State, that such precious metal or such precious stone is indeed a precious metal or a precious stone, as the case may be, that it is a precious metal or a precious stone of a particular kind and appearance and that the mass or value of such precious metal or such precious stone is as specified in that affidavit, shall, upon its mere production at such proceedings, be *prima facie* proof that it is a precious metal or a precious stone of a particular kind and appearance and the mass or value of such precious metal or such precious stone is as so specified.

[Sub-s. (5) substituted by s. 11 of Act 5 of 1991 (wef 23 December 1991).]

(6) In criminal proceedings in which the finding of or action taken in connection with any particular fingerprint, body-print, bodily sample or crime scene sample is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State and that he or she is in the performance of his or her official duties-

found such fingerprint, body-print, bodily sample or crime scene sample at or in the place or on or in the article or in the position or circumstances stated in the affidavit; or

dealt with such fingerprint, body-print, bodily sample or crime scene sample in the manner stated in the affidavit, shall, upon the mere production thereof at such proceedings, be *prima facie* proof that such fingerprint, body-print, bodily sample or crime scene sample, was so found or, as the case may be, was so dealt with.

[Sub-s. (6) substituted by s. 4 *(b)* of Act 6 of 2010 (wef 18 January 2013) and by s. 3 *(a)* of Act 37 of 2013 (wef 31 January 2015).]

(7) In criminal proceedings in which the physical condition or the identity, in or at any hospital, nursing home, ambulance or mortuary, of any deceased person or of any dead body is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges-

that he is employed at or in connection with the hospital, nursing home, ambulance or mortuary in question; and

that he during the performance of his official duties observed the physical characteristics or condition of the deceased person or of the dead body in question; and

that while the deceased person or the dead body in question was under his care, such deceased person or such dead body had or sustained the injuries or wounds described in the affidavit, or sustained no injuries or wounds; or

that he pointed out or handed over the deceased person or the dead body in question to a specified person or that he left the deceased person or the dead body in question in the care of a specified person or that the deceased person or the dead body in question was pointed out or handed over to him or left in his care by a specified person,

shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged.

(8)*(a)* In criminal proceedings in which the collection, receipt, custody, packing, marking, delivery or despatch of any fingerprint or body-print, article of clothing, specimen, bodily sample, crime scene sample, tissue (as defined in section 1 of the National Health Act), or any object of whatever nature is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges-

that he or she is in the service of the State or of a provincial administration, any university in the Republic or anybody designated by the Minister under subsection (4); that he or she in the performance of his or her official duties-

received from any person, institute, state department or body specified in the affidavit, a fingerprint or body-print, article of clothing, specimen, bodily sample, crime scene sample, tissue or object described in the affidavit, which was packed or

marked or, as the case may be, which he or she packed or marked in the manner described in the affidavit;
delivered or despatched to any person, institute, state department or body specified in the affidavit, a fingerprint or body-print, article of clothing, specimen, bodily sample, crime scene sample, tissue or object described in the affidavit, which was packed or marked or, as the case may be, which he or she packed or marked in the manner described in the affidavit;
during a period specified in the affidavit, had a fingerprint or body-print, article of clothing, specimen, bodily sample, crime scene sample, tissue or object described in the affidavit in his or her custody in the manner described in the affidavit, which was packed or marked in the manner described in the affidavit,
shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged: Provided that the person who may make such affidavit in any case relating to any article of clothing, specimen, bodily sample, crime scene sample or tissue, may issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate.

[Para. *(a)* amended by s. 46 of Act 97 of 1986 (wef 3 October 1986) and substituted by s. 4 *(c)* of Act 6 of 2010 (wef 18 January 2013) and by s. 3 *(b)* of Act 37 of 2013 (wef 31 January 2015).]

(b) Any person who issues a certificate under paragraph *(a)* and who in such certificate wilfully states anything which is false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury.

(9) In criminal proceedings in which it is relevant to prove-
the details of any consignment of goods delivered to the Railways Administration for conveyance to a specified consignee, a document purporting to be an affidavit made by a person who in that affidavit alleges-
that he consigned the goods set out in the affidavit to a consignee specified in the affidavit;
that, on a date specified in the affidavit, he delivered such goods or caused such goods to be delivered to the Railways Administration for conveyance to such consignee, and
that the consignment note referred to in such affidavit relates to such goods,
shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged; or
that the goods referred to in paragraph *(a)* were received by the Railways Administration for conveyance to a specified consignee or that such goods were handled or transhipped en route by the Railways Administration, a document purporting to be an affidavit made by a person who in that affidavit alleges-
that he at all relevant times was in the service of the Railways Administration in a stated capacity;
that he in the performance of his official duties received or, as the case may be, handled or transhipped the goods referred to in the consignment note referred to in paragraph *(a)*,
shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged.

(10) *(a)* The Minister may in respect of any measuring instrument as defined in section 1 of the Trade Metrology Act, 1973 (Act 77 of 1973), by notice in the *Gazette* prescribe the conditions and requirements which shall be complied with before any reading by such measuring instrument may be accepted in criminal proceedings as proof of the fact which it purports to prove, and if the Minister has so prescribed such conditions and requirements and upon proof that such conditions and requirements have been complied with in respect of any particular measuring instrument, the measuring instrument in question shall, for the purposes of proving the fact which it purports to prove, be accepted at criminal proceedings as proving the fact recorded by it, unless the contrary is proved.

(b) An affidavit in which the deponent declares that the conditions and requirements referred to in paragraph *(a)* have been complied with in respect of the measuring instrument in question shall, upon the mere production thereof at the

criminal proceedings in question, be *prima facie* proof that such conditions and requirements have been complied with.

(11) *(a)* The Minister may with reference to any syringe intended for the drawing of blood or any receptacle intended for the storing of blood, by notice in the *Gazette* prescribe the conditions and requirements relating to the cleanliness and sealing or manner of sealing thereof which shall be complied with before any such syringe or receptacle may be used in connection with the analysing of the blood of any person for the purposes of criminal proceedings, and if-

any such syringe or receptacle is immediately before being used for the said purpose, in a sealed condition, or contained in a holder which is sealed with a seal or in a manner prescribed by the Minister; and

any such syringe, receptacle or holder bears an endorsement that the conditions and requirements prescribed by the Minister have been complied with in respect of such syringe or receptacle,

proof at criminal proceedings that the seal, as thus prescribed, of such syringe or receptacle was immediately before the use of such syringe or receptacle for the said purpose intact, shall be deemed to constitute *prima facie* proof that the syringe or the receptacle in question was then free from any substance or contamination which could materially affect the result of the analysis in question.

