# ASPIRANT PROSECUTOR PROGRAMME

# STUDY GUIDE

## [ENTRY EXAMINATION]

NATIONAL PROSECUTING AUTHORITY
South Africa

**2022 INTAKE**

## 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.

**Duration of examination: 3 hours.**

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# PART 1: LAW OF EVIDENCE - CAPITA SELECTA
# [CPA = Criminal Procedure Act]
# [CPEA = Civil Proceedings Evidence Act]

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## A. BASIC TERMS

**Facts in Issue and Facts Relevant to the Facts in Issue**
The facts in issue (*facta probanda*) are those facts which a party must prove in order to succeed; the facts relevant to the facts in issue (*facta probantia*) are those facts which tend to prove or disprove the facts in issue. For example, in a paternity case the identity of the father will be a *factum probandum* (ie, a fact in issue); sexual intercourse with the alleged father will be a *factum probans* (ie, a fact relevant to the fact in issue). Schmidt & Rademeyer make a further distinction between primary and secondary *facta probanda*. According to them, primary *facta probanda* would refer to those facts placed in issue by the pleadings (in civil proceedings) and the plea (in criminal proceedings). Secondary *facta probanda* would refer to *facta probantia* which are in issue; for

example, in a paternity suit it may be disputed that sexual intercourse took place at the material time. This is then a *factum probans* which is in dispute. The facts in issue are, generally speaking, determined by substantive law, whereas the rules of procedure — and in particular the law of evidence — determine the facts relevant to the facts in issue.
In both criminal and civil matters the number of facts in issue at the initial stage of the case may be reduced by means of formal admissions. For example, where an accused is charged with murder it is necessary for the state to prove that the accused unlawfully and intentionally killed another person. Substantive law requires that these elements must be proved. During his explanation of plea in terms of s 115 of the CPA the accused may, however, admit that he killed a human being. At the same time he may dispute that the killing was unlawful. He may, for example, claim that the killing was justified by reason of self-defence. The fact that the accused killed the deceased may (with the consent of the accused) be recorded as a formal admission. The state need then prove only unlawfulness. In this way the rules of procedure and substantive law determine the facts in issue.

**Evidence and Probative Material**
There is a distinction between evidence and probative material. Our courts are not entirely consistent in distinguishing between the two. What follows is a simplified overview. "Evidence" essentially consists of oral statements made in court under oath or affirmation or warning (oral evidence). But it also includes documents (documentary evidence) and objects (real evidence) produced and received in court.
Evidence, however, is not the only means of furnishing proof. It was pointed out that even though an accused's admission made during the explanation of plea in terms of s 115 of the CPA is not evidence by the accused, it still is "probative material" and there is therefore no impediment in the way of a trial court to use against the accused material furnished during such procedure. An explanation of plea is not given under oath or affirmation or warning and therefore cannot be classified as evidence.
It was held that formal admissions do not constitute evidence. Formal admissions dispense with the need to adduce evidence to prove facts in issue, and must be classified as probative material. Judicial notice, similarly, cannot be classified as evidence
It was confirmed that presumptions also do not constitute evidence
It is submitted that the term "probative material" is a convenient term to include not only oral, documentary and real evidence but also formal admissions, judicial notice, presumptions and also those statements made in terms of s 115 of the CPA and which do not amount to formal admissions. Probative material therefore refers to more than oral, documentary and real evidence.

**Evidence and Proof**
Proof of a fact means that the court has received probative material with regard to such fact and has accepted such fact as being the truth for purposes of the specific case. Evidence of a fact is not yet proof of such fact: the court must still decide whether or not such fact has been proved. This involves a process of evaluation. The court will only act upon facts found proved in accordance with certain standards. In a criminal case the standard of proof is proof beyond a reasonable doubt. In a civil case the standard of proof is proof upon a balance of probability — a lower standard than proof beyond reasonable doubt.

**Conclusive Proof and Prima Facie Proof**
Conclusive proof means that rebuttal is no longer possible. It is proof which is taken as decisive and final.
Prima facie proof implies that proof to the contrary is (still) possible. In the absence of proof to the contrary, prima facie proof will, generally speaking, become conclusive proof. Prima facie proof is sometimes used as a synonym for prima facie evidence (especially by the legislature). This approach is, strictly speaking, incorrect.

**Admissibility and Weight of Evidence**
The admissibility of evidence and weight of evidence should not be confused. Lansdown & Campbell state that:
"If what is adduced can in law properly be put before the court, it is admissible. It is only once it has been or could be admitted that its persuasiveness, alone or in conjunction with other evidence, in satisfying the court as to the facta probanda has to be considered."
There are no degrees of admissibility. Evidence is either admissible or inadmissible. Evidence cannot be more or less admissible. Once admissible, however, it may carry more or less weight according to the particular circumstances of the case. The court weighs or evaluates evidence to determine whether the required standard of proof has been attained. It is only after the evidence has been admitted and at the end of the trial that the court will have to assess the final weight of the evidence.
It should be borne in mind, however, that the admissibility of evidence is in principle determined with reference to its relevance. In determining relevance reference must of necessity also be made to the potential weight of the evidence. This, however, is a preliminary investigation in order to determine whether such evidence, once admitted, would be of assistance when it must finally be decided whether the facts in issue have been proved.

**Circumstantial and Direct Evidence**
Circumstantial evidence often forms an important component of the information furnished to the court. In these instances the court is required to draw inferences, because the witnesses have made no direct assertions with regard to the fact in issue. These inferences must comply with certain rules of logic. Circumstantial evidence furnishes indirect proof. In a murder trial, for example, evidence may be given that A had a motive to kill B and was seen running from B's home with a bloodstained knife. Evidence, however, is direct when a fact in issue is proved directly by such evidence; for example, where witness C testifies that he saw A stabbing B in the latter's home.
The distinction between direct and circumstantial evidence is of special importance in those instances where an accused decides not to testify in his own defence.

**Primary and Secondary Evidence**
The distinction between primary and secondary evidence is of importance with regard to documentary evidence. In the fifth edition of Cross on Evidence it was said:
"Primary evidence is that which does not, by its very nature, suggest that better evidence may be available: 'Secondary evidence' is that which, by its very

nature, does suggest that better evidence may be available. The original of a document is primary evidence, a copy secondary evidence, of its contents. The distinction is now mainly of importance in connection with documents, because their contents must, as a general rule, be proved by production of the original, but it used to be of much greater significance on account of the 'best evidence' rule which occupied a prominent place in books on the law of evidence in the eighteenth and early nineteenth centuries."

**Hearsay**

Section 3 of the Law of Evidence Amendment Act 45 of 1988 provides:

3.(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless —

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

4th Ed, 2016, ch 13-p 293

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court having regard to —

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section —

- 'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
- 'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

**Judicial Notice**

It is in the nature of the accusatorial process that judicial officers should play a passive role and be aloof from the proceedings. This serves to enhance the principle of impartiality. A judicial officer must withdraw from a case (recuse himself) if he happens to have private information concerning the facts of the

case before him. However, the law of evidence does to a limited extent allow a judicial officer to accept the truth of certain facts which are known to him even though no evidence was led to prove these facts. This process is known as judicial notice and must be distinguished from the procedure of receiving evidence. For example, a judicial officer may, without hearing evidence, accept the fact that Johannesburg is in South Africa and that there are twelve months in a year. These facts are so well known or can so easily be ascertained that evidence to prove them would be completely unnecessary and even absurd. In Cross & Tapper on Evidence the following reasons for the existence of the doctrine of judicial notice are identified:
"In the first place, it expedites the hearing of many cases. Much time would be wasted if every fact which was not admitted had to be the subject of evidence which would, in many instances, be costly and difficult to obtain. Secondly, the doctrine tends to produce uniformity of decision on matters of fact where a diversity of findings might sometimes be distinctly embarrassing."
The process of judicial notice deprives the parties of an opportunity to cross-examine and consequently the courts apply the doctrine with caution.
How do we distinguish between receiving evidence and the taking of judicial notice? The distinction is easy to make when judicial notice is taken without any inquiry. In such a case the court is relying on its own knowledge, which is something entirely different from the reception of evidence. However, the distinction is more difficult to make when the taking of judicial notice is preceded by either referring to texts or the hearing of evidence. "If learned treatises are consulted, it is not easy to say whether evidence is being received under an exception to the rule against hearsay or whether the judge is equipping himself to take judicial notice." In McQuaker v Goddard the court, before taking judicial notice of the fact that camels are domesticated animals, consulted books about camels and heard evidence from witnesses regarding the nature of camels. The Court of Appeal in affirming the decision noted that the trial judge, when hearing the witness's testimony as to the nature of camels, had not been taking evidence in the ordinary sense — the witnesses were merely assisting him in "forming his view as to what the ordinary course of nature in this regard in fact is, a matter of which he is supposed to have complete knowledge.
Special common-law and statutory rules apply where rules of law are concerned.

<u>Notorious facts (general knowledge)</u>
According to Zeffertt & Paizes notorious facts can be divided into two categories: facts of general knowledge, and specific facts which are notorious within the locality of the court. Facts of general knowledge would include, for example, the fact that there is a national road network in South Africa and that these roads are public roads, the fact that chess, billiards and table-tennis are games of skill and the fact that there are seven days in a week. In R v African Canning Co (Swa) Ltd and Others it was said that notorious facts include elemental experience in human nature, commercial affairs and everyday life.

<u>Facts of local notoriety</u>
Facts may be judicially noticed even if they are not of general knowledge. However, the proviso is that these facts should be notorious among all reasonably well-informed people in the area where the court sits. In R v Levitt a local court took judicial notice of the fact that Franschhoek is not a small place and it contains a number of streets. Judicial notice has also been taken of the distance between well-known local places and that a specific local road is a

public road within the local town or city in the jurisdiction of the court. In S v Van Den Berg the court held that it was a notorious fact that a particular company was mining rough and uncut diamonds in Oranjemund.

Facts easily ascertainable
Facts which are not generally known but which are readily and easily ascertainable should also be judicially noticed. However, they should be easily ascertainable from sources of indisputable authority, for example, maps and surveys issued under governmental or other reliable authority. Section 229 of the CPA contains provisions to the effect that certain official tables, approved in the Gazette, may on the mere production thereof serve as proof of the exact times of sunrise and sunset at specific places in South Africa. In S v Sibuyi and Others the court held that, although a court might take judicial notice of the accuracy of almanacs, diaries or calendars as regards days and months, they could not be regarded as indisputably accurate as regards the phases of the moon, setting and rising of the sun, or the state of the tides. The basis of the court's reasoning was that such evidence was hearsay and did not merit being admitted as an exception to the hearsay rule. The court also noted that such information could not even be regarded as being prima facie correct.

**Informal admissions**
Admissions by silence.
Admissions may be contained in a verbal or written statement and they may also be inferred from conduct. For example, in S v Shepard and Others it was held that a party's payment of an invoice was an admission that the services specified in that invoice had been performed. However, conduct does not need to be positive to constitute an admission, and an admission may be inferred from silence. The constitutional right to remain silent and the presumption of innocence will no doubt severely restrict the inferences that can be drawn from an accused's silence.
Silence in the face of an accusation may amount to an admission when it forms the basis of a common-sense inference against a party. For example, in Jacobs v Henning the plaintiff, in bringing an action for damages for seduction, led evidence that the defendant, when confronted and accused by the plaintiff's father of having caused his daughter's pregnancy, remained silent and simply lowered his head. The court found that this conduct was sufficient corroboration of the plaintiff's version.

Admission by failure to answer a letter.
However, as responding to a letter requires a greater degree of positive conduct than an oral denial, the courts are more reluctant to draw such an inference. For example, in R v West, 63 where the accused had failed to respond to a letter from the complainant alleging that he was the cause of her pregnancy, the court held that an acknowledgement of paternity could not be inferred from his silence.
In each case, before an admission can be inferred, it must be established in the light of the surrounding circumstances that it would be reasonable to draw the inference that the party did not respond because he acknowledged that the contents of the letter were true.

Statements in the presence of a party.

A statement made in the presence of a party may be put before the court in order that the court may assess whether the party's response to hearing the statement amounted to an acceptance of its truth. It is not necessary for the party to assent to the statement for an inference to be drawn, as agreement as to the truth of the statement may be inferred from silence. An inference may even be drawn from a denial if, for example, the court finds that the party's demeanour contradicts the denial.

Failure to cross-examine

In certain circumstances the failure to cross-examine may also constitute an informal admission. The appellant in S v Mathlare had been convicted of rape in a regional court. On appeal it was alleged that the prosecution had failed to present formal evidence to the effect that the blood samples identifying the appellant as the father of the child conceived as a result of the rape were taken from himself, the child and the complainant. During the trial the source of the blood samples had not been raised in cross-examination, the cross-examination having focused on the reliability of the analysis of the samples and the conclusions drawn from such analysis. The appeal court held that the tenor of the defence cross-examination, in the particular context of the trial, constituted an informal admission of the source of the blood samples. In effect the failure to challenge the admissibility of the evidence at trial precluded the appellant from challenging its admissibility at the appeal stage.

**Vicarious Admissions**

As a general rule an admission is not admissible against anyone except its maker. A statement made out of court, by a person who is not a party to the suit, is excluded because it is hearsay in nature. It follows that an extra-curial statement will be admissible only if it can qualify as an exception to the hearsay rule. However, it has been argued that there are other reasons for excluding vicarious admissions and therefore such statements should not be admitted merely because they fall to be admitted as an exception to the hearsay rule. The Supreme Court of Appeal held in S v Litako and Others 88 that it had erred in S v Ndhlovu and Others in admitting admissions by a co-accused against other co-accused. It found that the rationale underlying the common-law prohibition against admitting an extra-curial admission by one co-accused against another had not been over-ridden by s 3 of the Law of Evidence Amendment Act 45 of 1988. In Ndhlovu the court also paid attention to the rationale underpinning the common-law rule: it considered the cautionary rule and other dangers of unreliability but found in the circumstances that there were sufficient safeguards to justify the admission of the co-accused's statements in the interest of justice.

The effect of the Litako judgment is to reinstate a rigid category of inadmissible evidence irrespective of its relevance and reliability on the basis that the inherent dangers in admitting an extra-curial admission by one accused against another will always be too great to justify admission in the interests of justice. The correctness of the decision in Litako was confirmed by the Constitutional Court in S v Mhlongo; S v Nkosi. Theron AJ, writing for a unanimous Constitutional Court, relied heavily on s 9(1) of the Constitution, which provides that everyone is equal before the law and entitled to equal protection and benefit of the law.

**Examples of Exceptions to the Vicarious Admissions Rule**

Agents and employees
Statements made by an agent within the scope of his authority may be admitted against his principal. Admissions by employees are similarly admissible. However, where the admission relates to a matter on which the employee and employer have incurred joint liability the statement will be admitted on the basis that the employee and employer have an identity of interest. Agents are rarely specifically authorised to make admissions, but authorisation will be established if it is shown that the statement was one of a type or class which the agent was expressly or impliedly authorised to make.

Partners
An admission made by a partner concerning partnership affairs is admissible against his partners. Partners are subject to the same principles applicable to agents. However, as a consequence of the contractual liability of partners, admissions made after the dissolution of the partnership may be admitted against ex-partners if they pertain to a transaction which occurred before the dissolution of the partnership.

Legal representatives
An admission made at trial by a legal representative is admissible against the client. However, it must first be established that the legal representative was properly instructed. That a legal representative has general authority to act on behalf of his client will often be inferred from the surrounding circumstances. It is only admissions of fact that are vicariously admissible and not expressions of opinion on the evidence adduced.

Spouses
An admission by one spouse is generally inadmissible against the other spouse unless it relates to the joint interest of the spouses in the community estate, or in a deferred sharing of profits under the accrual system introduced by the Matrimonial Property Act. 104 However, the court may find on the facts that an express or implied agency has been created and apply the principles pertaining to agents.

Acts and declarations in furtherance of a common purpose
If A, B and C are engaged in a common purpose, and A makes a statement in furtherance of that common purpose, it will be admissible against B and C. Such acts or statements are sometimes described as 'executive' to distinguish them from 'narrative statements', which are not made in furtherance of the common purpose but, rather, as an account or admission of past events, in which case they are not admissible against anyone other than the maker of that statement.
Before executive statements can be admitted into evidence the conspiracy and the accused's participation in it must be proved. In deciding these preliminary issues, the court is permitted to look at the statements of the alleged conspirators. The Appellate Division in S v Ffrench-Beytagh held that "it is immaterial whether the existence of the conspiracy or the participation of the defendants be proved first, although either element is nugatory without the other". There must be some evidence aliunde establishing the existence of the common purpose before the relevant statements can be considered at the end of the case.

**'Formal' admissions by the Accused**

At common law an extra-judicial statement made by an accused may not be admitted into evidence unless it is proved to have been made freely and voluntarily. In this context the words "freely and voluntarily" have a technical and restricted meaning and an admission will be found to be involuntary only if it has been induced by a promise or threat proceeding from a person in authority. Part of s 219A of the CPA provides:

"Evidence of any admission made extra-judicially by any person in relation to the commission of an offence, shall, if such admission does not constitute a confession to that offence and is proved to have been voluntarily made by the person, be admissible in evidence against him at criminal proceedings relating to that offence . . ."

In S v Yolelo the Appellate Division held s 219A merely codified the common law as regards the meaning of voluntariness in relation to admissions. As the voluntariness of an admission will be compromised only if it has been induced by a promise or threat emanating from a person in authority, it is necessary to look more closely at the meaning of these terms.

A threat or a promise will be found to have been made if a person, by means of words or conduct, indicates to the accused that they will be treated more favourably if they speak, or less favourably if they don't. Whether such a threat or promise was made will be a question of fact in each case. Proof of such threat or promise does not necessarily establish the absence of voluntariness. The test of whether the threat or promise actually affected the accused's freedom of volition is subjective. It follows from the subjective nature of the test that the threat or promise must be operative on the mind of the accused at the time that the admission is made. This subjective test makes it impossible to specify precisely what will constitute a threat or a promise. Clearly, an admission induced by violence or a threat of violence will not be admissible, nor will an admission made in response to a promise of lenient treatment be admitted. However, an admission made under police interrogation will not necessarily be inadmissible. It will be excluded only if on the facts it appears that it was induced by a threat or promise. Similarly, whether or not an exhortation or invitation to speak amounts to a threat or a promise negating volition will depend on the surrounding circumstances.