(b) An affidavit in which the deponent declares that he had satisfied himself before using the syringe or receptacle in question-

that the syringe or receptacle was sealed as provided in paragraph *(a)* (i) and that the seal was intact immediately before the syringe or receptacle was used for the said purpose; and

that the syringe, receptacle or, as the case may be, the holder contained the endorsement referred to in paragraph *(a)* (ii),

shall, upon the mere production thereof at the proceedings in question, be *prima facie* proof that the syringe or receptacle was so sealed, that the seal was so intact and that the syringe, receptacle or holder, as the case may be, was so endorsed.

(c) Any person who for the purposes of this subsection makes or causes to be made a false endorsement on any syringe, receptacle or holder, knowing it to be false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury.

(12) The court before which an affidavit or certificate is under any of the preceding provisions of this section produced as *prima facie* proof of the relevant contents thereof, may in its discretion cause the person who made the affidavit or issued the certificate to be subpoenaed to give oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to such person for reply, and such interrogatories and any reply thereto purporting to be a reply from such person, shall likewise be admissible in evidence at such proceedings.

(13) No provision of this section shall affect any other law under which any certificate or other document is admissible in evidence, and the provisions of this section shall be deemed to be additional to and not in substitution of any such law.

213 Proof of written statement by consent

(1) In criminal proceedings a written statement by any person, other than an accused at such proceedings, shall, subject to the provisions of subsection (2), be admissible as evidence to the same extent as oral evidence to the same effect by such person.

(2) *(a)* The statement shall purport to be signed by the person who made it, and shall contain a declaration by such person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or which he did not believe to be true.

(b) If the person who makes the statement cannot read it, it shall be read to him before he signs it, and an endorsement shall be made thereon by the person who so read the statement to the effect that it was so read.

(c) A copy of the statement, together with a copy of any document referred to in the statement as an exhibit, or with such information as may be necessary in order to enable the party on whom it is served to inspect such document or a copy thereof, shall, before the date on which the document is to be tendered in evidence, be served on each of the other parties to the proceedings, and any such party may, at least two days before the commencement of the proceedings, object to the statement being tendered in evidence under this section.

(d) If a party objects under paragraph *(c)* that the statement in question be tendered in evidence, the statement shall not, but subject to the provisions of paragraph *(e)*, be admissible as evidence under this section.

(e) If a party does not object under paragraph *(c)* or if the parties agree before or during the proceedings in question that the statement may be so tendered, the statement may, upon the mere production thereof at such proceedings, be admitted as evidence in the proceedings.

(f) When the documents referred to in paragraph *(c)* are served on an accused, the documents shall be accompanied by a written notification in which the accused is informed that the statement in question will be tendered in evidence at his trial in lieu of the State calling as a witness the person who made the statement but that such statement shall not without the consent of the accused be so tendered in evidence if he notifies the prosecutor concerned, at least two days before the commencement of the proceedings, that he objects to the statement so being tendered in evidence.

(3) The parties to criminal proceedings may, before or during such proceedings, agree that any written statement referred to in subsections (2) *(a)* and *(b)* which has not been served in terms of subsection (2) *(c)* be tendered in evidence at such proceedings, whereupon such statement may, upon the mere production thereof at such proceedings, be admitted as evidence in the proceedings.

(4) Notwithstanding that a written statement made by any person may be admissible as evidence under this section-

a party by whom or on whose behalf a copy of the statement was served, may call such person to give oral evidence;

the court may, of its own motion, and shall, upon the application of any party to the proceedings in question, cause such person to be subpoenaed to give oral evidence before the court or the court may, where the person concerned is resident outside the Republic, issue a commission in respect of such person in terms of section 171.

(5) Any document or object referred to as an exhibit and identified in a written statement tendered in evidence under this section, shall be treated as if it had been produced as an exhibit and identified in court by the person who made the statement.

(6) Any person who makes a statement which is admitted as evidence under this section and who in such statement wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury, shall be deemed to have committed the offence of perjury and shall, upon conviction, be liable to the punishment prescribed for the offence of perjury.

220 Admissions

An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact.

[S. 220 substituted by s. 12 of Act 86 of 1996 (wef 1 September 1997).]

233 Proof of public documents

(1) Whenever any book or other document is of such a public nature as to be admissible in evidence upon its mere production from proper custody, any copy

thereof or extract therefrom shall be admissible in evidence at criminal proceedings if it is proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted.

(2) Such officer shall furnish such certified copy or extract to any person applying therefor, upon payment of an amount in accordance with the tariff of fees prescribed by or under any law or, if no such tariff has been so prescribed, an amount in accordance with such tariff of fees as the Minister, in consultation with the Minister of Finance, may from time to time determine.

234 Proof of official documents

(1) It shall, at criminal proceedings, be sufficient to prove an original official document which is in the custody or under the control of any State official by virtue of his office, if a copy thereof or an extract therefrom, certified as a true copy or extract by the head of the department concerned or by any State official authorized thereto by such head, is produced in evidence at such proceedings.

(2) *(a)* An original official document referred to in subsection (1), other than the record of judicial proceedings, may be produced at criminal proceedings only upon the order of the attorney-general.

(b) It shall not be necessary for the head of the department concerned to appear in person to produce an original document under paragraph *(a)*, but such document may be produced by any person authorized thereto by such head.

(3) Any official who, under subsection (1), certifies any copy or extract as true knowing that such copy or extract is false, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding two years.

235 Proof of judicial proceedings

(1) It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be *prima facie* proof that any matter purporting to be recorded thereon was correctly recorded.

(2) Any person who, under subsection (1), certifies any copy as true knowing that such copy is false, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding two years.

260 Robbery

If the evidence on a charge of robbery or attempted robbery does not prove the offence of robbery or, as the case may be, attempted robbery, but-

the offence of assault with intent to do grievous bodily harm;

the offence of common assault;

the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law;

the offence of theft;

the offence of receiving stolen property knowing it to have been stolen; or

an offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955),

.....

[Para. *(g)* deleted by s. 1 of Act 49 of 1996 (wef 4 October 1996).]

the accused may be found guilty of the offence so proved, or, where the offence of assault with intent to do grievous bodily harm or the offence of common assault and the offence of theft are proved, of both such offences.

262 Housebreaking with intent to commit an offence

(1) If the evidence on a charge of housebreaking with intent to commit an offence specified in the charge, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit the offence so specified but the offence of housebreaking with intent to commit an offence other than the offence so specified or the offence of housebreaking with intent to commit an offence unknown or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

[Sub-s. (1) substituted by s. 6 of Act 64 of 1982 (wef 21 April 1982).]

(2) If the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of housebreaking with intent to commit a specific offence, or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

[Sub-s. (2) substituted by s. 5 *(a)* of Act 4 of 1992 (wef 11 March 1992).]

(3) If the evidence on a charge of attempted housebreaking with intent to commit an offence specified in the charge, or attempted housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of attempted housebreaking with intent to commit the offence so specified, or attempted housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

[Sub-s. (3) added by s. 5 *(b)* of Act 4 of 1992 (wef 11 March 1992).]

271 Previous convictions may be proved

(1) The prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused.

(2) The court shall ask the accused whether he admits or denies any previous conviction referred to in subsection (1).

(3) If the accused denies such previous conviction, the prosecution may tender evidence that the accused was so previously convicted.

(4) If the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.

274 Evidence on sentence

(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.

276 Nature of punishments

(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely-

.....

[Para. *(a)* deleted by s. 34 of Act 105 of 1997 (wef 13 November 1998).]
imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B (1);
[Para. *(b)* substituted by s. 3 of Act 107 of 1990 (wef 27 July 1990) and by s. 20 of Act 116 of 1993 (wef 1 November 1993).]
periodical imprisonment;
declaration as an habitual criminal;
committal to any institution established by law;
a fine;
.....
[Para. *(g)* deleted by s. 2 of Act 33 of 1997 (wef 5 September 1997).]
correctional supervision;
[Para. *(h)* added by s. 41 *(a)* of Act 122 of 1991 (wef various dates in respect of different magisterial districts - see Schedule appearing after this Act).]
imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.
[Para. *(i)* added by s. 41 *(a)* of Act 122 of 1991 (wef various dates in respect of different magisterial districts - see Schedule appearing after this Act) and substituted by s. 20 of Act 87 of 1997 (wef 1 October 2004).]
(2) Save as is otherwise expressly provided by this Act, no provision thereof shall be construed-
as authorizing any court to impose any sentence other than or any sentence in excess of the sentence which that court may impose in respect of any offence; or
as derogating from any authority specially conferred upon any court by any law to impose any other punishment or to impose any forfeiture in addition to any other punishment.
(3) Notwithstanding anything to the contrary in any law contained, other than the Criminal Law Amendment Act, 1997 (Act 105 of 1997), the provisions of subsection (1) shall not be construed as prohibiting the court-
from imposing imprisonment together with correctional supervision; or
from imposing the punishment referred to in subsection (1) *(h)* or *(i)* in respect of any offence, whether under the common law or a statutory provision, irrespective of whether the law in question provides for such or any other punishment: Provided that any punishment contemplated in this paragraph may not be imposed in any case where the court is obliged to impose a sentence contemplated in section 51 (1) or (2), read with section 52, of the Criminal Law Amendment Act, 1997.
[Para. *(b)* amended by s. 5 of Act 22 of 2005 (wef 11 January 2006).]
[Sub-s. (3) added by s. 41 *(b)* of Act 122 of 1991 (wef various dates in respect of different magisterial districts - see Schedule appearing after this Act) and substituted by s. 18 (1) of Act 139 of 1992 (wef 15 August 1991) and by s. 5 of Act 55 of 2003 (wef 31 March 2005).]

297 Conditional or unconditional postponement or suspension of sentence, and caution or reprimand

(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion-
postpone for a period not exceeding five years the passing of sentence and release the person concerned-
on one or more conditions, whether as to-
compensation;
the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

[Item *(cc)* substituted by s. 20 *(a)* of Act 33 of 1986 (wef 1 February 1989).]
submission to correctional supervision;
[Item *(cc*A*)* inserted by s. 47 of Act 122 of 1991 (wef various dates in respect of different magisterial districts - see Schedule appearing after this Act).]
submission to instruction or treatment;
submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991 (Act 116 of 1991);
[Item *(ee)* amended by s. 4 of Act 18 of 1996 (wef 1 April 1997).]
the compulsory attendance or residence at some specified centre for a specified purpose;
good conduct;
any other matter,
and order such person to appear before the court at the expiration of the relevant period; or
unconditionally, and order such person to appear before the court, if called upon before the expiration of the relevant period; or
pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph *(a)* (i) which the court may specify in the order; or
discharge the person concerned with a caution or reprimand, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

(1A) .....

[Sub-s. (1A) inserted by s. 20 *(b)* of Act 33 of 1986 (wef 1 February 1989) and deleted by s. 99 (1) of Act 75 of 2008 (wef 1 April 2010).]

(2) Where a court has under paragraph *(a)* (i) of subsection (1) postponed the passing of sentence and the court, whether differently constituted or not, is at the expiration of the relevant period satisfied that the person concerned has observed the conditions imposed under that paragraph, the court shall discharge him without passing sentence, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

(3) Where a court has under paragraph *(a)* (ii) of subsection (1) unconditionally postponed the passing of sentence, and the person concerned has not at the expiration of the relevant period been called upon to appear before the court, such person shall be deemed to have been discharged with a caution under subsection (1) *(c)*.

(4) Where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph *(a)* (i) of subsection (1).

(5) Where a court imposes a fine, the court may suspend the payment thereof-
until the expiration of a period not exceeding five years; or
on condition that the fine is paid over a period not exceeding five years in instalments and at intervals determined by the court.

(6) *(a)* A court which sentences a person to a term of imprisonment as an alternative to a fine or, if the court which has imposed such sentence was a regional court or a magistrate's court, a magistrate, may, where the fine is not paid, at any stage before the expiration of the period of imprisonment, suspend the operation of the sentence and order the release of the person concerned on such conditions relating to the payment of the fine or such portion thereof as may still be due, as to the court or, in the case of a sentence imposed by a regional court or magistrate's court, the magistrate, may seem expedient, including a condition that the person concerned take up a specified employment and that the fine due be paid in instalments by the person concerned or his employer: Provided that the power conferred by this subsection shall not be exercised by a magistrate where the court which has imposed the sentence has so ordered.

(b) A court which has suspended a sentence under paragraph *(a)*, whether differently constituted or not, or any court of equal or superior jurisdiction, or a magistrate who has suspended a sentence in terms of paragraph *(a)*, may at any time-

further suspend the operation of the sentence on any existing or additional conditions which to the court or magistrate may seem expedient; or

cancel the order of suspension and recommit the person concerned to serve the balance of the sentence.

[Sub-s. (6) substituted by s. 21 of Act 59 of 1983 (wef 11 May 1983).]

(7) A court which has-

postponed the passing of sentence under paragraph *(a)* (i) of subsection (1);

suspended the operation of a sentence under subsection (1) *(b)* or (4); or

suspended the payment of a fine under subsection (5),

whether differently constituted or not, or any court of equal or superior jurisdiction may, if satisfied that the person concerned has through circumstances beyond his control been unable to comply with any relevant condition, or for any other good and sufficient reason, further postpone the passing of sentence or further suspend the operation of a sentence or the payment of a fine, as the case may be, subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension.