Section 35(1)(c) of the Constitution may well provide the courts with the opportunity for departing from the artificial and technical common-law interpretation of the requirement of "voluntariness". Section 35(1)(c) reflects the accused's pre-trial privilege against self-incrimination. It provides that an arrested person shall have the right "not to be compelled to make any confession or admission that could be used in evidence against" him or her. There is nothing in s 35(1)(c) to suggest that admissions and confessions should be treated differently. Section 217 of the CPA requires a confession to be made freely and voluntarily whilst the maker is in his sound and sober senses and without having been unduly influenced thereto. In Rex v Barlin Innes CJ held that the requirement of undue influence pertaining to confessions was elastic and went beyond the ambit of voluntariness, which was restricted to an inducement, threat or promise coming from a person in authority. It can be argued that the constitutional entrenchment of the principles of due process and the right to a fair trial in s 35(3) as well as the wording of s 35(1)(c), which draws no distinction between admissions and confessions, favours an interpretation of voluntariness which is indistinguishable from undue influence.

**Confessions in Criminal Trials**

The Importance of Distinguishing Between Admissions and Confessions

An argument is put forward as to why it is constitutionally unsound to distinguish between admissions and confessions in respect of the requirements for admissibility. However, the matter has not as yet come before the South African courts and both the common law and existing statutory provisions make it necessary to distinguish between admissions and confessions. This is because the requirements for admissibility are far more onerous in respect of confessions than is the case with admissions. Furthermore, s 209 of the CPA provides that an accused may be convicted of an offence on the single evidence of a confession if the confession is confirmed in a material respect or if the offence is proved by evidence, other than such confession, to have been actually committed.

Freely and voluntarily

The requirements that the statement be made "freely and voluntarily" and "without undue influence" are treated as separate requirements, each having a distinct meaning. The requirement of freely and voluntary is assigned its common-law meaning: the statement must not be induced by a threat or promise emanating from a person in authority.

Sound and sober senses

Before a confession will be admitted into evidence it must be proved that the accused understood what he was saying. This is all that is meant by the requirement that the accused must be in his sound and sober senses. Consequently, the fact that the accused was intoxicated, or extremely angry, or in great pain will not in itself lead to the conclusion that this requirement has not been met, unless it is established that he could not have appreciated what he was saying.

Without being unduly influenced thereto

Undue influence will be present where some external factor operates so as to extinguish the accused's freedom of will. The undue influence need not emanate from a person in authority. Clearly violence or a threat of assault would constitute undue influence, but the concept includes subtler forms of influence such as the promise of some benefit, or an implied threat or promise. The view has been expressed that any practice that is repugnant to the principles upon which the criminal law is based, is an undue one. Even if a statement is found to have been made voluntarily, it will be excluded if it was induced because of undue influence.

The test of undue influence - The subjective inquiry requires the undue influence to have been operative on the accused's mind when he made the statement. The subjective approach has allowed courts in the past to conclude that a confession made after lengthy interrogation, or after detention without trial, did not necessarily result in undue influence. Similarly, a breach of the will not automatically render a confession inadmissible and will merely be a factor the court will take into consideration in determining whether a confession has been made freely and voluntarily and without being unduly influenced thereto.

Confessions made to peace officers

Section 217(1) of the CPA provides that where a confession is made to a peace officer who is not a magistrate or justice of the peace, the confession must be confirmed or reduced to writing in the presence of a magistrate or justice of the peace.

Confessions made to peace officers who are also magistrates and justices of the peace

Confessions made to peace officers who are also magistrates or justices of the peace need not be reduced to writing and will be admissible if they are made freely and voluntarily, in sound and sober senses, and without undue influence. In terms of s 217(1)(b)(ii) of the CPA, if a confession is reduced to writing and confirmed in the presence of magistrate, it is deemed to be admissible in evidence upon mere production and if it appears from the document that the confession was made freely and voluntarily, the confession is presumed to have been made freely and voluntarily in sound and sober senses and without undue influence.

The Constitutional Court in S v Zuma and Others found that the presumption in s 217(1)(b)(ii) placed on the accused the burden of proving that the confession was not made freely and voluntarily and required him to discharge the onus on a balance of probabilities. The court concluded that s 217(1)(b)(ii) violated the provisions of the Interim Constitution and was invalid.

Confessions confirmed and reduced to writing in the presence of a magistrate or justice of the peace and undue influence

Now that there is no longer a shift in onus when a confession is reduced to writing and confirmed in the presence of a magistrate, the significance of the above factors may well be diminished. However, reduction to writing remains a requirement for admissibility where the confession is made to a peace officer who is not a magistrate or justice of the peace. Consequently the circumstances in which a confession was reduced to writing will remain a factor to be taken into consideration in determining whether a confession was made freely and voluntarily, in sound and sober senses and without undue influence.

It is now clear that the prosecution will always bear the burden of proving that a confession was made freely and voluntarily in sound and sober senses and without undue influence.

Procedure: Trial-Within-a-Trial

The admissibility of a confession is determined at a trial-within-a-trial. The rationale is rooted in a rule of policy that self-incriminating statements should not be coerced and that accused persons be in a position to challenge the voluntariness of their statements without running the risk of further incriminating themselves. It is the insulation of the evidence given at a trial within a trial from the main trial which allows the accused to do this. This insulation applies to both evidence given by the accused and witnesses.

At this stage of the proceedings both prosecution and defence will adduce evidence as to the circumstances in which the confession was made. The judge and assessors will decide whether the requirements of admissibility have been met. In order to avoid potential prejudice to the accused the court will not consider the contents of a confession before determining whether it is admissible. The purpose of the inquiry is not to establish the accused's guilt or innocence but the admissibility of the confession, and the accused may not be

cross-examined on the issue of his guilt. Consequently, at the trial within a trial the general rule is that an accused may not be cross-examined as to whether the confession is true or not. However, cross-examination of this nature may be allowed where the accused alleges that the confession is false and that the true authors were the police. The purpose of the cross-examination is to test the accused's credibility and not the truth of the confession. In such circumstances the prosecution may cross-examine on the contents of the confession and only those portions referred to in cross-examination may become part of the record. In S v Potwana and Others the court, when assessing evidence pertinent to the voluntariness of the confession, warned against attaching undue significance to the fact that an accused person lied with regard to the truth of the content of the confession.

A confession (and admission) is admissible only against the person who made the confession and may not be admitted either directly or indirectly against any other person. This rule is also applicable to admissions and to evidence arising out of a pointing out that constitutes an admission (see s 219A of the CPA) In S v Jili the court distinguished between two types of evidentiary material that may arise out of a pointing out. The first kind are facts that are discovered as a result of the pointing out. These facts, which exist objectively, if found to be admissible can be taken into account for all purposes against all accused. The second is the fact that the accused did the pointing out. The relevance of this evidence is to establish the extent of the accused's knowledge by virtue of his ability to do the pointing out, which amounts to an admission and consequently is admissible only against the person who did the pointing out.

## B. KINDS OF EVIDENCE AND PRESENTATION THEREOF

**Oral evidence.**

General:

Evidence Must Generally be Given on Oath or Affirmation

Section 162 of the CPA provides that no person shall be examined as a witness unless he has taken the oath in the form set out in the section. The oath must be administered by the judge, registrar, or presiding officer. Section 163 of the CPA allows a person who objects to taking the oath (either at all or in the prescribed form) to make an affirmation to speak the truth. An affirmation has the same legal effect as an oath and the maker of both an oath and affirmation may be charged with perjury or statutory perjury. The oath or affirmation may be administered through or by an interpreter instructed by the court.

Section 39 of the CPEA provides that no person (other than a person referred to in ss 40 and 41 and may give evidence except on oath. The oath is to be administered in the manner which most clearly conveys to the witness the meaning of an oath and which the witness considers to be binding on his conscience. Section 40 provides for an affirmation to be made in lieu of an oath. A person who attends court in obedience to a subpoena duces tecum is not necessarily a witness and consequently need not take an oath unless he is required to prove the document (that is, where he is required to go into the witness-box and identify and hand in the document).

Unsworn evidence exceptionally allowed.

Section 164 of the CPA provides that any person, who is found not to understand the nature and import of the oath or affirmation, may in criminal proceedings give evidence without taking the oath or making an affirmation. There is, however, a proviso that he should be admonished by the judge or presiding officer to speak the truth. A person who falsely and wilfully states an untruth after he has been admonished may be charged with perjury or statutory perjury. Section 41 of the CPEA has similar provisions for the reception of unsworn evidence.
A witness with no religious belief shall make an affirmation at the direction of the presiding officer.

Examination in chief:
The purpose of examination in chief is to present evidence favourable to the version of the party calling the witness. The method most frequently adopted is the question-and-answer technique. This method is used to control the witness so that he does not speak of inadmissible or irrelevant matters. On the other hand, it is sometimes advisable to allow a witness to tell his story without interruption as, in this way, a person may tell a story more convincingly and clearly. 8 A mixture of these two approaches may be the happy medium provided the person leading the evidence has control of the witness so that he can prevent the introduction of inadmissible evidence. There is no rule as to which method should be employed; it lies within the discretion of the person leading the evidence. Strict adherence to the question-and-answer technique is normally unnecessary where the witness is experienced in court appearances (for example, a district surgeon or policeman).
Leading questions generally prohibited.
A leading question is one which either suggests the answer or assumes the existence of certain facts which might be in issue. The reason for the prohibition on leading questions is that the witness might be favourably disposed to the person calling him and readily adopt the suggested answer. Hoffmann & Zeffertt suggest that human laziness must also be considered; it is easy to say yes or no when asked something. However, not all questions which suggest a yes or no answer are leading questions. Wigmore states that questions may legitimately suggest to the witness the topic of the answer required, but not the specific tenor of the answer desired. In practice this distinction will depend on the circumstances of each case.
Situations where leading questions are permitted.
Leading questions are allowed with regard to introductory or uncontested matters. Most examinations commence by suggesting the witness's name (“Are you Joe Soap?”), his address (“Do you live at Jan Smuts Avenue?”) and his personal knowledge of a party (“Do you know the accused?”). Likewise, in a vehicle accident case the date, place and time of the accident may be led if these facts are not in dispute. It is often permissible to use leading questions with regard to such matters as identification of persons or things. The general rule is that leading questions may be asked in cross-examination.
Limited Use of Witness's Previous Consistent Statement
A party almost invariably presents the evidence in chief of his witnesses on the basis of earlier extra-curial written statements made by the witnesses concerned. These earlier statements may generally not be proved or quoted by the party conducting examination in chief. During examination in chief (and other stages of a trial) the earlier written statement serves an extremely limited purpose: it merely assists a party to examine his witness on facts falling within

the latter's knowledge. But there are some instances where a witness's previous consistent oral or written statement may — either during examination in chief or during re-examination — be put to more use on
account of its relevance. A witness's previous written statement may also be used to refresh his memory whilst he is in the witness-box, but certain strict requirements must be satisfied.

Cross-examination:
Cross-examination is a fundamental procedural right. It is one of the essential components of the accusatorial or adversarial trial and a natural and integral part of our trial system, where emphasis is placed upon orality. Cross-examination is the name given to the questioning of an opponent's witness. It succeeds examination in chief. The essence of any defence should in principle be introduced during cross-examination.
Failure to allow cross-examination constitutes a gross irregularity. The court has no right to prevent cross-examination — even if the purpose is to protect the witness.

The purpose and general scope of cross-examination
The purpose of cross-examination is to elicit facts favourable to the cross-examiner's case and to challenge the truth or accuracy of the witness's version of the disputed events.
The scope of cross-examination is wider than that of examination in chief. The cross-examiner is also not restricted to matters covered by the witness in his evidence in chief.
A number of methods may be used in cross-examination to test the reliability, credibility and observation of the witness. A witness may be asked the same question more than once in cross-examination in order to test the witness; but pointless repetition may be stopped by the court. The court should not forbid the cross-examiner the right to ask a witness to repeat something that has already been said in chief merely because it has already been said. But the court may curtail cross-examination where the cross-examiner endeavours to wear the witness down or where there are grounds to intervene on the basis of s 166(3) of the CPA
Leading questions may as a rule be asked in cross-examination But there is a measure of dispute as to whether leading questions may be put to witnesses who are obviously favourably disposed to the cross-examiner. A court is obviously entitled to attach less weight to answers given to leading questions put by a cross-examiner to a favourable witness. A cross-examiner who wishes to put blatant leading questions to a favourable witness must therefore consider this risk.
The right to cross-examine arises as soon as any witness of an opponent has been sworn or admonished or has made an affirmation. This right may be exercised even if the witness does not give evidence in chief. In the event of a joint trial, each accused is entitled to cross-examine a co-accused who has testified.
A party may as a rule not cross-examine his own witness.
A party has a duty to cross-examine on aspects which he disputes. His failure to cross-examine may in appropriate cases have evidential consequences in that an adverse inference may be drawn against him, The rationale of this duty to cross-examine is that if it is intended to argue that the evidence of the witness should

be rejected, he should be cross-examined so as to afford him an opportunity of answering points supposedly unfavourable to him.
Generally the failure of the prosecutor to cross-examine an accused may be decisive.
A failure to cross-examine by a simple peasant does not necessarily signify guilt.
It is the duty of the court to tell an undefended accused to put relevant portions of his defence to a witness. he court must assist illiterate persons and undefended persons.

There are limits beyond which cross-examination should not go.
Curial courtesy.
Vexatious, abusive, oppressive or discourteous questions may be disallowed.
Much will depend, however, upon the demeanour of the witness who is being cross-examined. The court will allow a cross-examiner to cut a rude or sarcastic witness down to size,but will adopt a different approach where a witness is for no reason harassed by abusive cross-examination. The dignity of the court must, above all, be maintained. Cross-examination need not always be aggressive in order to be effective.
Misleading statements put by cross-examiner
Misleading or vague statements should not be put to a witness.
A cross-examiner should take care before asserting that a witness has previously said something in his evidence which had in fact not been said; and the court should curb this type of questioning.
Inadmissible evidence
Inadmissible evidence may not be put to nor elicited from a witness. An accused may, for example, not be cross-examined on the basis of an inadmissible confession. Cross-examination on the basis of a privileged statement is also inadmissible.
In criminal cases, generally, where an accused elicits unfavourable evidence which is inadmissible, this evidence does not become admissible.
Sections 197 and 211 of the CPA
In terms of ss 197 and 211 of the CPA an accused who gives evidence may neither be asked nor be required to answer any questions which tend to show that he has been convicted of or charged with any other offence apart from the one on which he is standing trial. But s 197 also makes provision for specific instances where questions of this nature are admissible.
Cross-examination as to credit
This aspect and the rule that answers given to questions in cross-examination relating to collateral issues are final,
A witness may be cross-examined as to his memory, perception, reliability, consistency, honesty and accuracy in relating his story. Fairly wide bounds are permitted in cross-examination.
An answer to a question which solely concerns the credibility of a witness must be accepted as final. This is so as to prevent endless collateral issues from being investigated. It is sometimes difficult to decide whether an issue is sufficiently relevant to allow contradictory evidence to be led.
There are, however, two situations where cross-examination as to credit may be followed up with contradicting evidence.
A court must permit a fair measure of latitude in cross-examination and it must "avoid even suspicion that the defence is muzzled".There are, however, situations where cross-examination is abused and degenerates "to a treadmill of repetition and a quagmire of irrelevancies".

Legal professional ethics
Paragraph 3 3 of the Code of Conduct: Uniform Rules of Professional Ethics of the General Bar Council of South Africa requires advocates to observe the following ethical rules in cross-examining witnesses: (a) Questions which affect the credibility of a witness by attacking his character, but are not otherwise relevant to the actual enquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well-founded or true. (b) An advocate who is instructed by his attorney that in his opinion the imputation is well-founded or true, and is not merely instructed to put the question, is entitled prima facie to regard such instructions as reasonable grounds for so thinking and to put the question accordingly. (c) An advocate should not accept as conclusive the statement of any person other than the attorney instructing him that the imputation is well-founded or true, without ascertaining, so far as is practicable in the circumstances, that such person can give satisfactory reasons for his statement. (d) Such questions, whether or not the imputations they convey are well-founded, should only be put if, in the opinion of the cross-examiner, the answers would or might materially affect the credibility of the witness; and if the imputation conveyed by the question relates to matters so remote in time or of such a character that it would not affect the credibility of the witness, the question should not be put. (e) In all cases it is the duty of the advocate to guard against being made the channel of questions which are only intended to incense or annoy either the witness or any other person.

Re-examination:
Re-examination follows cross-examination and is conducted by the party who initially called the witness. A party has a right to re-examine.
The purpose of re-examination is to clear up any point or misunderstanding which might have occurred during cross-examination; to correct wrong impressions or false perceptions which might have been created in the course of cross-examination; to give the witness a fair opportunity to explain answers given by him under cross-examination which, if unexplained, may create a wrong impression or be used to arrive at false deductions; to put before the court the full picture and context of facts elicited during cross-examination; or to correct patent mistakes made under cross-examination. Re-examination can be, and frequently is, a very important mechanism of presenting a full picture and thus of arriving at the truth. The right to re-examine is not restricted to matters raised for the first time during cross-examination. But new matters (that is, matters not introduced in evidence in chief) may only be canvassed with leave of the court, which should then allow further cross-examination on the new evidence. Re-examination is conducted in accordance with the rules which cover examination in chief; consequently leading questions will not be permitted. If part of a document has been referred to in cross-examination, the whole document may be referred to in re-examination.

Examination by the Court
The court has the right to question a witness at any stage of the proceedings and the rule against leading questions does not apply. But it is desirable that leading questions should be avoided. Very often questioning by the court takes place after re-examination. The main purpose of such questioning should be to clear up any points which are still obscure. The court should play a limited role. The judge who himself conducts the examination . . . descends into the arena

and is liable to have his vision clouded by the dust of conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. it is said that it is difficult and undesirable to define precisely the limits within which judicial questioning should be confined. Certain broad limitations were mentioned: (a) the judge must conduct the trial so that his impartiality and fairness are manifest to all concerned; (b) a judge should refrain from questioning in such a way or to such an extent as to lose judicial impartiality and objectivity; and (c) a judge should desist from questioning in a way which may intimidate or disconcert a witness so as to affect his demeanour or impair his credibility.
In criminal cases a judge has more latitude, subject to the rules mentioned above, to intervene to see that justice is done and the truth ascertained. In civil proceedings his intervention should be less frequent.
Section 115 of the CPA does not entitle a court to cross-examine an accused during the so-called explanation of plea procedure.