(8) A court which has-

postponed the passing of sentence under paragraph *(a)* (i) of subsection (1); or

suspended the operation of a sentence under subsection (1) *(b)* or under subsection (4),

on condition that the person concerned perform community service or that he submit himself to instruction or treatment or to the supervision or control of a probation officer or that he attend or reside at a specified centre for a specified purpose, may, whether or not the court is constituted differently than it was at the time of such postponement or suspension, at any time during the period of postponement or suspension on good cause shown amend any such condition or substitute any other competent condition for such condition, or cancel the order of postponement or suspension and impose a competent sentence or put the suspended sentence into operation, as the case may be.

[Sub-s. (8) amended by s. 20 *(c)* of Act 33 of 1986 (wef 1 February 1989).]

(8A) *(a)* A court which under this section has imposed a condition according to which the person concerned is required to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, shall cause to be served upon the person concerned a notice in writing directing him to report on a date and time specified in the notice or (if prevented from doing so by circumstances beyond his control) as soon as practicable thereafter, to the person specified in that notice, whether within or outside the area of jurisdiction of the court, in order to perform that community service, to undergo that instruction or treatment or to attend that centre or to reside thereat, as the case may be.

(b) A copy of the said notice shall serve as authority to the person mentioned therein to have that community service performed by the person concerned or to provide that instruction or treatment to the person concerned or to allow the person concerned to attend that centre or to reside thereat.

[Sub-s. (8A) inserted by s. 20 *(d)* of Act 33 of 1986 (wef 1 February 1989).]

(8B) Any person who-

when he reports to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, is under the influence of intoxicating liquor or drugs or the like; or

impersonates or falsely represents himself to be the person who has been directed to perform the community service in question, to undergo the instruction or treatment in question or to attend or reside at the specified centre for the specified purpose,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

[Sub-s. (8B) inserted by s. 20 *(d)* of Act 33 of 1986 (wef 1 February 1989).]

(9)*(a)* If any condition imposed under this section is not complied with, the person concerned may upon the order of any court, or if it appears from information under oath that the person concerned has failed to comply with such condition, upon the order of any magistrate, regional magistrate or judge, as the case may be, be arrested or detained and, where the condition in question-

was imposed under paragraph *(a)* (i) of subsection (1), be brought before the court which postponed the passing of sentence or before any court of equal or superior jurisdiction; or

was imposed under subsection (1) *(b)*, (4) or (5), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction,

and such court, whether or not it is, in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such postponement or suspension, may then, in the case of subparagraph (i), impose any competent sentence or, in the case of subparagraph (ii), put into operation the sentence which was suspended.

[Para. *(a)* amended by s. 49 of Act 129 of 1993 (wef 1 September 1993) and by s. 99 (1) of Act 75 of 2008 (wef 1 April 2010).]

(b) A person who has been called upon under paragraph *(a)* (ii) of subsection (1) to appear before the court may, upon the order of the court in question, be arrested and brought before that court, and such court, whether or not constituted differently than it was at the time of the postponement of sentence, may impose upon such person any competent sentence.

300 Court may award compensation where offence causes damage to or loss of property

(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss: Provided that-

a regional court or a magistrate's court shall not make any such award if the compensation applied for exceeds the amount 16 determined by the Minister from time to time by notice in the *Gazette* in respect of the respective courts.

[Para. *(a)* substituted by s. 16 of Act 56 of 1979 (wef 1 June 1979), by s. 7 of Act 109 of 1984 (wef 1 September 1984) and by s. 14 of Act 5 of 1991 (wef 1 May 1992).]

.....

[Para. *(b)* deleted by s. 12 of Act 26 of 1987 (wef 26 February 1988).]

(2) For the purposes of determining the amount of the compensation or the liability of the convicted person therefor, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.

(3) *(a)* An award made under this section-

by a magistrate's court, shall have the effect of a civil judgment of that court;

by a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.

(b) Where a superior court makes an award under this section, the registrar of the court shall forward a certified copy of the award to the clerk of the magistrate's court designated by the presiding judge or, if no such court is designated, to the clerk of the magistrate's court in whose area of jurisdiction the offence in question was committed, and thereupon such award shall have the effect of a civil judgment of that magistrate's court.

(4) Where money of the person convicted is taken from him upon his arrest, the court may order that payment be made forthwith from such money in satisfaction or on account of the award.

(5) *(a)* A person in whose favour an award has been made under this section may within sixty days after the date on which the award was made, in writing renounce the award by lodging with the registrar or clerk of the court in question a document of renunciation and, where applicable, by making a repayment of any moneys paid under subsection (4).

(b) Where the person concerned does not renounce an award under paragraph *(a)* within the period of sixty days, no person against whom the award was made shall be liable at the suit of the person concerned to any other civil proceedings in respect of the injury for which the award was made.

16 R1 000 000 in respect of a regional court, and R300 000 in respect of a magistrates' court - GN R62 in *GG* 36111 of 30 January 2013

342A Unreasonable delays in trials

(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:

The duration of the delay;

the reasons advanced for the delay;

whether any person can be blamed for the delay;

the effect of the delay on the personal circumstances of the accused and witnesses;

the seriousness, extent or complexity of the charge or charges;

actual or potential prejudice caused to the State or the defence by the delay, 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;

the effect of the delay on the administration of justice;

the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;

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-

refusing further postponement of the proceedings;

granting a postponement subject to any such conditions as the court may determine;

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;

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;

that-

the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;

the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or

[Date of commencement of para. *(e)*: to be proclaimed.]

that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.

(4) *(a)* An order contemplated in subsection (3) *(a)*, where the accused has pleaded to the charge, and an order contemplated in subsection (3) *(d)*, shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order.

(b) The attorney-general and the accused may appeal against an order contemplated in subsection (3) *(d)* and the provisions of sections 310A and 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals and, in the case of an appeal by the accused, the provisions of section 309 and 316 shall apply *mutatis mutandis*.

(5) Where the court has made an order contemplated in subsection (3) *(e)*-
the costs shall be taxed according to the scale the court deems fit; and
the order shall have the effect of a civil judgment of that court.

[Date of commencement of sub-s. (5): to be proclaimed.]

(6) If, on notice of motion, it appears to a superior court that the institution or continuance of criminal proceedings is being delayed unreasonably in a lower court which is seized with a case but does not have jurisdiction to try the case, that superior court may, with regard to such proceedings, institute the investigation contemplated in subsections (1) and (2) and issue any order contemplated in subsection (3) to the extent that it is applicable.

(7) *(a)* The National Director of Public Prosecutions must, within 14 days after the end of January and of July of each year, submit a report to the Cabinet member responsible for the administration of justice, containing the particulars indicated in the Table of Awaiting Trial Accused in respect of each accused whose trial has not yet commenced in respect of the leading of evidence, as contemplated in section 150 and who, by the end of the month in question, has been in custody for a continuous period exceeding-
18 months from date of arrest, where the trial is to be conducted in a High Court;
12 months from date of arrest, where the trial is to be conducted in a regional court; and
six months from date of arrest, where the trial is to be conducted in a magistrate's court.

(b) The Cabinet member responsible for the administration of justice must, within 14 days of receipt of a report contemplated in paragraph *(a)*, table such report in Parliament.

[Sub-s. (7) added by s. 7 of Act 55 of 2003 (wef 31 March 2005).]
[S. 342A inserted by s. 13 of Act 86 of 1996 (wef 1 September 1997, except to the extent that it inserts sub-ss. (3) *(e)* and (5) - see above).]

PART 3: CRIMINAL LAW [SPECIFIC OFFENCES – CAPITA SELECTA]

ASSAULT

Definition: Assault consists in unlawfully and intentionally:
(A)applying force to the person of another directly or indirectly; or

(B) threatening another with immediate personal violence in circumstances which lead the threatened person to believe that the other intends and has the power to carry out the threat.

Application of force Assault can be committed by the application of force to the body of the complainant. Subject to the de minimis rule,the slightest contact with the complainant's body may be sufficient. In most cases of assault the force is applied directly, for example by striking or kicking, but it can also be applied indirectly, for example by derailing a passenger train or setting a vicious dog on somebody. Assault can also be committed indirectly by administering to an unsuspecting person some substance which causes the person bodily harm, even though it is internal instead of external harm. An example of such conduct is the putting of poison or drugs in someone's drink, or the administration of an excessive amount of alcohol to children. In principle the conduct in these cases is similar to the conduct of a person intentionally preparing a trap for his or her victim. Even where no positive act has been committed, a conviction of assault can result. For example, in S v B 1994 2 SACR 237 (E), a mother of a child aged two and a half years, was convicted of assault in circumstances where her lover assaulted the child. The mother was held to be under a legal duty to protect the child but had failed to do so. To force a person to consume any substance is an assault. An assault may be committed through another.

Threatening immediate personal violence Assault can also be committed, even though there is no physical impact on the complainant's body,by a threat of immediate personal violence in circumstances leading the threatened person to believe that the aggressor intends and has the power to carry out his or her threat. The threat, and the corresponding fear, must be not merely of some future harm3 but of immediate personal violence.

A conditional threat does not amount to an assault if the person making it is by law entitled to do what he or she threatens to. Thus a threat to use force if and when one is attacked, does not amount to an assault, since it is merely a threat to defend oneself. On the other hand, if someone threatens to use force unlawfully, the threat will amount to an assault if it prevents the threatened person from doing what he or she is lawfully entitled to do.

Fear of violence by victim The victim must fear the immediate use of force against him- or herself. According to the old description of this type of assault in the Native Territories Penal Code, which was adopted by Gardiner and Lansdown and by the courts, it is sufficient if the aggressor has the present ability to carry out his or her threats. By implication, therefore, a victim's knowledge of the aggressor's abilities is immaterial. Although the description refers to the victim's belief that the aggressor is able to effect his or her purpose, this belief or fear is mentioned as an alternative to the aggressor's ability to carry out the threat.

This definition of assault was based on English law, and was followed in some early cases. However, later the courts adopted the viewpoint that ability to carry

out the threat is insufficient, and that the essence of this type of assault is the victim's fear of physical violence. The victim must not only fear that the aggressor intends to carry out his or her threat, but must also be under the impression that the aggressor has the present ability to do so. Whether the aggressor in fact has the means of effecting the purpose is immaterial; what is material is that the aggressor has led the victim to believe that he or she has. Thus, there will be no assault if, though the aggressor has the means to effect his or her purpose, he or she inspires no fear in the victim.

Verbal threats sufficient_ According to the description of this type of assault in the Native Territories Penal Code,which was adopted by Gardiner and Lansdown and by the courts, the threat can be only "by an act or a gesture", with the implication that a mere verbal threat is not sufficient to constitute the crime. Although there may be some slight support in case law for the view that assault can never be committed by mere words, this aspect of the crime has not really been investigated by the courts. Limiting the crime in this way is not only contrary to principle, and sometimes impracticable, but also leads to absurd consequences. It is submitted that a verbal threat of immediate personal violence is sufficient to constitute this type of assault, provided, of course, that the other requirements are present.

Fear need not be reasonable. Although this requirement has been quoted with approval in a number of cases, there is no reported case in which the aggressor has been acquitted on a charge of assault merely because the victim's fear was unreasonable. It is submitted that the victim's fear of attack need not be a reasonable one. To require that it should be would be in conflict with the basic tenets of criminal law, according to which an inquiry to determine whether a person was aware of certain facts, like one to determine the presence of intention, embraces a purely subjective test. If reasonableness were required, it would be almost impossible to commit assault when threatening unduly timid, superstitious or credulous people, and this would be undesirable from a policy point of view.

Unlawfulness_ There are a number of grounds of justification for an otherwise unlawful assault. The precise circumstances in which these grounds of justification may validly be raised are considered in detail under the general principles of criminal law. Briefly stated, the following are the main defences excluding the unlawfulness of an assault. The first and possibly the most important one is that a person may assault another in self-defence, in order to ward off either an imminent physical attack, or an attack upon his or her dignity. Secondly, assault may be justified by authority, as where violence is used by a police officer in effecting a lawful arrest

Intention The accused must have intended to apply force to the person of another, or to threaten him or her with immediate personal violence in the circumstances described above. Dolus eventualis is sufficient, but negligence is

not. If the force is applied or the threats are uttered negligently, no common-law crime is committed. The accused must have been aware of the fact that his or her assault was unlawful. If the accused erroneously thought that the complainant had consented, or that circumstances existed which entitled him or her to act in self-defence, mens rea was lacking. If the assault is committed with the intention of committing some other offence such as robbery, rape or murder, the separate offence of assault with intent to commit such a crime is committed.

CRIMEN INIURIA

Definition and character Crimen iniuria consists in the unlawful and intentional violation of the dignity or privacy of another, in circumstances where such violation is not of a trifling nature. According to the traditional common-law interpretation, an iniuria consisted in the unlawful and intentional violation of the dignitas, fama (reputation) or corpus (physical security) of another. The crime of crimen iniuria is committed when the first of these three legal interests is violated. If the second and third interests are impaired, the crimes committed are criminal defamation and assault (in its various forms) respectively. The crime of crimen iniuria was unknown to English law, which probably accounts for the fact that it was unknown in South Africa up to 1908. In that year the crime, which is of purely Roman-Dutch origin, was resuscitated, and it has since then often featured in criminal courts. This crime may overlap with criminal defamation, if the conduct complained of constitutes an impairment of another's dignity and of his or her reputation. It may also overlap with assault, for an act which impairs bodily security may also impair dignitas.