**Real evidence**
The court's function and the limits of its observations
The court should describe the exhibit carefully so that the details may be embodied in the record. The court should not attempt to make any observations which require expert knowledge. But the court itself may obviously conduct any test where expert assistance would be superfluous, such as measuring exhibits. In Rex v Makeip the judge examined some plaster casts of footprints (which were exhibits) with a magnifying glass and also measured the distance between the various marks. The Appellate Division held that this procedure was permissible as it did not require more than ordinary knowledge or skill. There are situations where a court, having received real evidence for its inspection and assessment, can or should also receive expert evidence to enhance or contribute to the court's interpretation of the evidence.

Tape recordings:
Tape recordings may be admissible as real evidence. The main danger concerning this type of evidence is the possibility of editing or alteration of the tapes.
The court should be satisfied that it is shown prima facie that the recording is original. The recording must also be sufficiently intelligible. Sometimes a transcript of the recording will be produced in evidence subject to the court being satisfied as to the accuracy of the transcription. In Hopes v HM Advocate a Scottish court held that a typist who prepared a transcript after playing over the recording many times could be considered an expert in respect of the particular recording. The transcript must be identified by the person who made it. 18 There must be evidence to identify the speakers. This may be done in several ways, for example, either by a person who heard the speech or conversation or by inference from what was said.

Fingerprints
Evidence that fingerprints were found at the scene of the crime or on a particular object is often of strong probative value in linking the accused with the commission of a crime. The usual manner in which fingerprint evidence is obtained is as follows: a policeman will lift a print by means of folien from the object and then send off the folien and fingerprints taken from the suspect to a police expert stationed at a main centre; the expert will then compare the

fingerprints of the suspect with those found at the scene; the expert will mount enlarged photographs of the two sets of prints side by side and mark the points of similarity. If the expert attends court, he will often re-take the accused's fingerprints and compare them with the prints found at the scene. Seven points of similarity are sufficient to prove beyond doubt that the prints were made by one and the same person. The evidence of comparison may be given orally or by affidavit (s 212(4) and (6) of the CPA). Once the court accepts that the witness is an expert it will as a general rule accept his evidence. The procedural requirements relating to comparative charts are set out in a number of cases.
Footprints do not require explanation by an expert and the court is obviously not obliged to accept an opinion as to the identity.

Photographs, Films and Video Recordings
Photographs may be produced as real evidence of such matters as injuries or accident damage. A photograph may also be used where an item is too bulky to produce in court. Section 232 of the CPA expressly allows for the production of photographs. Witnesses may also identify persons by examining photographs. A photograph is a document in terms of Part VI of the CPEA (s 33) and may be admissible in both civil and criminal proceedings (s 222 of the CPA) if the photographer has acknowledged in writing that he is responsible for its accuracy. In other instances there must be evidence that the photograph is a true likeness of the items shown in it.
The principles regarding the use of films as real evidence are the same as those for photographs.
In S v Mpumlo and Others the court held that a video film was not a document but was real evidence which, so long as it satisfied the requirement of relevance, could be produced, subject to any dispute as to authenticity or interpretation. In that case a copy was produced, but this was said only to go against the weight that may be attached to the evidence.
In S v Ramgobin and Others Milne JP held that there was no difference in principle between the admission of audio tapes and video recordings. Milne JP held that the state had to prove the following factors beyond a reasonable doubt: (a) originality; (b) that no interference had taken place; (c) that they related to the incident in question; (d) that the recording was faithful; (e) that the identity of the speakers was identified; and (f) that the recordings were sufficiently intelligible. In S v Baleka and Others it was held that sound recordings and video recordings, and a combination of the two, are real evidence to which the rules relating to documentary evidence are not applicable

Inspection in loco
It is open to the court to hold an inspection in loco to observe the scene of an incident or the nature of an object which cannot be produced in court. The decision to hold an inspection in loco is solely within the discretion of the court. A court of appeal will be slow to hold that the trial court was wrong in refusing to hold an inspection. The power to hold inspections in loco is conferred on a court, in criminal cases, by s 169 of the CPA and in civil cases by Magistrates' Courts Rules rule 30(1)(d) and rule 39(16)(d) of the Uniform Rules of Court.
An inspection in loco may achieve two main purposes: (a) it may enable the court to follow the oral evidence more clearly or (b) it may enable the court to observe some real evidence which is additional to the oral evidence. It is undesirable that an inspection in loco should take place after the evidence and

arguments have been completed, because observations made by the court should be recorded and the parties should be afforded the opportunity of making submissions and leading evidence to correct an observation which seems to them to be incorrect. The inspection should be held in the presence of both parties. There is authority that the presiding officer may make the inspection on his own. The better view is that he should not do so. If witnesses point out items and places during the inspection, they should subsequently be called or recalled to give evidence on what was indicated at the inspection. 33 It is irregular for the inspection to be held in the presence of only one of the parties or his witnesses.

Handwriting

Comparisons of disputed writing with any writing proved to be genuine may be made by a witness. Such writings and the evidence of the witnesses may be submitted as proof or otherwise of the writing in dispute (s 228 of the CPA and s 4 of the CPEA). The writing submitted for comparison is real evidence. An expert in the comparison of handwriting is usually known as a "questioned document examiner". Such an expert will usually mount the disputed writing side by side with the genuine writing and indicate points of similarity. The court is of course not bound by an expert's opinion. A layman may give evidence concerning the comparison of writing that he knows. The Supreme Court of Appeal has found that a court may draw its own conclusions from its own comparisons.
comparison.

Blood Tests, Tissue Typing and DNA Identification

The results of blood tests may be used in litigation. This is usually done in cases of driving under the influence of alcohol or driving with an excess blood-alcohol level. In paternity cases red blood cell tests can at the most give a negative result. All that can be said is that the alleged father could not have been the father. 38 The HLA tissue typing test may be used to prove paternity to a much more certain degree than red blood cell tests. In Van der Harst v Viljoen 39 evidence showed a probability of 99,85% that the defendant was the father. However, such testing is merely corroborative of the evidence of the complainant or plaintiff.
In paternity cases it is disputed whether a person may be forced to submit to blood or tissue tests in civil cases by order of the Supreme Court. 40 However, if there is no such order and a party decides not to submit, the provisions of s 37 of the Children's Act 38 of 2005 must govern the situation (see § 28 5 4 below). A far more precise method of identification is to be found in the so-called DNA "fingerprinting". 41 Section 36A(1) in Chapter 3 of the CPA, defines "DNA" as "deoxyribonucleic acid which is a bio-chemical molecule found in the cells and that makes each species unique . . .". What follows is a very basic description of DNA as a means of identification, the scientific basis thereof and the process involved. Humans have 46 chromosomes in the nucleus of each somatic or body cell. These thread-like structures are composed of a linear arrangement of genes which in turn are made up of DNA (deoxyribonucleic acid). The DNA of each individual is unique, except for identical twins. A person's DNA resembles that of his or her parents because one member of each of the 23 chromosome pairs comes from the mother and one from the father. DNA can be extracted from cells taken from skin, bone, blood, hair follicles and semen. This DNA can then be used in laboratory tests to show a distinctive pattern of bands. This process is

known as DNA fingerprinting. The pattern that is revealed can then be compared with other samples of DNA to determine if there is a match.

**Documentary Evidence**

Document

There appears to be no single common-law definition of what constitutes a document and it is probably prudent to simply acknowledge that the definition is very wide. In the words of Darling J in R v Daye a document is "any written thing capable of being evidence" and it does not matter what it is written on. "Document" has also been statutorily defined and varies between statutes. For example, s 33 of the CPEA defines a document as including "any book, map, plan, drawing or photograph" and s 221 of the CPA defines a document as including "any device by means of which information is recorded or stored". The Electronic Communications and Transactions Act 25 of 2002 accommodates developments in technology by creating a new type of evidence, namely, a "data message", which is defined as "data generated, sent, received or stored by electronic means and includes (a) voice, where the voice is used in an automated transaction; and (b) a stored record.

Admissibility requirements

There are two basic rules governing the admissibility of a document: the original document must be produced and the document must be authenticated. OF course, all the general rules of evidence must — where applicable — also be taken into account (for instance, the rule that would exclude irrelevant evidence).

The original document

Despite the long history of the original document requirement it is not always clear how to identify an original document. However, originality would appear to correspond with the original source of recording. It is consistent with the rationale of requiring the original in order to avoid error or falsification. This accords with case law. For example, it has been held that the form filled in at the post office and not the resultant telegram constitutes the original document. It also allows for the recognition of multiple originals in the case of carbon copies, initialled copies and even a roneod copy.

Authenticity

The requirement that a document be authenticated, generally means no more than tendering evidence of authorship or possession depending on the purpose for which it is tendered. This can be done in a variety of ways, these were described by Human J in Howard & Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa 32 as follows:

"The law in relation to the proof of private documents is that the document must be identified by a witness who is either (i) the writer or signatory thereof, or (ii) the attesting witness, or (iii) the person in whose lawful custody the document is, or (iv) the person who found it in possession of the opposite party, or (v) a handwriting expert, unless the document is one which proves itself, that is to say unless it:

(1) is produced under a discovery order, or
(2) may be judicially noticed by the court, or
(3) is one which may be handed in from the Bar, or
(4) is produced under a subpoena duces tecum, or

(5) is an affidavit in interlocutory proceedings, or
(6) is admitted by the opposite party."

The effect of s 36 of the CPEA is that the only instance in which the evidence of an attesting witness is required to prove a document is in the case of a will. In all other cases the document may be proved by evidence identifying the author.

**Electronic evidence**

Criminal proceedings

The approach which South African courts have taken to the admissibility of computer printouts in criminal proceedings was based on s 221 (for business records) and s 236 (for banking records) of the CPA. Section 221 provides for certain trade or business records to be admitted into evidence as proof of their contents if (a) they are compiled in the course of business from information supplied by persons having personal knowledge of the matters dealt with in the document; and (b) the person who supplied the information is dead, out of the country, physically or mentally unfit to attend as a witness, cannot be identified or found, or cannot reasonably be expected to recollect the matters dealt with in the document. In terms of the Act, a document includes any device by means of which information is recorded or stored and a statement includes any representation of fact whether made in words or otherwise.

The question whether computer printouts are documents within the meaning of a document in s 221 was considered in S v Harper and Another. 32 Milne J took a similar approach to the finding in the Narlis decision by holding that the extended definition of a document in the CPA was not wide enough to cover a computer. In reaching his finding the judge stated that ". . . at any rate where the operations carried out by it are more than the mere storage or recording of information." 34 In other words information obtained from computer printouts would be admissible only if the function of the computer was purely passive in that it merely recorded or stored the information. If the computer carried out active functions, over and above storage, then the fruits of its endeavours would be inadmissible.

The decision in S v Harper and Another was then applied in S v Mashiyi and Another, and s 221 was read to exclude computer printouts (in this case documents relating to fraudulent medical aid claims) that contained information "obtained after treatment by arrangement, sorting, synthesis and calculation by the computer." In the Mashiyi judgment the court added its voice to the call "that this lacunae in our law be filled and for new legislation relating specifically to computer evidence in criminal cases be considered and promulgated." 37 Such legislation is contained in the ECT Act, which came into operation soon after the Mashiyi judgment was handed down.

Electronic Communications and Transactions Act 25 of 2002 (ECT Act)

The ECT Act moves beyond the concept of "computer printouts" and focuses on the terms "data" and "data messages". The Act defines data as "electronic representations of information in any form" and data messages as "data generated, sent, received or stored by electronic means and includes — (a) voice, where the voice is used in an automated transaction; and (b) a stored record." Section 15 of the ECT Act regulates the admissibility and evidential weight of data messages, which is the focus of this chapter. However, the ECT Act further provides for the production of a data message in an original form, guidelines for judging the integrity of the data message, the production of the data message in court and the requirement to satisfy a court of the authenticity

thereof. 45 In so far as the formal requirements of signature are concerned, s 13 provides for compliance by way of the use of an electronic signature 46 to be attached to a data message. The ECT Act is a comprehensive document, which aims to be an enabling piece of legislation that will permit and regulate the use of electronic data in civil and criminal proceedings.

The admissibility of electronic evidence

Section 15(1) permits the admissibility of electronic evidence by laying down the following general principle: "In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence —
(a) on the mere grounds that it is constituted by a data message; or
(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form."
The exact meaning of this provision requires close consideration of the established principle that the law excludes documents as hearsay because of doubts about the reliability of their content. Therefore, should s 15(1) be given too wide an interpretation by making all data messages admissible then it would undermine the established law which governs manuscript documents. The court in Ndlovu v The Minister of Correctional Services And Another 48 took the view that s 15(1) facilitates admissibility by ousting evidence rules which would exclude electronic evidence purely because of its electronic origin. The printout concerned was identified as "a data message". The court stated: "The data message must be relevant and otherwise admissible, be proved to be authentic and the original be produced, unless (in regard to the latter aspect) s 15(1)(b) applied."

Data Messages as Real Evidence

The law of evidence in South Africa distinguishes a distinction between documentary evidence and real evidence. Relevant real evidence is admissible. The question is whether a data message may take the form of real evidence? In this regards a distinction needs to be drawn between "computer-generated" and "computer-assisted" data.
In Ex Parte Rosch the court was called upon to consider the admissibility of a series of automatically generated computer print-outs regarding the details of telephone calls. The court held as follows: "On behalf of the appellant it was submitted that the admission of this document offends against the hearsay rule. In our view there is no substance in this submission. The computer is not a witness who stated what he did not himself know. The printout is real evidence in the sense that it came about automatically and not as result of any input of information by a human being. There is therefore no room for dishonesty or human error. The printout in the present case is similar to the radar diagram produced in the English case of The Statue of Liberty: Owners of the Motorship Sapporo Maro v Owner of Steam Tanker, Statue of Liberty [1968] 2 All ER 195 (PDA) where such a document was admitted as evidence." On this basis the computer-generated printouts were treated as real evidence and held admissible. In S v Ndiki and Others Van Zyl J considered the admissibility of two kinds of computer print-outs. Some were generated by a computer following human input. These the judge classified as hearsay. But the print-outs produced without human intervention, were regarded as real evidence and were therefore held admissible. However, Van Zyl J noted that the admissibility of this evidence would be dependent on the accuracy and reliability of the computer, its operating system and its processes. The approach of the courts to treat computer generated

evidence as real evidence overcomes the problem of treating all data messages as hearsay forms of evidence and is in keeping with the functional equivalence doctrine. The contrary view would result in the classification of evidence long considered as real evidence as hearsay simply because it takes an electronic form.

**Witnesses**

**The Competence and Compellability of Witnesses**

The General Rule

In both civil and criminal proceedings the general rule is that every person is presumed to be competent and compellable to give evidence unless the matter of competence and compellability is regulated by statutory provisions or, where applicable, by the law as it stood "on the thirtieth day of May 1961".
It should be noted that in South Africa, following the English example, the parties to a civil suit are regarded as competent witnesses. In contrast to the English orientated approach continental systems generally, under the influence of the French model, do not regard the parties in civil proceedings as competent witnesses. In South Africa a party to a civil suit is not only competent to testify in his own cause but he can also be compelled by his opponent to give evidence for the latter. In other words, the plaintiff can call the defendant as a witness and vice versa.

General Procedural Matters

Parties cannot consent to the admission of an incompetent witness' evidence. The court must decide any question concerning the competence or compellability of any witness. The method of examining and deciding issues relating to competence or compellability is normally that of trial within a trial. It may be necessary for the court to hear evidence, for example, on the issue whether a deaf mute can communicate properly. However, the court can also decide the issue of competence on the basis of its own observations, without requiring a trial within a trial. A competent and compellable witness who refuses to attend the proceedings may be brought before the court by means of a warrant of arrest. Such a witness, or one who does attend but refuses to testify, may also be tried and punished summarily by the court for his failure or refusal. The witness concerned can, however, avoid punishment by presenting an acceptable excuse.

Judicial Officers

Judges and magistrates are not competent to give evidence in cases over which they preside or have presided. If they have personal knowledge of a fact in dispute, they should recuse themselves. They may then testify after recusal. No recusal is necessary where judicial notice may take place.
If a judge is competent to testify in a given case, a subpoena may nevertheless not be issued against him without leave of the High Court

Officers of the Court

Attorneys, advocates and prosecutors are competent witnesses in cases in which they are professionally involved. But it is extremely undesirable that they testify in such cases. By so doing they would compromise their independence with regard to the case and put their credibility at stake.

The Accused

An accused, whether or not charged jointly with another accused, is at any appropriate stage in criminal proceedings competent to testify in his own

defence. He may not, however, be called as a witness except upon his own application. The accused is therefore a competent but non-compellable witness. It should be borne in mind, however, that an accused who has given evidence may be recalled by the court.

The Accused and Co-Accused in the Same Proceedings

An accused who testifies in his own defence may in the process give evidence favourable to a co-accused. But since every accused testifies only of his own volition, a co-accused cannot compel another accused to give evidence on his behalf. An accused may also incriminate a co-accused whilst giving evidence on his own behalf. But the state cannot call him as a witness for the prosecution since his competence is confined to being a witness in his own defence. It is only by terminating his status as an accused in the same proceedings as the co-accused that he can become a witness for the prosecution against his former co-accused.

Such a change of status can be achieved in the following ways:

(a) If the charge against the accused is withdrawn. This does not amount to an acquittal and the former accused can be prosecuted again. But by testifying he can in certain circumstances qualify for an indemnity from prosecution.

(b) If the accused is found not guilty and discharged. In terms of s 6(b) of the CPA a prosecution may be stopped even after an accused has pleaded, in which event he must be acquitted. In such an instance the accused may not be prosecuted again but may be called as a state witness.

(c) If the accused pleads guilty and the trials of the accused and his co-accused are

separated. Furthermore, it is desirable that the accused should be convicted and sentenced before being called as a witness.

(d) If the trials of the accused and his co-accused are separated for another valid reason. 47 In this event it is also desirable that the accused, if convicted, should be sentenced before being called to testify for the prosecution.

Since the former accused is ordinarily an accomplice, the cautionary rule in this regard will apply.

Spouses

The position regarding the competence and compellability of a spouse to be called as a witness for or against the other spouse depends on the nature of the proceedings A partner in a civil union as provided for by the Civil Union Act 17 of 2006 is also a spouse. This is clearly the effect of s 13(2)(b) of this Act, which provides that "husband, wife or spouse in any other law, including the common law, includes a civil union partner." People married in terms of indigenous law or any system of religious law, are also considered spouses (see n 52 to § 22 11 2 below).