Interests protected The interest protected by crimen iniuria is dignitas, but this is a technical term which is not synonymous with "dignity" as ordinarily understood. Dignitas is a vague term which broadly covers all objects protected by the rights of personality, other than reputation and bodily integrity. Dignitas is a formal, collective description of all the rights or interests involved. In view of their divergent character, it is difficult if not impossible to reduce all these to a single concept. For example, privacy cannot be included and the right to privacy can be infringed without the complainant being aware of it, whereas an infringement of a person's dignity or right to self-respect is only conceivable if the complainant is aware of the wrongdoer's act. This distinction between privacy and the other possible elements of "dignitas" is borne out by the decisions of the courts. Nevertheless, the courts undoubtedly regard both dignity and privacy as being protected by crimen iniuria. It is therefore possible to describe the technical term dignitas as including both a person's dignity and his or her privacy. The exact meaning of "dignity" has never been defined by the courts, though a fair inference from case law is that "dignity" includes both "self-respect" and "mental tranquillity"; "that valued and serene condition in his social and individual life which is violated when he is, either publicly or privately,

subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt".

Violation of "dignitas" The actus reus of the crime consists in the violation of the dignitas of another. Strictly speaking, a subjective test should be applied to determine whether a person's dignity, self-respect or mental tranquillity (but perhaps not privacy) has been impaired, because these terms describe subjective attributes of personality. For example, the mental tranquillity of the timid will be more easily disturbed than that of the robust. In addition, an individual's self-respect is intimately connected with his or her particular station in life and moral values.In practice, however, an objective test is applied in that conduct which in the ordinary course of events would impair a person's dignitas is assumed to have impaired the dignitas of the particular complainant. This assumption does not operate where it appears (as it does in a minority of cases) that, because of the complainant's subjective state of mind (for example broadmindedness or consent), he or she was in fact not aggrieved by the accused's conduct. Another reason why an objective test is applied in practice is to exclude cases where a hypersensitive person's feelings are hurt, but where a reasonable person would not regard the conduct as insulting. Although it is sometimes stressed that the complainant must feel aggrieved or insulted, the law, somewhat illogically, accepts that crimen iniuria can be committed in respect of a small child or a person devoid of reason. An attack, not against a complainant, but against some group to which he or she is affiliated (for example the complainant's language group, religion, race or nationality), normally not constitute a violation of dignitas unless there are special circumstances from which an attack on his or her self-respect can be deduced. Instances of violation of dignitas. The crime can be committed either by word or by deed. The perpetrator and the victim of the crime may be either male or female. Again, the conduct involved in this crime usually, but not necessarily, bears some taint of sexual impropriety.

Instances of violation of *dignitas.* The crime can be committed in many ways, and what follows is not an exhaustive list. First, it may be committed by the indecent exposure of a person's body, in public or in private. It can also be committed by communicating a message containing, expressly or impliedly, an invitation to, or a suggestion of, sexual immorality or impropriety. A mere declaration of love or affection is not an impairment of the dignitas of the recipient, however unwelcome or irritating it may be. There have been cases where men have been convicted of crimen iniuria when they have fraudulently induced women to become engaged or to have sexual intercourse with them, but it is doubtful whether these decisions should be followed. The crime can be committed through the use of humiliating or disparaging language. The uttering of words constituting vulgar abuse or gross impertinence may constitute the crime, provided that the circumstances are sufficiently serious. Assaults which violate the dignitas of the complainant also constitute crimen iniuria, although a

charge of crimen iniuria will be laid only if the impairment of dignitas is more serious than the impairment of bodily security. If a stranger kisses or embraces a woman he may, depending upon the circumstances, commit crimen iniuria, and the same applies to cases of staring at and following a woman. Forms of iniuria which have become obsolete as crimes are adultery and the malicious laying of a false criminal charge (calumnia). Mere trespassing does not constitute crimen iniuria. Finally, and in general, any other conduct of an abusive, insulting or degrading character which impairs the dignitas of the complainant can constitute the crime. It is not the act that is punished, but the conduct that results in the complainant's dignity being impaired. This crime can be committed by way of an omission.

Unlawfulness Several possible grounds of justification may negative the otherwise unlawful character of the act, for example consent, necessity, and self-defence. If someone violates another's privacy, the infringement may be justified by the fact that the person is acting in an official capacity or with legal authority (for example a police officer searching in a house for evidence of a crime). This ground of justification can be extended to apply to the private investigator who, at the instance of an aggrieved spouse, invades the other spouse's privacy with the object of obtaining evidence of adultery.

Intention The crime of crimen iniuria can only be committed intentionally. An impairment of another's dignitas which takes place accidentally or negligently is not criminal. The intent need not necessarily be "an indecent, lewd or lascivious intent" as has been suggested. The wrongdoer's actual motive is immaterial. The wrongdoer must, however, appreciate that the complainant's dignitas will in fact be impaired, which implies that the wrongdoer must not be under the impression that the complainant is a willing party. In cases involving an infringement of another's right to privacy, the wrongdoer need not intend to draw the attention of the victim to the infringement.

THEFT

General character of theft Although theft is one of the best-known criminal offences, endeavors to describe its constituent elements in general terms often meet with considerable difficulty. This is first because theft covers a wider field than it does in most other legal systems. It embraces not only taking another's property out of his or her possession, but also embezzlement, meaning the appropriation of another's property which is already in the lawful possession of the accused. It even includes the unlawful taking of one's own property which is in the lawful possession of somebody else, or in respect of which somebody else has a special right or interest. A second difficulty is occasioned by the long history of this offence. Many of the concepts and much of the terminology used in Roman law to describe furtum are still used today, although their meanings

have undergone remarkable changes and, although such notions as contrectatio in its original meaning and the requirement that the stolen property must be corporeal, do not have a place in a modern economy. To add to the confusion, the crime has been strongly influenced by English law, although the essential requirements for larceny are quite foreign to Roman-Dutch law. There is general consensus that a definition of "theft" along the lines of the concept of "appropriation" offers a sufficient basis for a description of the elements of this offence.

Definition and elements Theft consists in the unlawful and intentional appropriation of another's movable corporeal property, or of such property belonging to the thief in respect of which somebody else has a right of possession or a special interest. The elements of the offence (and the order in which they will be dealt with here) are therefore the following

(a) actus reus or appropriation (or contrectatio);
(b) property capable of being stolen;
(c) unlawfulness;
(d) intention (or animus furandi).