Criminal cases

In this context a distinction must be drawn between the case where the spouse of an accused testifies on behalf of the defence and where the spouse is called as a witness on behalf of the prosecution. For the sake of convenience the husband is in paragraphs (i) and (ii) below cast in the role of the accused, whilst his wife assumes the role of the witness.

Witness for the defence

The spouse of an accused is a competent witness for the defence, whether or not the accused is charged jointly with any other person. If the spouse is called to testify on behalf of the accused, she is both competentand compellable 50 to do

so. The spouse is also a competent witness for any co-accused of the accused. But in this instance she cannot be compelled to testify.

Witness for the prosecution

The spouse of an accused is a competent witness for the prosecution, but as a rule she cannot be compelled to testify in this capacity. However, she is both a competent and compellable witness for the prosecution where the accused is charged with a crime falling within the following categories: (a) any offence committed against the person of either of them or of a child of either of them; (b) any offence under Chapter 8 of the Child Care Act 1983 committed in respect of any child of either of them; (c) any contravention of any provision of s 31(1) of the Maintenance Act 1998, or of such provision as applied by any other law; (d) bigamy; (e) incest as contemplated in s 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; (f) abduction; (g) any contravention of any provision of s 2, 8, 10, 11, 12, 12A, 17 or 20 of the Sexual Offences Act 1957; (gA) any contravention of any provision of s 17 or 23 of Act 32 of 2007 as referred to in (e) above; (h) perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other, or in connection with or for the purpose of criminal proceedings in respect of any offence included in this subsection; (i) the statutory offence of making a false statement in any affidavit or any affirmed, solemn or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in (h) above.

**The Calling of Witnesses**

Witnesses called by the state

In criminal cases the state leads evidence first. Before any evidence is adduced the prosecutor may address the court for the purpose of explaining the charge and indicating, without comment, what evidence the state intends to adduce in support of its allegations against the accused. The prosecutor then calls his first witness and examines him in terms of the rules which govern examination in chief. In terms of s 150(2)(a) of the CPA the prosecutor may examine the witness and adduce such evidence as may be admissible to prove that the accused committed the offence referred to in the charge or any other offences which might be competent verdicts on the charge. At the completion of examination in chief the accused or his legal representative has a right 1 and a duty to cross-examine the witness. Cross-examination should not be conducted by the accused and his legal representative. The prosecutor has a right to re-examine the witness upon completion of cross-examination by the defence. The prosecutor may thereafter call the next witness (if any) and this witness will in turn be taken through examination in chief by the prosecutor, cross-examination by the defence, and (if necessary) re-examination by the prosecutor.

The prosecutor closes his case after all the witnesses for the state have testified. At this stage the defence may apply for the discharge of the accused in terms of s 174 of the CPA. The court may also grant a discharge mero motu.

Witnesses called by the court

Section 186 of the CPA provides as follows:

"The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential for the just decision of the case."

This section introduces an inquisitorial element into our basically accusatorial trial system. 36 It is an irregularity if the court fails to call a witness whose evidence is essential for the just decision of the case.
In terms of s 166(2) of the CPA the prosecutor and the accused may, with leave of the court, examine or cross-examine any witness called by the court in criminal proceedings.
Section 186 of the CPA does not empower the court to call the accused as a witness. The accused may testify only upon his own application. 38 The court may, however, recall an accused who testified in his own defence (
Witnesses recalled by the court
Section 167 of the CPA determines, inter alia, that the court may recall and re-examine any person, including an accused, already examined at the proceedings and shall recall the person concerned if his evidence appears to the court essential to the just decision of the case.

**Refreshing the Memory of a Witness**
The law of evidence assigns great importance to the principle of orality in the adjudication of disputes. Witnesses are as a rule required to give independent oral testimony in the sense that they are generally not permitted to rely on, or refer to, a statement, note or document whilst testifying. This general rule creates the impression that preference is given to memory over writing as a means of "preserving evidence". This preference can hardly be reconciled with the simple truth embodied in the saying "Ink does not loose its hold on paper, as facts do on the memory". Be this as it may, the preference for oral evidence is a corner-stone of the common-law evidential system, where cross-examination plays a pivotal role: greater weight is attached to *viva voce* statements of witnesses than to their earlier recorded statements.
Legislation has amended the position to a certain extent. Part VI of the CPEA (as read with s 222 of the CPA) 3 gives effect to the valid argument that the written statement of a witness may, depending upon circumstances, be more accurate than his recollection in court. In certain circumstances a prior written statement can in terms of Part VI be submitted in order to supplement — but not corroborate — the evidence of a witness who cannot recall an event or some details thereof. Part VI cannot, however, be relied upon in all circumstances. Where Part VI does not find application, recourse must be had to the common-law rules which provide for refreshing the memory of a witness. This procedure entails that a witness, who for some reason has forgotten a part (or all) of the events in respect of which he is to testify, may read or rely on his earlier record or statement in an attempt to refresh his memory. Refreshing the memory of a witness with the aid of his earlier record or statement is really a necessary exception to the general rule that witnesses must testify on the basis of an independent recollection of the relevant facts. Human memory is fallible, especially in those situations where considerable time has lapsed between the actual event and the witness's narration in court. The complexity of some issues may also make it extremely difficult or impossible for a witness to testify without the aid of his earlier record. 7 In this context "record" may include an ordinary written statement, a tape recording, 8 a policeman's notebook, 9 hospital records, 10 a ship's logbook, 11 and entries in a family Bible. Refreshing the memory of a witness in the course of his testimony and whilst he is in the witness-box, may take place only if certain conditions have been met. These conditions are referred to as the common-law foundation requirements and are discussed in §§ 24 5–24 5 6 below. Evidence must also be led to show

compliance with these conditions. It is also possible to distinguish between the situation where a witness refreshes his memory before being called upon to testify (see § 24 3 below) and the situation where refreshing of memory takes place during an adjournment (see § 24 4 below). In all these situations the distinction between "present recollection revived" and "past recollection recorded" (as explained in § 24 2 below) plays an important role.

## C. EVALUATION OF EVIDENCE

It was pointed out that a court should first determine the factual basis of the case before pronouncing on the rights, duties and liabilities of the parties engaged in the dispute. The factual basis is determined by evaluating all the probative material admitted during the course of the trial. In Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others Nienaber JA provided the following informative guidelines and principles in resolving factual disputes: ". . . To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail." The difficult task of finally analysing and assessing the weight or cogency of probative material arises after all the parties have closed their respective cases and delivered their arguments. The presiding judge or magistrate — and assessors where they have been used — must then assess the weight of the probative material in order to determine whether the party carrying the burden of proof has proved its allegations in accordance with the applicable standard of proof. A court must give reasons for its decision. Maguire once said that the rules of exclusion have kept Anglo-American lawyers so fully occupied that they have not yet satisfactorily explored the importance of evidential cogency; they have been too busy deciding what should be kept out to make — much less teach — a systematic appraisal of what they finally let in. 3 This allegation is probably partly true. However, it is also true that the court's duty to evaluate probative material is in many respects similar to the function of any prudent non-judicial finder of fact: credibility is determined, inferences are

drawn, and probabilities and improbabilities are considered. In the evaluation of evidence there are a few legal rules — largely stemming from case law — which can assist the court and which can act as a check But the difficult mental task of sifting truth from falsehood, of determining credibility, of relying on probabilities, and of inferring unknown facts from the known is by and large a matter of common sense, logic and experience. Inferences which are drawn should, for example, be in accordance with the rules of logic (see § 30 5 below) and circuitous reasoning is obviously not permissible. The absence of extensive legal rules governing the evaluation of probative material must also be understood in the light of the following statement by Van den Heever J: In the process of adjudication two factors are constant, namely what must be proved and to what degree of persuasion; but the third factor, namely the quantum and quality of the probative material required so to persuade the court, is subject to great variety. The purpose of the present chapter is to identify some of the main principles and rules which govern the determination of the quantum and quality of probative material.

# D. The Standard and Burden of Proof in Criminal Trials

### Introduction

The burden of proof functions to assist decision-makers in conditions of uncertainty. An accused is in terms of ss 106(4) and 108 of the CPA entitled to a verdict once she has pleaded. This principle of finality requires presiding officers to make an affirmative finding in every case irrespective of deficiencies in the evidence. Furthermore, the decision must accord with "certain abstract notions of justice and fairness". Allen notes even though "burdens of proof and presumptions . . . are tools which the legal system employs to advance its objective of accurate fact-finding," 3 they are tempered by considerations of policy. For example, the allocation of the burden of proof in criminal trials is a product of a society's preference that innocent people be protected from erroneous conviction. If we adopt the language of decision theory, burdens of proof "maximise the expected utility of legal proceedings". Although maximum utility can frequently be equated with the most accurate outcome, policy sometimes dictates otherwise. For example, when we require the prosecution to bear the burden of proving guilt beyond reasonable doubt it is "because the disutility of convicting an innocent person far exceeds the disutility of finding a guilty person to be not guilty: better that ten guilty persons go free than one innocent person be convicted". The burden of proof allocates the risk of non-persuasion: the person who bears the burden of proof will lose if she does not satisfy the court that she is entitled to succeed in her claim or defence. A proper understanding of the burden of proof requires a clear distinction to be drawn between the onus (burden of proof) and an evidentiary burden.

### The Ambit of the State's Onus of Proof

Identity and every element of the crime

The constitutional and common-law presumption of innocence and the principle that the burden of proof rests on a party seeking to change the status quo, cast on the state the burden of proving everything necessary to establish criminal liability: the accused as the perpetrator, the required mens rea, the commission of the act charged, and its unlawfulness. The state is required to prove the absence of any defence raised by the accused, for example, the absence of

compulsion, private defence, consent, sane automatism, the right to chastise or necessity. The incidence of the onus of proof with regard to mens rea and actus reus is also in no way altered by a defence of voluntary or involuntary intoxication. Where an alibi is raised the state bears the onus of proving that it was the accused who committed the crime.

Statutory exceptions
There are several exceptions to the general rule that the burden of proof rests on the state to prove guilt beyond reasonable doubt. These exceptions are obviously an infringement of the constitutional rights to be presumed innocent and to remain silent. Such infringements will be tolerated only if they meet the requirements of the limitations clause. The constitutionality of statutory presumptions that have the effect of placing a burden of proof on the accused is more fully considered in chapter 29 above.

Issues concerning the mental illness or mental defect of the accused
A distinction must be drawn between two situations, namely mental illness or mental defect as a substantive law defence and mental illness or mental defect as a procedural issue.

Criminal non-responsibility (incapacity) on account of mental illness or mental defect (s 78(1) of the CPA) An accused is criminally non-responsible if at the time of the alleged offence he was — on account of mental illness or mental defect — unable to appreciate the wrongfulness of his act, or to act in accordance with such an appreciation. This is a substantive law defence as provided for in s 78(1) of the CPA. It is sometimes called the "then" question, 2referring to the situation as it was at the time of the commission of the alleged offence. Section 78(1A) of the CPA provides as follows in respect of the above defence: "Every accused person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of s 78(1), until the contrary is proved on a balance of probabilities". Section 78(1A) codifies the common law and must be read with s 78(1B). The latter section provides as follows: "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". The burden of proof is therefore on the accused should he raise the issue by relying on the defence of mental illness or mental defect as provided for in s 78(1). He will be successful if he can discharge this burden on a balance of probabilities, that is, the civil standard of proof as explained in § 32 7 below. And in those (very rare) instances where the prosecution and not the accused, raises the issue, the prosecution will have the burden of proving its allegation on a balance of probabilities. This is the combined effect of s 78(1A) and 78(1B). It should be noted that s 78(1B) regulates the s 78(1) defence and does not apply to a defence of non-pathological incapacity. Is the common-law and statutory presumption of sanity (and its concomitant rule that an accused must prove his or her s 78(1) defence on a balance of probabilities) constitutionally tenable? In R v Chaulk the Canadian Supreme Court held that although the presumption of sanity infringed the constitutional right to be presumed innocent, it was a reasonable limitation. The underlying rationale of this conclusion was that to require the state to prove sanity would place an almost impossible burden on the prosecution. In a

minority judgment Wilson J held that the presumption of sanity could not be viewed as a reasonable limitation in that it did not impair as little as possible the accused's right to be presumed innocent as the same objectives could be met by merely placing an evidentiary burden ("weerleggingslas") on the accused. It should be noted that in Canadian law there appear to be no provisions in terms of which the court can order an investigation into the accused's mental state. In the South African context it is clear that insanity excludes the element of capacity which is a fundamental aspect of liability. Placing an onus of proving insanity on the accused relieves the prosecution of establishing this element of liability and, therefore, infringes the presumption of innocence. Burchell & Milton's solution is to restrict the effect of the presumption of sanity to the creation of an evidentiary burden. Although this distinction between the burden of proof and the evidentiary burden does not necessarily cure the prima facie unconstitutionality of the presumption of sanity, it certainly strengthens the argument that it meets the requirements of the limitations clause.

Non-triability on account of mental illness or mental defect (s 77 of the CPA)
An accused "may not be tried while he or she is incapable of understanding the proceedings". Section 77 of the CPA covers this situation and sets the following test: Is the accused "by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence"? This is the so-called "now" question, referring to the accused's mental state at the time of the trial. It concerns mental fitness to stand trial and raises the fundamental procedural issue of "triability". It is not a substantive law defence and does not give rise to issues pertaining to criminal responsibility. . Where an accused who indeed suffers from a mental defect or mental illness relies on s 77 (he or she has raised the matter of non-triability), the state (who did not raise the matter but wishes to contest non-triability) has the burden of proving that, notwithstanding the mental illness or mental defect, the accused is capable of understanding the proceedings so as to make a proper defence.

**The Criminal Standard of Proof**
The criminal standard of proof, is proof beyond a reasonable doubt and the courts have articulated its meaning in a number of different ways. In *S v Glegg* it was said that proof beyond reasonable doubt cannot be put on the same level as proof beyond the slightest doubt, because the burden of adducing proof as high as that would in practice lead to defeating the ends of criminal justice. It was also held that the words "reasonable doubt" in the phrase "proof beyond reasonable doubt" cannot be precisely defined, but it can well be said that it is a doubt which exists because of probabilities or possibilities which can be regarded as reasonable on the ground of generally accepted human knowledge and experience. Where there are no probabilities either way and it cannot be said that the innocent version of the accused is not reasonably true, then the evidence does not constitute proof beyond reasonable doubt. In *Rex v M* it was said that it is not a prerequisite for an acquittal that the court should believe the innocent account of the accused: it is sufficient that it might be substantially true. The accused is not required to prove her innocence. But fanciful possibilities should not be allowed to deflect the course of justice. In *Rex v Difford* the following remarks of the trial court were approved by the Appellate Division:
"It is not disputed on behalf of the defence that in the absence of some explanation the Court would be entitled to convict the accused. It is not a

question of throwing any onus on the accused, but in these circumstances it would be a conclusion which the Court could draw if no explanation were given. It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal . . .” Nugent J in *S v Van Der Meyden* elaborates as follows: “The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent . . . These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward may be true. The two are inseparable, each being the logical corollary of the other . . . In whichever form the test is expressed, it must be satisfied upon consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. . . .” In *S v Magano* the court set aside a conviction on the basis that the trial magistrate had misunderstood the required standard of proof in criminal cases when he found that “the evidence of the State was reasonably possibly true against that of the defence”. Cameron JA in *S v Mavinini* articulated the relationship between proof beyond reasonable doubt and legal guilt: “It is sometimes said that proof beyond reasonable doubt requires the decision-maker to have 'moral certainty' of the guilt of the accused. Though the notion of 'moral certainty' has been criticised as importing potential confusion in jury trials, it may be helpful in providing a contrast with mathematical or logical or 'complete' certainty. It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction — in our case, the rules of evidence interpreted within the precepts of the Bill of Rights — remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system.” The standard of proof is not affected by the serious or trivial nature of the charge.

In those exceptional circumstances where statutes place the burden of proof onthe accused the civil standard of proof applies. If a statute merely places an evidentiary burden on the accused, the state will still carry the burden of proving its case beyond reasonable doubt.

# PART 2: CRIMINAL PROCEDURE - CAPITA SELECTA
# [Act = Criminal Procedure Act, 1977 (Act 51 of 1977).]

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**NOTE**: It is not required to memorise the name of quoted judgments, it is required to study the quoted principles (ratio decidendi) of the judgments.

**NOTE:** The contents of the quoted sections in the CPA and the comments on the quoted sections must be studied.

**6 Power to withdraw charge or stop prosecution**
An attorney-general or any person conducting a prosecution at the instance of the State or anybody or person conducting a prosecution under section 8, may-(a) 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;
(b) 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.
Comments:
A charge against an accused may be withdrawn before he is asked to plead, and the accused will not be entitled to his acquittal (s 6(a)). The stopping of the prosecution envisaged by s 6(b) is a special provision relating to the prerogative of the Director of Public Prosecutions and was not intended to refer to the day-to-day decisions which prosecutors are called upon to take in the execution of their function. Whether the prosecution's conduct constitutes a stopping of the prosecution is a factual question which ought to be answered on the basis of all the circumstances of each individual case.

**18 Prescription of right to institute prosecution**
(1) The right to institute a prosecution for any offence, other than-
(a) murder;
(b) treason committed when the Republic is in a state of war;
(c) robbery, if aggravating circumstances were present;
(d) kidnapping;
(e) child-stealing;
(eA) the-
(i) common law offence of bribery;

(ii) offence referred to in section 1 of the Corruption Act, 1994 (Act 92 of 1994); or
(iii) offences referred to in Parts 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004);
(f) any sexual offence in terms of the common law or statute;
(g) 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;
(h) 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); or
(i) .....
(j) torture as contemplated in section 4 (1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013 (Act 13 of 2013),
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.
(2) The right to institute a prosecution that, in respect of any offence referred to in subsection (1) (eA) and (f), has lapsed before the commencement of the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act, 2020, is hereby revived.
Comments:
On 14 June 2018 the Constitutional Court confirmed the High Court's declaration of constitutional invalidity of s 18. In NL & others v Estate Late Frankel & others 2018 (2) SACR 283 (CC).
'1. The declaration of constitutional invalidity of section 18 of the Criminal Procedure Act 51 of 1977 made by the High Court of South Africa, Gauteng Local Division, Johannesburg is confirmed.
2. The order is suspended for 24 months from the date of this order to afford Parliament an opportunity to enact remedial legislation.
3. During the period of suspension s 18(f) of the Criminal Procedure Act 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."
4. Should Parliament fail to enact remedial legislation within the period of suspension, the interim reading-in remedy shall become final.
5. The declaration of invalidity is retrospective to 27 April 1994.'
The Constitutional Court's 'reading in' as referred to in para 3 of its order has now become final because of Parliament's failure to respond within the 24 months.

**26 Entering of premises for purposes of obtaining evidence**
Where a police official in the investigation of an offence or alleged offence reasonably suspects that a person who may furnish information with reference to any such offence is on any premises, such police official may without warrant enter such premises for the purpose of interrogating such person and obtaining a statement from him: Provided that such police official shall not enter any private dwelling without the consent of the occupier thereof.
Comments:
It is to be noted that the official may not enter a private dwelling without the consent of the occupier thereof. The right of an official to interrogate the

person on the premises is clear and it is not necessary to obtain his consent before questions are put, although the person will clearly enjoy the right to remain silent.

**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.
(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.
Comments:
The South African law of criminal procedure recognises the principle that the accused must be present at his trial (s 158). This principle is based upon the consideration that the court must be placed in a position to enable it to arrive at the truth, and the accused can properly conduct his defence only if he is present.

**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-
(i) no charge is to be brought against him or her; or
(ii) 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-
(i) 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;
(ii) 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
(iii) 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.
(2) For purposes of this section-
(a) '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
(b) 'ordinary court hours' means the hours from 9:00 until 16:00 on a court day.
(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.
(4) and (5) .....
(6) (a) At his or her first appearance in court a person contemplated in subsection (1) (a) who-
(i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60-
(aa) be informed by the court of the reason for his or her further detention; or
(bb) 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
(ii) 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.
(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-
(i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;
(ii) 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)
(iii) .....
(iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to-
(aa) procure material evidence that may be lost if bail is granted; or
(bb) perform the functions referred to in section 37; or

(v) it appears to the court that it is necessary in the interests of justice to do so.
(7) .....
Comments:
Section 50(1)(c) stipulates that an arrested person shall be brought before a lower court as soon as reasonably possible but not later than 48 hours after his arrest in those cases where he is not released as provided for in sub-s (1)(c). What is possible or reasonably possible must be judged in the light of the prevailing circumstances in any particular case. Factors such as the availability of a magistrate, police manpower, transport problems and distances are to be taken into account, but convenience is not one such factor. Where the 48-period expires outside ordinary court hours or on a day which is not an ordinary court day, the arrested person shall be brought before a lower court not later than the end of the first court day.
Section 50(d)(i) was intended to extend the 48-hour outer limit during which an arrested person could be detained where the 48-hour period expired outside court hours or on a day that was not an ordinary court day. The legislative purpose in extending the 48 hours, if it is interrupted by a weekend, is to overcome the difficulty of co-ordinating police, prosecutorial and court administration over weekends.

**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-
(a) 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
(b) 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.
Comments:
The issue of a summons is formally the task of the clerk of the court. It was decided that the issue of a summons means in effect the preparation of the

document. The summons is prepared with a view to handing it to the messenger of the court, who in turn serves it (139C). Issue, or preparation, of a summons involves the placing of the date and the signature of the issuing officer thereon (139D). But if the prosecutor instead of the clerk of the court signs the summons, it is none the less considered to have been properly issued and valid.
Service is effected by an authorised official handing the summons to the person therein named, or making use of one of the alternative forms of service. The alternative forms of service which are provided by s 54(2)(a) involve the handing-over of the summons at the residential, employment or business address of the person named therein to someone apparently over the age of sixteen and who apparently lives there.

**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).
(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.
(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-
(a) 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
(b) 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.
(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)-
(i) an endorsement to the same effect shall be made on the warrant in question;

(ii) 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.
(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.
(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.
(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.
Comments:
The procedure which is followed where a person who has been summonsed to appear on a given day is absent on that day, is of a sui generis nature and consists of two phases. On the day of his failure to attend, the court investigates whether the summons was properly served. As indicated above, for this purpose the court may rely on the return of service of the serving official. Should the court, however, entertain any doubt as to the accuracy or effectiveness thereof, it may require further evidence before concluding that proper service took place. If there is then no doubt in the court's mind that proper service was effected, the court issues a warrant for the arrest of the accused. In consequence of the court's being convinced of proper service, a prima facie case of failure to attend exists against the accused. The second phase comes into play once the accused appears in court under the warrant for his arrest. The court now mero motu summarily enquires into the reasons for the accused's failure to attend. First the court will inform him of the prima facie case against him and ask whether he received the summons. The subsequent proceedings must be seen against the background of the onus upon the accused to show on a balance of probabilities that his failure was unattended by fault on his part. This onus exists once the court is satisfied that proper service took place. And because of this onus on the

accused, if he admits receipt of the summons and offers no excuse for his failure to attend, the court will convict him and impose an appropriate sentence.

**57A Admission of guilt and payment of fine after appearing in court**

(1) If an accused who is alleged to have committed an offence has appeared in court and is-

(a) in custody awaiting trial on that charge and not on another more serious charge;

(b) released on bail under section 59 or 60; or

(c) released on warning under section 72,

the public prosecutor may, before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount 8 determined by the Minister from time to time by notice in the Gazette, hand to the accused a written notice, or cause such notice to be delivered to the accused by a peace officer, containing an endorsement in terms of section 57 that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a stipulated fine in respect thereof without appearing in court again.

(2) Such notice shall contain-

(a) the case number;

(b) a certificate under the hand of the prosecutor or peace officer affirming that he or she handed or delivered, as the case may be, the original of such notice to the accused and that he or she explained to the accused the import thereof; and

(c) the particulars and instructions contemplated in paragraphs (a) and (b) of section 56 (1).

(3) The public prosecutor shall endorse the charge-sheet to the effect that a notice contemplated in this section has been issued and he or she or the peace officer, as the case may be, shall forthwith forward a duplicate original of the notice to the clerk of the court which has jurisdiction.

(4) The provisions of sections 55, 56 (2) and (4) and 57 (2) to (7), inclusive, shall apply mutatis mutandis to the relevant written notice handed or delivered to an accused under subsection (1) as if, in respect of section 57, such notice were the written notice contemplated in that section and as if the fine stipulated in such written notice were also the admission of guilt fine contemplated in that section.

Comments:

The Minister has determined the amount of R10 000 for purposes of s 57A(1) (GN R62 in GG 36111 of 30 January 2013, effective from 1 February 2013). Prosecutors are not prohibited by s 103(2) of the Firearms Control Act 60 of 2000 from invoking admission of guilt procedures as provided for in terms of 57A of the Criminal Procedure Act 51 of 1977. Payment of admission of guilt fine not possible once an accused has pleaded in court

**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.(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.
(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-
(a) may postpone any such proceedings as contemplated in section 50 (6);
(b) 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;
(c) 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;
(d) 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.
(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.
(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-
(i) 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
(ii) 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.
(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:
(a) 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
(b) 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
(c) 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
(d) 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

(e) 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.
(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-
(a) the degree of violence towards others implicit in the charge against the accused;
(b) any threat of violence which the accused may have made to any person;
(c) any resentment the accused is alleged to harbour against any person;
(d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;
(e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;
(f) the prevalence of a particular type of offence;
(g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or
(h) 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-
(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
(b) the assets held by the accused and where such assets are situated;
(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set
(e) 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;
(f) the nature and the gravity of the charge on which the accused is to be tried;
(g) 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;
(h) 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;
i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
(j) 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-
(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
(b) whether the witnesses have already made statements and agreed to testify;
(c) whether the investigation against the accused has already been completed;
(d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;

(e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
(f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
(g) the ease with which evidentiary material could be concealed or destroyed; or
(h) 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-
(a) 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;
(b) whether the accused is in custody on another charge or whether the accused is on parole;
(c) 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
(d) 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-
(a) 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;
(b) whether the shock or outrage of the community might lead to public disorder if the accused is released;
(c) whether the safety of the accused might be jeopardized by his or her release;
(d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
(e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or
(f) any other factor which in the opinion of the court should be taken into account.
(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-
(a) the period for which the accused has already been in custody since his or her arrest;
(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
(c) 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;
(d) any financial loss which the accused may suffer owing to his or her detention;
(e) 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;
(f) the state of health of the accused; or

(g) 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-
(a) 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;
(b) 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.
(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.
(11B) (a) In bail proceedings the accused, or his or her legal adviser, is compelled to inform the court whether-
(i) the accused has previously been convicted of any offence; and
(ii) 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-
(i) fails or refuses to comply with the provisions of paragraph (a); or
(ii) 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.

(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-
(a) 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
(b) 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.
(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.
Comments:
No comments.

**63 Amendment of conditions of bail**

(1) Any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, increase or reduce the amount of bail determined under section 59 or 60 or amend or supplement any condition imposed under section 60 or 62, whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application.
(2) If the court referred to in subsection (1) is a superior court, an application under that subsection may be made to any judge of that court if the court is not sitting at the time of the application.
Comments:
The purpose of s 63 is to provide the necessary procedure for those instances where changed circumstances require appropriate amendments to the conditions or amount of bail fixed at an earlier stage. Section 63 should be distinguished from s 68 which governs cancellation of bail where the accused is about to abscond. But it is submitted that appropriate stricter amendments to the conditions of bail, or an increase in the amount of bail, can be applied for by the State in circumstances where the State fails to satisfy the court that cancellation of bail in terms of s 68 is warranted.

**67 Failure of accused on bail to appear**
(1) If an accused who is released on bail-
(a) fails to appear at the place and on the date and at the time-
(i) appointed for his trial; or

(ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or
(b) 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.
Comments:
Section 67 deals with the procedures and consequences of the non-attendance of an accused who was on bail. It does not envisage a trial which can result in a conviction and sentence. It has been said that the wording of s 67 'is peremptory and mandatory. A court is compelled to withdraw bail and declare it provisionally forfeited in terms of s 67 if an accused who is on bail fails to appear, or fails to remain in attendance.

**68 Cancellation of bail**
(1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that-
(a) the accused is about to evade justice or is about to abscond in order to evade justice;
(b) the accused has interfered or threatened or attempted to interfere with witnesses
(c) the accused has defeated or attempted to defeat the ends of justice;
(d) the accused poses a threat to the safety of the public or of a particular person;
(e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;
(f) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bail; or
(g) it is in the interests of justice to do so
issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.

(2) Any magistrate may, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection (1), upon the application of any peace officer and upon a written statement on oath by such officer that-
(a) he or she has reason to believe that-
(i) an accused who has been released on bail is about to evade justice or is about to abscond in order to evade justice;
(ii) the accused has interfered or threatened or attempted to interfere with witnesses;
(iii) the accused has defeated or attempted to defeat the ends of justice; or
(iv) the accused poses a threat to the safety of the public or of a particular person;
(b) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;
(c) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to release the accused on bail; or
(d) it is in the interests of justice to do so,issue a warrant for the arrest of the accused, and may, if satisfied that the ends of justice may be defeated if the accused is not placed in custody, cancel the bail and commit the accused to prison, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail.
Comments:
No comments.

**72 Accused may be released on warning in lieu of bail**
(1) Subject to section 4 (2) of the Child Justice Act, 2008, if an accused who is eighteen years or older is in custody in respect of any offence and a police official or a court may in respect of such offence release the accused on bail under section 59 or 60, as the case may be, such police official or such court, as the case may be, may, in lieu of bail and if the offence is not, in the case of such police official, an offence referred to in Part II or Part III of Schedule 2-
(a) release the accused from custody and warn him to appear before a specified court at a specified time on a specified date in connection with such offence or, as the case may be, to remain in attendance at the proceedings relating to the offence in question, and the said court may, at the time of such release or at any time thereafter, impose any condition referred to in section 62 in connection with such release.
(b) .....
(2) (a) An accused who is released under subsection (1) (a) and who fails to appear or, as the case may be, to remain in attendance at the proceedings in accordance with a warning under that paragraph, or who fails to comply with a condition imposed under subsection (1) (a), shall be guilty of an offence and liable to the punishment prescribed under subsection (4).
(b) .....
(3) (a) A police official who releases an accused under subsection (1) (a) shall, at the time of releasing the accused, complete and hand to the accused and, in the case of subsection (1) (b), to the person in whose custody the accused is, a written notice on which shall be entered the offence in respect of which the

accused is being released and the court before which and the time at which and the date on which the accused shall appear.
(b) A court which releases an accused under subsection (1) shall, at the time of releasing the accused, record or cause the relevant proceedings to be recorded in full, and where such court is a magistrate's court or a regional court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court and which sets out the warning relating to the court before which, the time at which and the date on which the accused is to appear or the conditions on which he was released, shall, on its mere production in any court in which the relevant charge is pending, be prima facie proof of such warning.
(4) The court may, if satisfied that an accused referred to in subsection (2) (a) or a person referred to in subsection (2) (b), was duly warned in terms of paragraph (a) or, as the case may be, paragraph (b) of subsection (1), and that such accused or such person has failed to comply with such warning or to comply with a condition imposed, issue a warrant for his arrest, and may, when he is brought before the court, in a summary manner enquire into his failure and, unless such accused or such person satisfies the court that 9 his failure was not due to fault on his part, sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.
Comments:
The release procedure of s 72 is an alternative to bail only in respect of minor offences.
Section 72 restricts the authority of a policeman to release a detainee on warning to those cases in which he is in custody for an offence which is not listed in Part II or Part III of Schedule 2 OF the CPA.
The Constitutional Court confirmed that s 72(4) had to be read as if the phrase 'there is a reasonable possibility that' appears between the words 'that' and 'his failure'. The accused therefore does not carry the burden of proof; he merely has to satisfy the court that there is a reasonable possibility that his failure was not due to fault on his part.

**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.
(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.
(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.
Comments:
Section 75 provides that a case cannot be transferred to the regional court or High Court unless the prosecutor so requests. Section 75 does not authorise a district court to transfer a case unless requested by the prosecutor or unless the prosecutor has indicated that a case will be transferred for purposes of trial to a court designated by the prosecutor. Similarly a district court does not have the power to transfer a case in terms of s 75(3) unless the prosecutor has designated a court for transfer of the case for purposes of trial. Therefore, s 75 provides no basis for district courts to transfer cases from their roll to the regional court mero muto.

**76 Charge-sheet and proof of record of criminal case**
(1) Unless an accused has been summoned to appear before the court, the proceedings at a summary trial in a lower court shall be commenced by lodging a charge-sheet with the clerk of the court, and, in the case of a superior court, by serving an indictment referred to in section 144 on the accused and the lodging thereof with the registrar of the court concerned.
(2) The charge-sheet shall in addition to the charge against the accused include the name and, where known and where applicable, the address and description of the accused with regard to sex, nationality and age.
(3) (a) The court shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept, and the charge-sheet, summons or indictment shall form part thereof.
(b) Such record may be proved in a court by the mere production thereof or of a copy thereof in terms of section 235.
(c) Where the correctness of any such record is challenged, the court in which the record is challenged may, in order to satisfy itself whether any matter was correctly recorded or not, either orally or on affidavit hear such evidence as it may deem necessary.
Commentary:
If an accused is in custody, proceedings in a lower court summary trial commence with the lodging of a charge sheet with the clerk of the court. Where the attendance of the accused is secured by means of a summons, the prosecution is initiated and proceedings commence upon the issue of the summons.
The charge against the accused before a lower court is contained in a charge sheet, a summons or a written notice. A charge sheet is therefore the document to be used where attendance is secured by means of arrest. In contrast to an indictment, a charge sheet is not served on the accused but is read out to him in court. Apart from the charge, the charge sheet contains the accused's name and, if known and applicable, his address, sex, nationality and age. As soon as the charge is put to the accused, he must plead to it.
Subsection (3) requires that a record be kept of the court proceedings, and that the charge sheet, summons or indictment form part thereof.

**79 Panel for purposes of enquiry and report under sections 77 and 78**

**[77 = Capacity of accused to understand proceedings]**
**[78 = Mental illness or intellectual disability and criminal responsibility]**
(1) Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on-
(a) where the accused is charged with an offence other than one referred to in paragraph (b), by the head of the designated health establishment designated by the court, or by another psychiatrist delegated by the head concerned; or
(b) where the accused is charged with murder or culpable homicide or rape or compelled rape as provided for 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, or where the court in any particular case so directs-
(i) by the head of the designated health establishment, or by another psychiatrist delegated by the head concerned;
(ii) by a psychiatrist appointed by the court;
(iii) by a psychiatrist appointed by the court, upon application and on good cause shown by the accused for such appointment; and
(iv) by a clinical psychologist where the court so directs.
(1A) The prosecutor undertaking the prosecution of the accused or any other prosecutor attached to the same court shall provide the persons who, in terms of subsection (1), have to conduct the enquiry and report on the accused's mental condition or mental capacity with a report in which the following are stated, namely-
(a) whether the referral is taking place in terms of section 77 or 78;
(b) at whose request or on whose initiative the referral is taking place;
(c) the nature of the charge against the accused;
(d) the stage of the proceedings at which the referral took place;
(e) the purport of any statement made by the accused before or during the court proceedings that is relevant with regard to his or her mental condition or mental capacity;
(f) the purport of evidence that has been given that is relevant to the accused's mental condition or mental capacity;
(g) in so far as it is within the knowledge of the prosecutor, the accused's social background and family composition and the names and addresses of his or her near relatives; and
(h) any other fact that may in the opinion of the prosecutor be relevant in the evaluation of the accused's mental condition or mental capacity.
(2) (a) The court may for the purposes of the relevant enquiry commit the accused to a psychiatric hospital or to any other place designated by the court, for such periods, not exceeding thirty days at a time, as the court may from time to time determine, and where an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.
(b) When the period of committal is for the first time extended under paragraph (a), such extension may be granted in the absence of the accused unless the accused or his legal representative requests otherwise.
(c) The court may make the following orders after the enquiry referred to in subsection (1) has been conducted-
(i) postpone the case for such periods referred to in paragraph (a), as the court may from time to time determine;