Appropriation Seeing that the term contrectatio no longer bears the original meaning it had, the actus reus of theft is best described by a more comprehensible term, namely the "appropriation" of property. This term clearly describes the conduct required by the courts. By appropriating the property the accused arrogates to him- or herself the rights of an owner in respect of the property, and deals with it as if he or she were the owner. At the same time the accused deprives the real owner of his or her property. The act of appropriation always involves the acquisition of effective control over the property.

Only movable corporeals in commercio can be stolen. Only a movable corporeal can be stolen and immovable property is incapable of being stolen. Parts of immovable property that have become movable by separation and removal can, however, be stolen, such as branches chopped off a tree.The property must be corporeal. Thirdly, the property must be in commercio. Things such as res communes, which belong to everybody, for example water in a public stream, res derelictae, namely property abandoned by its owner with the intention of relinquishing all his or her rights to it, and res nullius, which belong to nobody although they can be the subject of private ownership, cannot be stolen. Animals ferae naturae are included in the lastmentioned category. Such animals can be stolen only if they are in private ownership, for instance birds in a cage. Even property which the complainant is not entitled by law to possess, for example dependence-producing drugs can be stolen.

Theft of own property (furtum possessionis) Theft of one's own property is possible if somebody else has a "special interest" in it or a right of possession to it which avails against the owner, for example by virtue of a lien or pledge. Thus, if somebody else has a lien on the property to secure payment of a debt, removal and appropriation of it by the owner amounts to theft. A further

instance is the removal by an accused before a debt has been paid, of a pledge which the accused has given to his or her creditor.

No theft if owner consents In practice the only ground of justification for the otherwise unlawful appropriation of property is consent to the taking or appropriation by the owner. The element of unlawfulness is absent where the owner consents to the appropriation even if the accused is unaware of such consent or thinks that no consent has been given. Where the owner, as part of a prearranged plan to trap the accused, fails to prevent the accused from gaining possession of the property, although the owner knows of the accused's plans, there was no valid consent to the taking. The owner has merely allowed it in order to trap the thief. Where the owner hands over his or her property as a result of threats, there is similarly no consent and the taking amounts to theft (or robbery). The position is the same where consent is obtained by fraud or false pretences. In the case of inadvertent overpayments or of money mistakenly given to an accused in payment of a debt already paid, there is no consent to the appropriation of such funds by the recipient.

Intention to steal (*Animus furandi)* is the traditional term describing the *mens rea* or intention required for theft. The term dates back to Roman times, but the concept has undergone considerable change. In the first place the courts have rejected the Roman law requirement of an intent or motive to acquire some form of gain or profit (*lucri faciendi gratia*) and in the second place the requirement of an intention permanently to deprive the owner of the full benefit of his or her ownership has been introduced from English law. The *animus furandi* or intention to steal must refer to all the elements of the offence, and thus comprises:

(a) the intention to appropriate the property (which, as will be seen,3 comprises the intention permanently to deprive the owner of his or her article);

(b) knowledge that the property or article is one recognised by the law as capable of being stolen;

(c) knowledge that the appropriation is unlawful, that is, without the consent of the owner.

Theft a continuing crime, and consequences of this rule Theft is a delictum continuum or a continuing crime. This means that the theft continues as long as the stolen property is in the possession of the thief, or of some other person who was a party to the theft, or even of some person acting on behalf of or even, possibly, in the interest of the original thief. The important effect of this doctrine is that virtually no differentiation is made between a perpetrator or socius criminis on the one hand, and an accessory after the fact on the other. Any person, who assists the original thief or his or her socius whilst the theft continues, is a thief. He or she cannot be an accessory after the fact, because the original theft has not yet been completed. A further reason why such person is regarded as a thief is that he or she also has the necessary intention permanently to deprive the owner of his or her property. Even if the assistance which is given to the original thief does not in itself amount to an independent

appropriation of the property (for example where it merely consists in rendering advice on how to dispose of the property), he or she is nevertheless liable as an accessory to the crime. Obviously assistance or advice rendered before or during the original appropriation makes a person a socius criminis to theft. A clear distinction must be drawn between the above cases and the one where a person has come by property in an innocent way, has subsequently discovered that it is actually stolen property, and then appropriated it. Such conduct constitutes an independent theft.

ROBBERY

Definition Robbery consists in the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it. It is customary to describe the offence briefly as "theft by violence". Though incomplete, this description adequately conveys the gist of the offence. It is not an essential element of the crime that the theft must take place in the presence of the victim.

Violence or threats of violence The victim's resistance must be overcome and the property obtained by the use of violence against the victim's person. If the accused injures the complainant and then takes the property from the complainant while he or she is physically incapacitated, robbery is likewise committed. Even in the absence of actual physical violence, a threat to commit immediate violence against the complainant if he or she does not hand over the property is sufficient Here the complainant submits to the taking because his or her will is overcome by fear. The victim need not therefore be physically incapacitated The test whether the victim's will is overcome by fear is subjective and it is no defence to aver that a reasonable person would not have succumbed to the threats Although the question has not yet been decided, it would seem that, where the prosecution relies on threats, these must be threats of physical violence against the victim and that a threat of harm to a third party or to the victim's reputation or property is not sufficient.6 Such conduct would amount to extortion.

Causal link between violence and taking. The property must be obtained by the accused as a result of the violence or the assault. This normally means that the violence must precede the taking. However, robbery may in exceptional cases also be committed even though the violence follows the completion of the theft. This will be the case if, having regard to the time and place of the offender's act, there is such a close link between the theft and the violence that they may be regarded as connecting components of one action. There is no robbery when violence is used merely to retain property already stolen, or to facilitate escape. This may be theft or assault (depending on the circumstances). If one person assaults another and after the assault discovers that the victim has by chance dropped some of his or her property, robbery is not committed if he or she picks

up the property and appropriates it, but only assault or theft (depending on the circumstances). If, despite threats of violence, the property is handed over not as a result of the threats, but as part of a pre-arranged plan to trap the accused, there is at most attempted robbery. It is not a requirement of the crime that the property should be obtained from the victim personally or in the victim's presence. The lapse of time between the assault and the taking and the distance between the place of assault and place of taking are merely of evidentiary value in deciding whether the assault and taking formed one continuous transaction, and whether there was a causal link between the assault and the taking.

Intention to acquire property by means of violence Until fairly recently in so-called "bag snatching" cases, the accused was usually found guilty of theft rather than robbery on the grounds that the property must be obtained as a result of the use of violence and in addition the accused must have intended the violence to be a means of overcoming the victim's resistance. It was said that the force in snatching the bag was merely incidental. In S v Mogala Rumpff CJ in an obiter dictum questioned the correctness of the rule that, if an accused person snatched the victim's handbag out of her hands suddenly and unexpectedly, the offence was theft not robbery as the violence was said to be incidental. Rumpff CJ indicated that the accused would very well know that possession of the bag could only be gained by snatching it in a sudden and unexpected movement. S v Sithole this reasoning was approved and it was held that the snatching of a handbag from under the arm of the victim from behind amounted to robbery; it was sufficient that the accused intentionally used force to overcome the hold. It was further held that the offence would amount to robbery if no resistance was actually offered as the grasp of the victim on the bag was intended to protect the item. S v Sithole has subsequently been followed. The snatching of a bag protruding from the victim's pocket amounts to theft not robbery as no violence is directed at the person of the victim.

FRAUD

Definition Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.

Misrepresentation The first requirement for fraud is that there must be a misrepresentation or, as it has been expressed, "a perversion or distortion of the truth". The accused must represent to the complainant that a fact or set of facts exists which in truth does not exist. Usually the misrepresentation takes place by means of spoken or written words, but it can also take place by conduct, for example by nodding one's head. It can furthermore take place expressly or implicitly. Thus, in the ordinary course of events, somebody who buys goods on credit implicitly represents that at the time of buying he or she is willing to pay or intends to pay at some future date, and that he or she believes that he or she will

be able to pay for such goods. If at the time of purchase the person in fact has no such intention or belief, he or she misrepresents the state of his or her mind.

Misrepresentation by means of non-disclosure A misrepresentation can be committed by means of an omissio, where the accused fails to disclose material facts which, unless revealed, can induce the complainant to act to his or her prejudice. It is impossible to lay down categorically when a concealment of a fact will amount to a misrepresentation. The answer to this question invariably revolves around the intention of the accused and the circumstances under which a fact is concealed. In general terms it can be stated that a failure to disclose a fact will amount to a misrepresentation if there was a legal duty to disclose. Thus an insolvent person is obliged by section 137(a) of the Insolvency Act to inform a person, from whom he or she obtains credit for more than a specified amount, that he or she is an insolvent. Mere civil fraud is, however, not necessarily equivalent to criminal fraud. If it can be established that a person has, through failure to disclose a fact, committed fraud for the purposes of the civil law, it must still be established that the person had the intention to defraud which resulted in actual or potential prejudice before he or she is criminally liable.

Misrepresentation of state of mind A person can misrepresent his or her state of mind or intention as much as any other fact or state of affairs. It is misleading to say that the misrepresentation must refer to the past or the present, and that a misrepresentation regarding the future (or a mere promise) is not sufficient. If an accused induced somebody to believe that he or she would do something in the future, or that he or she believed that something would happen in the future, what must be established is whether the accused, at the time when he or she made the representation, honestly intended to perform the act or honestly believed that the event would take place. If the accused had no such belief at the time, he or she misrepresented his or her state of mind and (provided the other elements of the offence are present) is guilty of fraud. An important illustration of this rule in practice is the case of a person who gives somebody a cheque when, at the time of delivery, such person is not sure or does not believe that he or she has or will have enough funds in his or her account to meet the amount given on the cheque. The person implicitly represents that he or she believes or is sure that the cheque will be met on the due date. There is also a misrepresentation with regard to an existing fact if one person represents to another that the law is X, whilst he or she knows very well that the law is Y. In such a case the person misrepresents his or her state of mind. Where the alleged false representation relates to the accused's state of mind concerning a future event, it must be clearly alleged in the indictment that, at the time of the statement, the accused did not in fact believe that the event referred to would take place.

Unlawfulness Although authority, obedience to orders or coercion should, according to general principles, justify an otherwise unlawful misrepresentation,

such cases have never yet occurred in practice. Because a fraudulent misrepresentation is ex hypothesi unlawful, the element of unlawfulness is of scarcely any practical importance in fraud.

Prejudice Actual prejudice is not required to constitute fraud. It is sufficient if the misrepresentation is of such a nature that it may cause harm or prejudice. This risk of prejudice need not be probable, direct or reasonably certain. It is sufficient if there is a reasonable possibility that the misrepresentation may prejudice some person, who does not necessarily have to be the representee.On the other hand, the risk, or possibility of prejudice, must not be too remote or fanciful. The test is whether the misrepresentation is such that a reasonable person might (or could), in the ordinary course of events, be deceived. If it is so preposterous that the reasonable person would never believe it, there is no potential prejudice. It does not matter that the representee is aware of the fact that the representation is false or has some special knowledge which the ordinary reasonable person does not have. Thus, even in an attempt to sell pieces of glass as diamonds to a police trap there would be sufficient potential prejudice to constitute fraud. It therefore does not matter that the representee did not act upon the misrepresentation or that the representer's fraudulent design did not succeed. It is furthermore immaterial whether, as a result of the misrepresentation, the defrauded party is ultimately in a better position than he or she was before, because whether there is prejudice must be determined at the time when the misrepresentation is made.

Causation Although a causal link between the misrepresentation and the prejudice is sometimes mentioned as a requirement in descriptions of fraud, it can hardly be said to be a separate element of the offence. This is because the existence of potential prejudice is sufficient. It can be present even if the representee did not believe in the truth of the representation, or was not induced to act or change his or her position on the strength of it. The view that the element of causation is logically redundant should therefore be endorsed. Fraud is committed even where there was actual prejudice which was, however, not proved to be induced by the misrepresentation, as long as the misrepresentation was of such a nature as to be potentially prejudicial.

Intention The intention which an accused must have in order to be guilty of fraud is usually described as "an intention to defraud". This implies that the accused must be aware of the fact that the representation is false. An accused can be said to be aware that his or her representation is false not only if he or she knows that it is false, but also if he or she has no honest belief in its truth, or if he or she acts recklessly, careless whether it is true or false. An accused can even be said to know that his or her representation is false if, although suspicious of their correctness, he or she intentionally abstains from checking on sources of information with the express purpose of avoiding any doubts about the facts which form the subject matter of the representation. All these rules are merely applications of the rule that dolus eventualis suffices, in other words that

it is sufficient if the representer foresees the possibility that his or her representation may be false, but nevertheless decides to make it. Negligence, even gross negligence, regarding the truth of the statement cannot, however, be equated with intention (including dolus eventualis). There is a distinction between an intention to deceive and an intention to defraud. The former means an intention to make somebody believe that something is true which is in fact false. The latter means an intention to induce somebody to embark on a course of action to his or her prejudice, as a result of the misrepresentation. This latter intention establishes fraud. The mere telling of lies, which the teller does not believe the person to whom they are told will act upon, is not fraud. The intention to defraud includes the intention to deceive, but the latter does not include the former. The intention to defraud in fact includes an intention to prejudice. If the intention to defraud is present, the accused’s motive is immaterial. No intention to acquire some advantage is required.