(ii) refer the accused at the request of the prosecutor to the court referred to in section 77 (6) which has jurisdiction to try the case;
(iii) make any other order it deems fit regarding the custody of the accused;
(iv) any other order.
(3) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or, as the case may be, the clerk of the court in question, who shall make a copy thereof available to the prosecutor and the accused.
(4) The report shall-
(a) include a description of the nature of the enquiry; and
(b) include a diagnosis of the mental condition of the accused; and
(c) if the enquiry is under section 77 (1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence; or
(d) if the enquiry is in terms of section 78 (2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or intellectual disability or by any other cause.
(5) If the persons conducting the relevant enquiry are not unanimous in their finding under paragraph (c) or (d) of subsection (4), such fact shall be mentioned in the report and each of such persons shall give his finding on the matter in question.
(6) Subject to the provisions of subsection (7), the contents of the report shall be admissible in evidence at criminal proceedings.
(7) A statement made by an accused at the relevant enquiry shall not be admissible in evidence against the accused at criminal proceedings, except to the extent to which it may be relevant to the determination of the mental condition of the accused, in which event such statement shall be admissible notwithstanding that it may otherwise be inadmissible.
(8) A psychiatrist and a clinical psychologist appointed under subsection (1), other than a psychiatrist and a clinical psychologist appointed for the accused, shall, subject to the provisions of subsection (10), be appointed from the list of psychiatrists and clinical psychologists referred to in subsection (9) (a).
(9) The Director-General: Health shall compile and keep a list of-
(a) psychiatrists and clinical psychologists who are prepared to conduct any enquiry under this section; and
(b) psychiatrists who are prepared to conduct any enquiry under section 286A (3),and shall provide the registrars of the High Courts and all clerks of magistrate's courts with a copy thereof.
(10) Where the list compiled and kept under subsection (9) (a) does not include a sufficient number of psychiatrists and clinical psychologists who may conveniently be appointed for any enquiry under this section, a psychiatrist and clinical psychologist may be appointed for the purposes of such enquiry notwithstanding that his or her name does not appear on such list.
(11) (a) A psychiatrist or clinical psychologist designated or appointed under subsection (1) by or at the request of the court to enquire into the mental condition of an accused and who is not in the full-time service of the State, shall be compensated for his or her services in connection with the enquiry from public funds in accordance with a tariff determined by the Minister in consultation with the Minister of Finance.
(b) A psychiatrist appointed under subsection (1) (b) (iii) for the accused to enquire into the mental condition of the accused and who is not in the full-time

service of the State, shall be compensated for his or her services from public funds in the circumstances and in accordance with a tariff determined by the Minister in consultation with the Minister of Finance.
(12) For the purposes of this section a psychiatrist or a clinical psychologist means a person registered as a psychiatrist or a clinical psychologist under the Health Professions Act, 1974 (Act 56 of 1974).
Comments:
No comments

**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.
Comments:
Any number of charges against an accused may be joined, provided this is done before evidence is led on any one of those charges Where a charge was added after evidence had been led, such a charge will be declared null and void on review and the matter remitted to the magistrate to continue with the trial on the original charge.
Although admissions that were made during s 112(1)*(b)* questioning were not recorded as admissions in terms of s 220 and 'stand as proof in court' in terms of s 113(1), they did not amount to evidenc Although admissions that were made during s 112(1)(b) questioning were not recorded as admissions in terms of s 220 and 'stand as proof in court' in terms of s 113(1), they did not amount to evidence for the purposes of s 81. Consequently, additional charges could be brought against the accused after such questioning e for the purposes of s 81. Consequently, additional charges could be brought against the accused after such questioning.

**82 Several charges to be disposed of by same court**
Where an accused is in the same proceedings charged with more than one offence, and any one charge is for any reason to be disposed of by a regional court or a superior court, all the charges shall be disposed of by the same court in the same proceedings.
Comments:
This new section endorses a sound procedural tenet and an essential prerequisite for appropriate sentencing. The requirement that all the charges against an accused be heard by the same court enables that court to form a total picture of the individual's criminal activity in order to take adequate cognizance of the classic triad of offender, offence and community which constitutes the cornerstone of responsible sentencing in South African law. In cases where the simultaneous disposal of multiple counts will, in fact, prejudice the administration of justice, s 80 permits a court to order a separate trial, to be presided over by another court.

**83 Charge where it is doubtful what offence committed**

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

Comments:

In most cases, the person who is responsible for drafting charge sheets or indictments will not, prior to trial, be exactly sure which facts the court will find to be found proven. To avoid this dilemma, s 83 authorises the drafter of a charge sheet or an indictment to charge an accused with all the offences that might possibly be proved by means of the available facts. Section 83 authorises the inclusion in the charge sheet of all the charges that could possibly be supported by the facts, even if they overlap to such an extent that convictions on all or on some of the counts would amount to a duplication of convictions An accused may thus not object, at the beginning of the trial, to the charge sheet or indictment on the basis that it contains a duplication of charges. Such a duplication will occur where more than one charge is supported by the same culpable fact. It is, however, the task of the court to be careful not to convict an accused of more than one offence if the offences with which the accused is charged in the relevant charges rest on the same culpable fact. In short, it is the court's duty to guard against a duplication of convictions and not the prosecutor's duty to refrain from the duplication of charges.

**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.

Comments:

No comments.

**85 Objection to charge**

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

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

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

(c) that the charge does not disclose an offence;

(d) that the charge does not contain sufficient particulars of any matter alleged in the charge: 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
(e) that the accused is not correctly named or described in the charge:
Provided that the accused shall give reasonable notice to the prosecution of his intention to object to the charge and shall state the ground upon which he bases his objection: 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.
Comments:
Section 85 puts into the hands of the accused a useful instrument for bringing about the quashing of a charge even before he has pleaded to it. The section also enables the accused to obtain, by means of a court order, more particulars about aspects of the charge where the State is opposed to furnishing such information. Where a court sustains an objection to the charge sheet, the State must be given an opportunity of remedying such charge sheet. However, if the charge sheet is not capable of amendment or if the particulars will not cure the defect, the charge will be quashed.

**86 Court may order that charge be amended**
(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.
(2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit.
(3) Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences as if it had been originally in its amended form.
(4) The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder.
Comments:
No comments.

**87 Court may order delivery of particulars**
(1) An accused may at any stage before any evidence in respect of any particular charge has been led, in writing request the prosecution to furnish particulars or further particulars of any matter alleged in that charge, and the court before

which a charge is pending may at any time before any evidence in respect of that charge has been led, direct that particulars or further particulars be delivered to the accused of any matter alleged in the charge, and may, if necessary, adjourn the proceedings in order that such particulars may be delivered: Provided that the provisions of this subsection shall not apply at the stage when an accused is required in terms of section 119 or 122A to plead to a charge in the magistrate's court.
(2) The particulars shall be delivered to the accused without charge and shall be entered in the record, and the trial shall proceed as if the charge had been amended in conformity with such particulars.
(3) In determining whether a particular is required or whether a defect in the indictment before a superior court is material to the substantial justice of the case, the court may have regard to the summary of the substantial facts under paragraph (a) of section 144 (3) or, as the case may be, the record of the preparatory examination.
Comments:
No comments.

**88 Defect in charge cured by evidence**
Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgement, be cured by evidence at the trial proving the matter which should have been averred.
Comments:
The purpose of s 88 was to abolish the former principle that an appellant was entitled to rely on the fact that a conviction based on a materially defective charge was bad.
By virtue of s 88, a charge that is defective in the sense that an essential element of the offence charged was omitted, may be automatically cured by evidence. Section 88 has the effect that the accused can be found guilty even though the indictment does not disclose an offence, as long as the evidence proves the offence. The possibility of automatic curing exists only if the defect is not brought to the court’s attention before judgment. Section 88 applies only in respect of a defective or incomplete charge.

**89 Previous conviction not to be alleged in charge**
Except where the fact of a previous conviction is an element of any offence with which an accused is charged, it shall not in any charge be alleged that an accused has previously been convicted of any offence, whether in the Republic or elsewhere.
Comments:
The proof of previous convictions during the trial but before judgment is, in general, prohibited in an accusatorial system of criminal procedure and s 89 confirms this principle. For practical purposes, certain exceptions to the general rule are permitted. Thus, for example, the proof of previous convictions for the receipt of stolen property or offences of which fraud or dishonesty are elements, is permitted in a trial of an accused on a charge of receiving stolen property Likewise, relevant previous convictions may be proved in a trial based on similar fact evidence.

**92 Certain omissions or imperfections not to invalidate charge**
(1) A charge shall not be held defective-

(a) for want of the averment of any matter which need not be proved;
(b) because any person mentioned in the charge is designated by a name of office or other descriptive appellation instead of by his proper name;
(c) 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;
(d) 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;
(e) for want of, or imperfection in, the addition of any accused or any other person;
(f) 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-
(a) 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;
(b) 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.
Comments:
No comments.

**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.
Comments:
No comments

**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.
Comments:
It was not held that s 105 is peremptory in the sense that it is essential that s 105 be followed to the letter: what was held was that a plea process is peremptory in terms of s 105 for purposes of the commencement of the trial. It was also observed that the 'determination' was that the effect of s 105 (and s 106 which identifies the various pleas an accused may tender) is that a trial does not commence until an accused has pleaded. 'To use an analogy from civil procedure, *litis contestatio* is not obtained, and the case is not triable, until the accused has pleaded.

**106 Pleas**
(1) When an accused pleads to a charge he may plead-
(a) that he is guilty of the offence charged or of any offence of which he may be convicted on the charge; or
(b) that he is not guilty; or
(c) that he has already been convicted of the offence with which he is charged;
(d) that he has already been acquitted of the offence with which he is charged;
(e) that he has received a free pardon under section 327 (6) from the State president for the offence charged; or
(f) that the court has no jurisdiction to try the offence; or

(g) that he has been discharged under the provisions of section 204 from prosecution for the offence charged; or
(h) that the prosecutor has no title to prosecute; or
(i) that the prosecution may not be resumed or instituted owing to an order by a court under section 342A (3) (c).
(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.
Comments:
No comments.

**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-
(a) after the accused has pleaded a plea of guilty or of not guilty; or
(b) 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.
Comments:
It is obvious that a court may only hear cases which fall within its jurisdiction area. Where a court does not possess the necessary (usually territorial) jurisdiction and the accused pleads this, the case must be removed to the court which does possess jurisdiction.
If the accused does not plead the absence of jurisdiction, but guilty or not guilty, or another plea which was not accepted, the court will have the necessary jurisdiction by law (s 110(1)). This section will not add to the jurisdiction of the court where the offence was committed in another country.

**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-
(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount 10 determined by the Minister from time to time by notice in the

Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and-
(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or
(ii) deal with the accused otherwise in accordance with law;
(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount 11 determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.
(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.
(3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.
Comments:
Section 112(1)(a) authorises a presiding officer to convict an accused on his bare plea of guilty in circumstances where such presiding officer is of the opinion that the offence in question does not merit certain kinds of punishment or a fine exceeding R5 000, which is the monetary jurisdictional fact as determined by the Minister.
It has rightly been pointed out that '[t]he integrity of the public prosecutor is very important in the application of section 112(1)*(a).*
Section 112(1)(b) was designed to protect an accused—and especially an uneducated and undefended accused—from the adverse consequences of an ill-considered plea of guilty.
The questions and answers must at least cover all the essential elements of the offence which the State in the absence of a plea of guilty would have been required to prove.

**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-
(a) 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;

(b) 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
(c) that the accused is a person referred to in section 286A (1),
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-
(i) is satisfied that a plea of guilty or an admission by the accused which is material to his guilt was incorrectly recorded; or
(ii) 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.
Comments:
Section 114 indirectly confers a limited form of review upon regional courts in respect of certain cases dealt with in the magistrate's court (see, for example, s 114(3)). But the regional court magistrate does not have the power to request reasons from the district magistrate (nor can a regional court magistrate return a matter to the district court magistrate on the basis that the regional court would impose a sentence within the penal jurisdiction of the district court. The regional court magistrate has the power to question the accused afresh.
An order made by a district court magistrate in terms of either s 114 or s 116 referring a case to the regional court for sentencing purposes, 'is merely a ruling of a procedural nature seeking to direct the future conduct of proceedings' and does not 'dispose, or seek to dispose, of the case'.

**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.
Comments:
The explanation of plea is governed by the following basic rules and principles:
(a) Sections 162 and 163 are not applicable to the explanation of plea: it is therefore irregular to require an accused to take the oath or make an affirmation for purposes of s 115 (
(b) The ambit of questions put by the presiding officer cannot be extended by invoking s 167
(c) It is irregular to question an accused in terms of s 115(2) without having first invited him in terms of s 115(1) to make a statement indicating the basis of his defence.
(d) The provisions of s 115 should be employed at a specific procedural stage, ie after the plea of not guilty but before the State adduces evidence
(e) The rule in para (d) above does not preclude a presiding judge from employing s 115 in respect of an accused who was referred to trial in the Supreme Court after completion of the s 115 proceedings in the lower court
(f) The presiding officer is not entitled to cross-examine the accused
(g) Common-law and statutory procedural rights which are affected by s 115 must be explained to an accused who appears without legal representation (see the discussion below, sv 'Procedural rights: warnings and explanations by the court'.
(h) Exculpatory facts contained in the explanation of plea of an undefended accused should be used by a presiding officer in an attempt to assist such an accused in the examination of State witnesses.
(i) There is a rule of practice that a court should inform an accused that he is under no obligation to make a statement indicating the basis of his defence. This rule is necessary in view of s 35(3)(h) of the Constitution.
(j) Section 115 is couched in permissive terms. A court is not obliged to question an accused who has pleaded not But the better view is that a court should at least make use of its s 115(1) power to ask whether the accused 'wishes to make a statement indicating the basis of his defence'.
(k) In the case of an unrepresented accused it might be unwise not to invoke s 115. By not giving an accused an opportunity to state his defence, the court deprives itself of any possible opportunity to use an unrepresented accused's explanation of plea as the basis on which such an accused can be assisted by the court in putting the defence to State witnesses.

**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-
(a) 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;

(b) 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
(c) that the accused is a person referred to in section 286A (1),
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.
(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.
Comments:
No comments.

**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.
Comments:
The prosecutor may address the court after the arraignment procedure is completed. The prosecutor should not divulge the contents of documents which

are in dispute and may be ruled to be inadmissible. Statements made by the prosecutor may be binding but with limitations and may be disregarded if found to be erroneous, but not where it is a deliberate statement defining the ambits of the case.
The court may compare any statement made by the prosecutor with the actual evidence led by the State. The credibility inference to be drawn from such a comparison is a matter to be decided in the light of the circumstances on each case.

**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.
(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-
(a) 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;
(b) 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-
(a) 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;
(b) 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
(c) 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.
(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.
(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.
Comments:
No comments.

**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.
Comments:
The provision is permissive and not imperative.
An accessory after the fact may be charged with the principal offender or he may be charged separately. If charged separately the State must prove the guilt of the principal offender.
Section 63(2) of the Child Justice Act 75 of 2008 provides that where a child and an adult are charged together in the same trial in respect of the same set of facts in terms of ss 155, 156 and 157 of the Criminal Procedure Act, a court must apply the provisions of the Child Justice Act in respect of the child and the provisions of the CPA in respect of the adult.

**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.
Comments:
It was held that when different persons were alleged to have committed separate offences where none of the evidence would be admissible against the other, to try them together would be misjoinder which may give rise to prejudice.
The holding of a mass trial on unrelated charges is fraught with many dangers and the potential prejudice to the accused that such forms of trial should not be condoned.
The section allow for different accused to be charged on different counts, provided the two requirements were met: that the offences were committed at the same place and at the same time or at about the same time; and that the prosecution informed the court that the evidence admissible in the trial of one

of the charged persons would also be admissible at the trial of any of the other charged 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.

Comments:

A trial may not commence de novo simply because further accused were added after evidence had been led.

Where no evidence has been led, it is permissible to join more accused even though one has pleaded not guilty and explained his plea.

If this should happen the existing accused should be present in the event of more accused being joined. The new accused should be advised as to the plea and any explanation of plea made by existing accused.

This procedure is not permissible where the original accused pleaded guilty.

he holding of an inspection in loco and the recording of his observations by a judicial officer should be regarded as the leading of evidence. Thus another accused cannot be joined after such an inspection.

**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.
Comments:
The court itself is not required to read the record nor need the reading take place in court.
It was held that the words 'examine any witness' as used in s 160(1), cannot be interpreted to mean that the accused concerned is entitled to examine all witnesses who testified in his absence. In view of the court's duty to discourage and curtail irrelevant cross-examination, the accused concerned should only be permitted to question those State witnesses 'who had implicated [him] in the commission of the offence or those witnesses from whom favourable evidence may be elicited.

**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.
Comments:
No comments

**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.
Comments:
The decision whether to adjourn the proceedings is in the discretion of the court. If the discretion has been exercised in a judicial manner the court of appeal will be very reluctant to interfere even if it may have come to a different conclusion Three principles should guide a court in considering an application for an adjournment: (a) it is in the interests of society that guilty persons should not evade conviction by reason of an oversight or because of a mistake that can be rectified; (b) an accused person who is deemed to be innocent is entitled, once indicted, to be tried with expedition and (c) the need to consider the effect of a refusal to adjourn on the constitutional rights of an accused.

**169 Court may adjourn proceedings to any place**

A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient that the proceedings be continued at any place within its area of jurisdiction other than the one where the court is sitting, adjourn the proceedings to such other place, or, if the court with reference to any circumstance relevant to the proceedings deems it necessary or expedient that the proceedings be adjourned to a place other than the place at which the court is sitting, adjourn the proceedings, on the terms which to the court may seem proper, to any such place, whether within or outside the area of jurisdiction of such court, for the purpose of performing at such place any function of the court relevant to such circumstance.

Comments:

The second part of the section gives the court the power to hold inspections *in loco*. An inspection *in loco* may enable the court *(a)* to follow the oral evidence more clearly or *(b)* to observe some real evidence.

It is undesirable that an inspection in loco should take place after the evidence and arguments have been completed because observations made by the court should be recorded and the parties should be afforded the opportunity of making submissions; also to allow for the leading of evidence to correct an observation which may be incorrect. The presiding officer may make the inspection alone subject to communicating his observations to the parties. The better view is that a presiding officer should not make an inspection alone. Any observations which are not brought to the attention of the parties must be disregarded Statements made by parties or witnesses at the scene should be disregarded unless they later give evidence at or are recalled to give evidence as to their indications.

**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.

Comments:

Section 174 thus gives the court the power to decide not to put the accused on his or her defence if there is no case for the accused to answer. As was pointed out there is 'no formula or test applicable to all circumstances when deciding whether or not to discharge; each case must be decided on its own merits in order to reach a just decision.

The words 'no evidence' in the section have been interpreted to mean no evidence upon which a reasonable man acting carefully may convict.

The court may act mero motu and should do so where the accused is unrepresented.

The section gives the court a discretion in deciding whether to discharge an accused at the conclusion of the State case. This discretion must be exercised judicially and it is wrong to prescribe to a court how and when it should be exercised in favour of an accused: Where, however, more than one accused are charged with the same offence, the court may refuse to discharge one of them if it is in the interests of justice to do so.

**175 Prosecution and defence may address court at conclusion of evidence**

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

(2) The prosecutor may reply on any matter of law raised by the accused in his address, and may, with leave of the court, reply on any matter of fact raised by the accused in his address.

Comments:

Where the accused's constitutional right to a fair trial has been violated by failing to afford him or her the right to address the court on the merits, the legal validity of the proceedings has been destroyed and the conviction and sentence set aside.

The bedrock of the right to a fair trial is s 35(3) of the Constitution, and—even though it contained no express provision in this regard—the right to be heard before a decision affecting one is taken was one of the most fundamental rights of an accused person. This is not only an expression of the audi alteram partem rule, but also an integral component of the right to adduce and challenge evidence embodied in s 35(3)(i) of the Constitution. The right to participate in the proceedings is a fundamental principle, the denial of which is per se an infringement of the right to a fair trial, regardless of the prospects of success.

**212 (4) Proof of certain facts by affidavit or certificate**

(4)(a) Whenever any fact established by any examination or process requiring any skill-

(i) in biology, chemistry, physics, astronomy, geography or geology;

(ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;

(iii) in computer science or in any discipline of engineering;

(iv) in anatomy or in human behavioural sciences;

(v) in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or

(vi) 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.

(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.

Comments:

No comments.

**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) a party by whom or on whose behalf a copy of the statement was served, may call such person to give oral evidence;
(b) 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.
Comments:
No comments.

**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.
Comments:
This section originally intended to relieve the State of the necessity of proving allegations admitted by the accused. It now covers admissions made by the prosecution as well, so it may be seen more generally as a provision that allows for the proof of facts that are not in dispute.
It is well established that an accused is bound by the admissions made on his or her behalf by a legal representative unless either such legal representative has not been properly instructed or the admission was made as a result of a bona fide mistake.
Averments which are detrimental to a cross-examiner's case and which are deliberately and specifically made during cross-examination, amount to admissions requiring 'no additional formal proof before they may be used'

**225 Evidence of prints, bodily samples or bodily appearance of accused**
(1) Whenever it is relevant at criminal proceedings to ascertain whether-
(a) any fingerprint, body-print or bodily sample, as defined under Chapter 3, or the information derived from such prints or samples, of an accused at such proceedings corresponds to any other fingerprint, body-print, bodily sample, crime scene sample or the information derived from such samples; or
(b) the body of such an accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance,
evidence of the fingerprints or body-prints of the accused or that the body of the accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, including evidence of the result of any blood test of the accused, shall be admissible at such proceedings.
(2) Such evidence shall not be inadmissible by reason only thereof that the fingerprint, body-print, or bodily sample as defined in Chapter 3, in question was not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of sections 36A, 36B, 36C, 36D, 36E or 37, or that it was taken or ascertained against the wish or the will of the accused concerned.
Comments:
No comments.

**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.
Comments:
No comments

**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.
Comments:
Judicial proceedings may be proved by producing a copy of the record of those proceedings properly certified in terms of the requirements set out in s 235(1). It is further provided that such copy shall be prima facie proof that any matter purporting to be recorded on the record was properly recorded. The record does not, however, constitute prima facie proof of any fact it contains:
The effect of s 235(1) is that it is not necessary to call officers of the court to testify in order to prove that judicial proceedings have been correctly recorded.

**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.
Comments:
After conviction the State may produce to the court a list of previous convictions which it is alleged the accused committed. The State has a discretion to produce or hand in the list after conviction and before sentence and is not obliged to do

so, however his approach is incompatible with the duty of the prosecutor and the adjudicative function of the court.
If previous convictions are disputed, the State must prove these convictions beyond a reasonable doubt.
Convictions for crimes committed after the crime for which the accused stands to be sentenced, can also be taken into account, in the sense that it is indicative of the character of the accused to be sentenced.

**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.
Comments:
After proof of previous convictions, or after the court has been informed that the accused has no previous convictions, the court may hear such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The court may itself call witnesses to give evidence regarding sentence (eg a probation officer) or may allow the prosecution or the defence to lead evidence. Usually the prosecution or defence will indicate that they wish to lead evidence on sentence and, unless it appears that the evidence is clearly irrelevant, no court will refuse such a request. Both parties must be allowed the opportunity to place relevant facts regarding a proper sentence before the court.
It is accepted that at the sentencing stage the state's duty is even more consonant with a non-adversarial stance, it remains the only party to the trial able to procure the information necessary to enable the court to discharge its sentencing responsibilities under s 274(1) . . .'
It is the duty of a presiding officer to question the accused thoroughly and objectively in connection with possible mitigating circumstances where the accused is unrepresented.
Where an accused is unrepresented, the magistrate should play a more active role in eliciting relevant information, including the accused's ability to pay a fine.

**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-
(a) .....
[Para. (a) deleted by s. 34 of Act 105 of 1997 (wef 13 November 1998).]
(b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B (1);
(c) periodical imprisonment;
(d) declaration as an habitual criminal;
(e) committal to any institution established by law;
(f) a fine;
(g) .....
[Para. (g) deleted by s. 2 of Act 33 of 1997 (wef 5 September 1997).]
(h) correctional supervision;
(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.

(2) Save as is otherwise expressly provided by this Act, no provision thereof shall be construed-
(a) 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;
(b) 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-
(a) from imposing imprisonment together with correctional supervision; or
(b) 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.
Comments:
No comments.

**332 Prosecution of corporations and members of associations**
(1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law-
(a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,
in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.
(2) In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question: Provided that-
(a) if the said person pleads guilty, other than by way of admitting guilt under section 57, the plea shall not be valid unless the corporate body authorized him to plead guilty;
(b) if at any stage of the proceedings the said person ceases to be a director or servant of that corporate body or absconds or is unable to attend, the court in question may, at the request of the prosecutor, from time to time substitute for the said person any other person who is a director or servant of the said corporate body at the time of the said substitution, and thereupon the proceedings shall continue as if no substitution had taken place;
(c) if the said person, as representing the corporate body, is convicted, the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as an alternative, other than a fine, even if

the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body and may be recovered by attachment and sale of property of the corporate body in terms of section 288;

(d) the citation of a director or servant of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, shall not exempt that director or servant from prosecution for that offence in terms of subsection (5).

(3) In criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of the corporate body within the scope of his activities as such director, servant or agent, or any document which was at any time in the custody or under the control of any such director, servant or agent within the scope of his activities as such director, servant or agent, shall be admissible in evidence against the accused.

(4) For the purposes of subsection (3) any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his custody or under his control, shall be presumed to have been made or kept by him or to have been in his custody or under his control within the scope of his activities as such director, servant or agent, unless the contrary is proved.

(5)When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.

(6) In criminal proceedings against a director or servant of a corporate body in respect of an offence-

(a) any evidence which would be or was admissible against that corporate body in a prosecution for that offence, shall be admissible against the accused;

(b) whether or not such corporate body is or was liable to prosecution for the said offence, any document, memorandum, book or record which was drawn up, entered up or kept in the ordinary course of business of that corporate body or which was at any time in the custody or under the control of any director, servant or agent of such corporate body, in his capacity as director, servant or agent, shall be prima facie proof of its contents and admissible in evidence against the accused, unless he is able to prove that at all material times he had no knowledge of the said document, memorandum, book or record, in so far as its contents are relevant to the offence charged, and was in no way party to the drawing up of such document or memorandum or the making of any relevant entries in such book or record.

(7) When a member of an association of persons, other than a corporate body, has, in carrying on the business or affairs of that association or in furthering or in endeavouring to further its interests, committed an offence, whether by the performance of any act or by the failure to perform any act, any person who was, at the time of the commission of the offence, a member of that association, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it: Provided that if the business or affairs of the association are governed or controlled by a committee or other similar governing body, the provisions of this subsection shall not apply to any person who was not at the

time of the commission of the offence a member of that committee or other body.
(8) In any proceedings against a member of an association of persons in respect of an offence mentioned in subsection (7) any record which was made or kept by any member or servant or agent of the association within the scope of his activities as such member, servant or agent, or any document which was at any time in the custody or under the control of any such member, servant or agent within the scope of his activities as such member, servant or agent, shall be admissible in evidence against the accused.
(9) For the purposes of subsection (8) any record made or kept by a member or servant or agent of an association, or any document which was at any time in his custody or under his control, shall be presumed to have been made or kept by him or to have been in his custody or under his control within the scope of his activities as such member or servant or agent, unless the contrary is proved.
(10) In this section the word 'director' in relation to a corporate body means any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body.
(11) The provisions of this section shall be additional to and not in substitution for any other law which provides for a prosecution against corporate bodies or their directors or servants or against associations of persons or their members.
(12) Where a summons under this Act is to be served on a corporate body, it shall be served on the director or servant referred to in subsection (2) and in the manner referred to in section 54 (2).
Comments:
In S v Coetzee and Others 1997 (1) SACR 379 (CC) & 1997 (3) SA 527 (CC) the Constitutional Court declared section 332 (5) inconsistent with the Constitution and therefore invalid.

**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:
(a) The duration of the delay;
(b) the reasons advanced for the delay;
(c) whether any person can be blamed for the delay;
(d) the effect of the delay on the personal circumstances of the accused and witnesses;
(e) the seriousness, extent or complexity of the charge or charges;
(f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
(g) the effect of the delay on the administration of justice;
(h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
(i) any other factor which in the opinion of the court ought to be taken into account.

(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order-
(a) refusing further postponement of the proceedings;
(b) granting a postponement subject to any such conditions as the court may determine;
(c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without the written instruction of the attorney-general;
(d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;
(e) that-
(i) 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;
(ii) 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.]
(f) 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)-
(a) the costs shall be taxed according to the scale the court deems fit; and
(b) 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-
(i) 18 months from date of arrest, where the trial is to be conducted in a High Court;
(ii) 12 months from date of arrest, where the trial is to be conducted in a regional court; and
(iii) 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.
Comments:
No comments.

# PART 3: CRIMINAL LAW – CAPITA SELECTA

**NOTE**: It is not required to memorise the name of quoted judgments, it is required to study the quoted principles (ratio decidendi) of the judgments.

## A. PRINCIPLES

Source:
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"**Voluntary human conduct.**
It follows from this that persons will be held criminally liable only if their actions are determined by their free will. This principle is expressed by the requirement that for purposes of the criminal law, a human act must be voluntary in the sense that it is subject to the accused's conscious will. Where for some reason or another a person is deprived of freedom of will, his or her actions are 'involuntary' and he or she cannot be held criminally liable for them. In the absence of exceptional circumstances, a natural inference can be drawn that a sane person acts consciously and voluntarily.
The South African courts have described involuntary conduct as: 'mechanical activity', 'unconsciousness', 'automatic activity', 'involuntary lapse of consciousness', 'lack of self-control' or, simply 'automatism'. Voluntary conduct has been defined as conduct which is 'controlled by the will' Thus voluntary conduct must be regarded as conduct controlled by the accused's conscious will or subject to his or her self-control. Even an omission, or failure to act, must be voluntary in this sense. Our courts have used the term 'goal-directed' as an important factor indicating voluntariness. They have also drawn a clear distinction between 'loss of temper' and 'loss of control'. The fact that a person was extremely angry does not necessarily mean that he or she lacked self-control.

Conduct is usually considered to be involuntary if it takes the form of 'automatism'. This term covers conduct that occurs during sleep, black-out, dissociation, hypnosis, or is the result of arteriosclerosis, concussion, epilepsy, hypoglycaemia (low blood sugar), intoxication or provocation.

An act will be involuntary where it occurs as the result of the application of superior force upon the body of a person. A distinction is drawn between absolute force (vis absoluta) and relative force (vis compulsiva). The former situation, which is unlikely to arise in practice, is where Y by superior physical strength forces X's fist into Z's face or where a hurricane blows X through Z's plate-glass window. In both cases there is in fact no act or conduct on X's part. If, however, Y threatens X that if he (X) does not kill Z then Y will kill X or his family, we have a situation where if X yields to Y's threats and kills Z, his conduct cannot be said to be involuntary in the strict sense, but in some systems of law may not attract liability because of the compelling force (vis compulsiva).

Act (positive conduct).
Since the criminal law does not punish mere thoughts, criminal liability will arise only where the human being concerned has carried out an 'act' or, in limited circumstances, an omission (failure to act).
In the most elementary sense, what this means is that there should have been some external or physical manifestation of the accused's thoughts (his or her 'intentions'). It is only where there is such objectively verifiable manifestation of evil intent that the sanction of the criminal law can be imposed.

The obvious form that such objective manifestation of inner designs will take is a movement of the body. Such movement is generally termed an 'act'. It is the general rule that criminal liability is dependent upon the commission of an act by the accused person.

Every crime is defined in terms of human conduct. To constitute a punishable crime the manifestation of the evil mind must take the form of conduct that matches the description in the definition.

Omission (failure to act)
As a general rule conduct must consist in doing something, that is, a positive act (an act of commission) or in not doing something (an omission). A driver who, while driving a motor vehicle, fails to signal the intention to turn or to apply brakes timeously, can strictly speaking be said to have omitted to signal his or her intention or to apply brakes, but his or her conduct takes place within the context of driving a car, which is clearly a positive act. The central question is whether the driver came up to the standard of driving set by the reasonable person. In essence, all cases of negligence involve an omission or failure to achieve a particular standard, but what concerns us in this chapter is a 'mere' omission or passive inaction.
The central question whenever it is argued that liability should be based on an omission is whether there was a legal duty to act in the circumstances. The issue, in the South African law, is one of unlawfulness rather than fault.

However, in South Africa, in the context of omissions, morality and law part company in order to preserve a realm of individual liberty of action.

Whether a general rule of liability or no liability is adopted, there will always be exceptions to the rule. Those systems of law that require action to prevent others from suffering harm must accommodate exceptional circumstances of no liability where the danger in acting is equal to or even outweighs the danger in not acting or where there is some other valid reason not to give assistance. Those systems that do not require action to prevent others from suffering harm must envisage exceptional circumstances where a legal duty to act may arise.

The South African law has crafted a broad exceptional category of legal duties based upon a flexible concept of the legal convictions of the community and has, more recently, imposed extensive delictual duties on the State to protect persons from violent crime, based upon a theory of 'accountability' derived from constitutional theory. The imposition of an expanded liability on the State in delict can arguably also be justified on common-law principles governing omissions, but whether this form of liability will extend to criminal liability remains to be seen.

The general rule in South Africa, expressed in the leading delict case of Minister van Polisie v Ewels, is that a person is not under a legal duty to protect another from harm, even though he or she can easily and ought morally to do so. However, there are exceptions.

Generally speaking, in the common law, failure to inform the police of the commission of a crime, to prevent the commission of a crime or to rescue a drowning person does not amount to a crime. However, immunity does not extend to all failures to act. In certain cases, the omission is punishable since the person concerned was under a legal duty to act. The special situations in which such a duty exists have crystallised over the years.

Traditionally a legal duty to act may arise where some prior conduct on the part of a person has created a potentially dangerous situation, where a person has control of a potentially dangerous thing or animal, where a protective or special relationship exists between the parties, where a person occupies a public or quasi-public office or calling which imposes on him or her a duty to act, and where statute or contract imposes a legal duty. These exceptions to the general rule are merely crystallised forms of the legal convictions of the community (the general standard for determining unlawfulness).

If the concept of the legal convictions of the community is used in an unrestrained way to create new duties, or even extend existing ones, the fundamental principle of legality is in jeopardy of being infringed and the exception will be converted into the general rule.

**Causation**

The Appellate Division and the Constitutional Court have affirmed that the liability of a participant in a common purpose to commit a consequence crime is not dependent upon proof of a causal connection between the act of every participant in the common purpose and the eventual unlawful consequence. This means that before embarking on an examination of causal questions in consequence crimes one must first determine the extent of the causal inquiry by assessing whether participation in a common purpose is involved or not. If participation in a common purpose is involved, then a factual and legal causal link between conduct and unlawful consequence need only be established in

regard to at least one of the participants, whoever he or she may be. His or her causal contribution is then attributed to these others in terms of the common purpose doctrine. Special problems of causation may also arise in situations where accomplice liability is in issue.
The *conditio sine qua non* (or factual) test: Where the conduct in question takes the form of a positive act, the question is asked whether, but for the accused's conduct, the consequence in question would not have occurred at all or when it did. If the answer to this question is in the affirmative, then the accused's conduct is a factual cause of the consequence.
The test is also expressed in the following way: An act is a cause of a consequence if the act cannot be notionally eliminated from the sequence of events, without the consequence also disappearing. The court must therefore engage in a process of hypothetical elimination in order to determine whether a positive act is a factual cause of a consequence.
If an omission, as opposed to a positive act, is in issue, then the traditional investigation by the court involves the hypothetical addition, to the factual complex, of the act which should have been performed. 23 In other words, the act that should have been performed (the positive act legally required of the accused) is notionally added to the factual complex and if the consequence disappears then the omission in question is a factual cause of the consequence.

**Unlawfulness**
Despite having perpetrated prohibited conduct or having caused a consequence prohibited by law, an accused may nevertheless escape criminal liability by raising or leading evidence of a recognised defence excluding the unlawfulness of the conduct. Such a defence is available even where no fault *(mens rea)* is required for criminal liability. If the prosecution does not negate the existence of such a defence beyond reasonable doubt, the defence succeeds and an acquittal results. In other words, conduct can be lawful or unlawful. Lawful conduct does not match the elements of the definition of one or other crime. Conversely conduct will be unlawful when it does comply with the definition of a crime. In some cases, however, conduct that is unlawful because it complies with the definition of a crime, will be rendered not unlawful because it is committed in circumstances that justify the performance of the conduct.
The idea that unlawful conduct may be justified arises from the recognition that there may be circumstances or considerations that deprive the unlawful conduct of its blameworthiness or, in other words, remove the social need to punish the accused for the performance of the conduct in question. A distinction is sometimes drawn between a *special* and a *general* defence. A special defence arises when the prosecution fails to prove one of the special elements of a particular offence beyond reasonable doubt. Thus, if the prosecution fails to establish the element of causation in a consequence crime, the accused is entitled to an acquittal, provided the accused is not a co-participant in a common purpose. *Procedural* defences relating to matters of process can be distinguished from *substantive* defences relating to the merits of the case, but the line between these two defences is sometimes blurred. For instance, a defence based upon the infringement of the principle of legality could be regarded as both of a procedural and a substantive nature.

Viewed from a narrow perspective, unlawfulness can be seen simply as the absence of a defence excluding unlawfulness (or ground of justification).

However, explicit reference to the 'legal convictions of the community' as the basis of criminality has surfaced in various South African judgments. Few would dispute that the criminal law, both common and statute law, should reflect the values and consensus of society. In fact, only when the criminal sanction reflects this consensus can there be the respect for the law that leads to the concomitant stigma attaching to conviction under this law. But the dangers of the legal convictions of the community becoming a weapon for imposing sectional interests are disturbing.

Defences excluding unlawfulness:

Private Defence.
The description 'private defence' highlights the fact that citizens have been unable to rely upon the agencies of the State (the police and the courts) to protect their legal interests, and have been compelled to take the law into their own hands, or, in other words, to defend their interests 'privately'. Private defence is very often referred to as 'self-defence', a term that implies that what is in issue is only the defence of the physical self, the person. Since the defence is available for the protection of other persons and other interests, the description 'private defence' is preferable to 'self-defence'.

Necessity.
The defence of necessity arises when a person, confronted with a choice between suffering some evil and breaking the law in order to avoid it, chooses the latter alternative. The term 'necessity' is used to refer to this type of situation whether it is brought about by the force of surrounding circumstances or by human agency (ie compulsion, duress or coercion). The law is the same in both instances.

Impossibility.
The defence of impossibility is relevant where it is impossible for the accused to comply with a positive injunction of the law, whereas necessity is applicable where the accused could not help doing an act prohibited by law.

Superior orders.
The defence of obedience to orders arises in the context of obedience to military and police commands. Warfare, as normally conducted, involves the perpetration of various acts which at common law would constitute crimes such as murder, arson, assault, theft, espionage, sedition, public violence and the like. A soldier may thus be required as part of the proper performance of his or her duties to engage in conduct which as a civilian would attract the penal sanction. No criminal liability attaches to any member of the military who perpetrates such acts as part of the ordinary performance of combat or ancillary military duties. This is because the soldier is clothed with the authority of the State to act in this way.

Consent.
In legal theory human beings are free to waive their legal rights if they so choose. Individual autonomy triumphs. Thus, in the case of a delict, the victim of the harm suffered may, by consenting to suffering the harm involved, excuse the wrongdoer from liability. Here the principle is *volenti non fit injuria* (an injury is not done to one who consents).

However, a crime is less about harm to the victim and more about harm to the community as a whole. Thus, in general, it does not lie within the power of the victim of a crime to render the act not unlawful by consenting to suffer the harm involved. Accordingly, the general rule of criminal law is that consent on the part of the victim will not serve to excuse the crime of the offender.

Entrapment.
In a system of law where it is applicable, the defence of entrapment may be raised when the wrongdoer was induced to act unlawfully by a law-enforcement officer. The essence of the defence is that an ordinary citizen should not be criminally liable for committing an offence where, in fact, a government agent has induced him or her to commit the offence. An American judge described entrapment as 'the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer'

De minimis non curat lex.
The de minimis rule means 'the law does not concern itself with trifles'. It is clear from a line of cases, starting with R v Dane and culminating with the Appellate Division decision in S v Kgogong, that the rule is applicable in the criminal law.
This rule, which is apparently of English origin, must be distinguished from situations where 'serious harm' is an element of the offence. For instance, there is authority for the view that to constitute crimes such as public violence and crimen injuria the conduct of the accused must be of a sufficiently serious nature. Strictly speaking, de minimis is not a defence which excludes the unlawfulness of the accused's conduct, but rather a decision of a court to allow unlawful conduct to go unpunished on account of its triviality.

Negotiorum gestio (or 'unauthorised administration').
Negotiorum gestionis occurs where a person voluntarily performs an act in the interest of another with the intention of benefiting that other, but without the latter's knowledge or consent. It may be a defence to a criminal charge that the conduct concerned was done in negotiorum gestio.
If, for instance, while Y is away on holiday, X notices that Y's house is burning, and X intervenes without obtaining the consent of Y, breaking down the front door of Y's house in order to rescue some of Y's valuables from the conflagration, X's conduct in damaging the front door will be justified on the basis of negotiorum gestio.

**Capacity.**
Persons are responsible for their criminal conduct only if the prosecution proves, beyond reasonable doubt that, at the time the conduct was perpetrated they possessed criminal capacity or, in other words, the psychological capacities for insight and for self-control.
The Rumpff Commission of Inquiry (into the responsibility of mentally deranged persons) in 1967 noted that psychology conceives of the normal human personality as comprising three categories of mental function: cognitive, conative and affective. The cognitive function relates to the individual's capacity to think, perceive and reason, the capacity by which humans learn, solve problems, and make plans; the conative function relates to the capacity for self-control and the ability to exercise free will (conative or volitional functions); and

the affective capacity relates to the capacity for emotional feelings such as anger, hatred, mercy and jealousy.

A person whose cognitive or conative capacities are impaired in a significant way, the Commission suggested, ought not to be held criminally responsible for their actions. Criminal capacity is thus concerned with a person's cognitive and conative functions or, in other words, his or her capacity for insight and self-control.

Therefore the test for determining whether an accused had criminal capacity is whether the accused had the capacity to appreciate the wrongfulness of his or her conduct and the capacity to act in accordance with this appreciation.

**Fault.**
Fault is an element of every crime. It takes the form of either intention *(dolus)* or negligence *(culpa).* All common-law crimes require intention, apart from culpable homicide and contempt of court committed by an editor of a newspaper, for which negligence is sufficient. Statutory crimes require either intention or negligence.
It is a firmly established principle of criminal justice that there can be no liability without fault, a principle generally expressed in the maxim *actus non facit reum, nisi mens sit rea* (the act is not wrongful unless the mind is guilty). In other words, the general rule is that, in order for an accused to be held liable, in addition to unlawful conduct (or *actus reus)* and capacity, there must be fault (or *mens rea)* 1 on the part of the accused. This fundamental principle of the South African criminal law was endorsed by O'Regan J in *Coetzee*. There is also a presumption of statutory interpretation that the legislature intended some form of fault as a requirement for liability under the statute in question.

Intention.
An accused is at fault where he or she intentionally commits unlawful conduct knowing it to be unlawful.
Intention is the principal form of fault. 'Even a dog', Oliver Wendell Holmes pointed out, 'distinguishes between being stumbled over and being kicked'. This elementary appreciation of the distinction between deliberate and accidental conduct is the basis of the concept 'intention' as a form of fault in our law. In essence, the concept establishes that only those who deliberately cause harm ought to be punished. However, the concept of intention has gradually been extended to cover not just deliberate but also foreseen conduct.

Negligence.
In South Africa, an accused who negligently commits homicide or contempt of court (in the case of an editor of a newspaper), or who contravenes certain statutory prohibitions is considered to be at fault.
Negligence is the term used in law to indicate that the conduct of a person has not conformed to a prescribed standard, that of the reasonable person. The failure to ensure that conduct does conform to the standard is reprehensible and thus negligence is regarded as a form of fault. The notion that conduct should conform to some prescribed standard arises from the fact that human beings regularly undertake activities (eg driving a motor car) that create the risk of harm to others. Since the activity has social advantages the law does not prohibit it. However, in order to minimise the risk to others, the law does require that the activity be carried out carefully, prudently and circumspectly. In other

words, the person engaging in the activity must take reasonable precautions to ensure that the manner or circumstances of the performance of the activity will not cause harm to another person. The nature of such reasonable precautions depends on the nature of the activity and the circumstances under which it is being carried out. The test that is applied to determine whether the actor has displayed the necessary caution is whether a 'reasonable' person in the same circumstances would have acted in the same way. Negligence can thus be said to be the failure to act as the reasonable man or woman would have acted.

**Participation in crime.**
So far we have dealt with the criminal liability of a person who himself or herself satisfies the definitional elements of the crime (the perpetrator). However, more than one person may be involved in the commission of a crime and we now need to consider how the law assigns liability to such persons.
Since the accessory after the fact, by definition, does not participate in the commission of the crime, but only intervenes after its completion.

# B. STATUTORY OFFENCES

### Unlawful possession of firearms (Firearms Control Act, 2000)

Source:
South African Criminal Law and Procedure Volume III: Statutory Offences CD-Rom and Intranet: ISSN 2218–127X Internet: ISSN 2218–113X Jutastat e-publication S V Hoctor, M G Cowling, J R L Milton

"Any person who has in his possession any firearm, unless licensed to possess such firearm, commits an offence. The onus of proving that the accused was licensed, permitted by permit or authorized to possess the firearm rests on the accused and it is thus not necessary for the prosecution to allege and prove such lack of licence - Section 250(1) of the Criminal Procedure Act 51 of 1977.

The elements of this offence are: that the accused (i) unlawfully (ii) possessed (iii) a firearm (iv) mens rea.

The Act defines the word 'firearm' to mean any

(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);

(b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;

(c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of (a) or (b);

(d) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6mm or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or

(e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c), or (d), but does not include devices that are not regarded as firearms in terms of section 5 of Act 60 on 2000."

**Unlawful possession of ammunition (Firearms Control Act, 2000)**

Source:
South African Criminal Law and Procedure Volume III: Statutory Offences CD-Rom and Intranet: ISSN 2218–127X Internet: ISSN 2218–113X Jutastat e-publication S V Hoctor, M G Cowling, J R L Milton

"Any person who unlawfully possesses any ammunition commits an offence. 1 The elements of this offence are: that the accused (i) unlawfully (ii) possessed (iii) ammunition (iv) mens rea.

Possession of ammunition is considered unlawful only were the accused did not lawfully possess either a firearm capable of discharging that ammunition; 2 or possessed a permit or licence for such ammunition or was otherwise authorised to be in the possession of such ammunition. A lawful reason to possess ammunition exists only where the accused is duly licensed or falls within one of the exceptions created in the Act, namely (a) holding a licence in respect of a firearm capable of discharging that ammunition; (b) holding a permit to possess ammunition; (c) holding a dealer's licence, manufacturer's licence, gunsmith's licence, import, export or in-transit permit or transporter's permit issued in terms of this Act; or (d) otherwise being authorised to do so.

The Act defines ammunition as a primer or complete cartridge. A 'cartridge' is in turn defined as a complete object consisting of a cartridge case, primer, propellant and bullet. Lead pellets discharged from an air-rifle are thus not ammunition for purposes of the Act."

**Manufacture and supply of scheduled substances (Drugs and Drug Trafficking Act, 1992)**

Source:
Justice College note: A selective discussion of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992) by B J King, Updated by J P Nordier 2021

"Section 3 provides as follows: "Manufacture and supply of scheduled substances. No person shall manufacture any scheduled substance or supply it to any other person, knowing or suspecting that any such scheduled substance is to be used in or for the unlawful manufacture of any drug."

Section 13(b) provides that any person contravening section 3 is guilty of an offence and section 17(d) stipulates the punishment therefore, namely - any fine the court deems fit or to imprisonment not exceeding 15 years or to both such fine and such imprisonment.

The punishable act in this case consists of the "manufacture" or "supply". Without limiting the general meaning of "manufacture", section 1 defines it as:

"..., in relation to a substance, includes the preparing, extraction or producing of the substance."

"Scheduled substance" as defined in section 1 means: "any substance included in Part I or II of Schedule 1." Schedule 1, as mentioned, lists substances useful for the manufacture of drugs and includes the salts of the substances. Evidence as to the chemical composition of the substance will in all likelihood have to be presented in order to prove that the alleged substance is a schedule I substance.

A qualifying element is added in the prohibition, that is, it must also be proved that the accused person knew or suspected that the scheduled substance was to be used for the unlawful manufacture. "Drug" is defined in section 1 as meaning "any dependence producing substance, any dangerous dependence producing substance or any undesirable dependence producing substance." The possible reason for this qualification is that some of the scheduled substances, acetone for example, is freely available, for instance, from a paint supplier. Proof of this particular element, because of the subjective nature thereof, could be difficult and would probably, in the majority of instances, be provided by way of circumstantial evidence.

NB:
Note must be taken of: Minister of Justice and Constitutional Development and others v Prince and others 2019 (1) SACR 14 (CC) AND Smit v Minister of Justice and Correctional Services and Others [2020] ZACC 29 (18 December 2020) discussed hereunder**.**"

**Use and possession of drugs (Drugs and Drug Trafficking Act, 1992)**

| Source:<br>Justice College note: A selective discussion of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992) by B J King, Updated by J P Nordier 2021 |
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"Section 4 provides as follows: "Use and possession of drugs No person shall use or have in his possession
(a) any dependence producing substance; or
(b) any dangerous dependence producing substance or any undesirable dependence producing substance,
unless
(i) he is a patient who has acquired or bought any such substance
(aa) from a medical practitioner, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder; or
(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, dentist or practitioner ,and uses that substance for medicinal purposes under the care or treatment of the said medical practitioner, dentist or practitioner,
(ii) he has acquired or bought any such substance for medicinal purposes
(aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder;
(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or

(cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian,
with the intent to administer that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;
(iii) he is the Director General: Welfare who has acquired or bought any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;
(iv) he, she or it is a patient, medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer, of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to administer, supply, sell, transmit or export any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation;
(v) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who has acquired, bought, imported, cultivated, collected or manufactured, or uses or is in possession of, or intends to supply, sell, transmit or export any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation; or
(vi) he has otherwise come into possession of any substance in a lawful manner."

NB:
Note must be taken of: Minister of Justice and Constitutional Development and others v Prince and others 2019 (1) SACR 14 (CC) AND Smit v Minister of Justice and Correctional Services and Others [2020] ZACC 29 (18 December 2020) discussed hereunder**.**"

**Dealing in drugs (Drugs and Drug Trafficking Act, 1992)**

| Source:<br>Justice College note: A selective discussion of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992) by B J King, Updated by J P Nordier 2021 |
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"Section 5 provides as follows:
"Dealing in drugs. - No person shall deal in
(a) any dependence-producing substance; or
(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance,unless-
(i) he has acquired or bought any such substance for medicinal purposes -
(aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder;
(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or

(cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian,
and administers that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;
(ii) he is the Director-General: Welfare who acquires, buys or sells any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;
(iii) he, she or it is a medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which prescribes, administers, acquires, buys, tranships, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation; or
(iv) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who acquires, buys, tranships, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation."

**NB: Note must be taken of the following:**

The Constitutional Court in Minister of Justice and Constitutional Development and others v Prince and others 2019 (1) SACR 14 (CC) declared, section 22A(9)(a)(i) of the Medicines and Related Substances Control Act, 1965 as well as sections 4(b) and 5(b) of the Drugs and Drug Trafficking Act, 1992, inconsistent with the Constitution and invalid to the extent that they respectively prohibit the use, possession or cultivation of cannabis by an adult in private - where use, possession or cultivation of cannabis is for personal consumption by that adult in private.

The Constitutional Court in Smit v Minister of Justice and Correctional Services and Others [2020] ZACC 29 (18 December 2020) declared that section 63 of the Drugs Act is inconsistent with the Constitution to the extent that it purports to delegate to the Minister the plenary legislative power to amend Schedules 1 and 2 to the Drugs Act; only the amendments to the Schedules listed in paragraph 3 of the order in the first judgment are invalid; the applicant cannot rely on the Prince judgment to escape extradition; the declaration of constitutional invalidity must be prospective; this declaration must be suspended for 24 months; and the warrant issued for the arrest of the applicant is, in fact, valid.

The order of invalidity is suspended for a period of 24 months to allow Parliament to cure the defect – Thus until 18 December 2022.
The order of invalidity is not yet a valid legal defense. It may only become a valid legal defense after 18 December 2022.
Contraventions of the provisions remain an offence.”

**Corruption (Prevention and Combating of Corrupt Activities Act, 2004)**

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

"1 The general crime of corruption: definition in the Act
General offence of corruption (s 3)
"Any person who, directly or indirectly-
(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-
(i) that amounts to the-
(aa) illegal, dishonest, unauthorised, incomplete, or biased; or
(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
(ii) that amounts to-
(aa) the abuse of a position of authority;
(bb) a breach of trust; or
(cc) the violation of a legal duty or a set of rules,
(iii) designed to achieve an unjustified result; or
(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption."

2 Corruption by giver and corruption by recipient Corruption can be committed in many ways. If one attempts to make statements about corruption which are applicable to all instances of the crime, one becomes entangled in long and diffuse formulations which are not easy to understand immediately. In order to overcome this problem, discussions of the crime usually distinguish between the two most important ways in which the crime can be committed. These two main categories are corruption committed by the giver and corruption committed by the recipient. Corruption is committed if one party gives a gratification (benefit) to another party and the latter accepts it as inducement to act in a certain way. Both parties – the giver as well as the recipient – commit corruption. The expression "corruption by a giver" refers to the conduct of the giver, and "corruption committed by the recipient" refers to the conduct of the party who accepts the gratification. In the discussion of the crime that follows, the party who gives the gratification is referred to as X, and the party who accepts the gratification, as Y. In discussions of the previous corresponding crimes, one sometimes comes across the expression "active corruption" and "passive corruption". "Active corruption" refers to the conduct whereby X gives a gratification to Y, and "passive corruption" to the conduct of the recipient (Y) of the gratification from X.
The word "gives" includes an agreement by X to give the gratification to Y, or the offering by X to give it to Y. The word "accepts" in turn includes an agreement by Y to accept the gratification or the offering by Y to accept it.
In the Act the legislature distinguishes between these two forms of corruption not only in the definition of the general crime, but also in the definitions of the

specific crimes. In section 3, quoted above, in which the general crime is defined, corruption by the recipient is set out in the subdivision of the section marked (a), while corruption committed by the giver is set out in the subdivision marked (b). The legislature employs the somewhat illogical sequence of first setting out the crime committed by the recipient and thereafter the crime committed by the giver. In the discussion which follows, the same sequence will be adopted.
Corruption by the giver is, in principle, merely a mirror image of corruption by the recipient. The same requirements apply to both these forms of corruption, provided certain terms used in describing the one are replaced by other terms when setting out the other. In order to avoid duplication, corruption by the giver will, in the discussion which follows, not be discussed in such detail as corruption by the recipient. The emphasis will be on corruption by the recipient. It is in the discussion of this form of corruption that the different requirements or elements of the crime will be identified and explained.

3 General crime: corruption committed by the recipient
Elements of crime: The elements of the general crime of corruption committed by the recipient are the following: the acceptance by Y (the act); of a gratification; in order to act in a certain way (the inducement); unlawfulness; intention.

4 General crime of corruption: corruption by the giver
Elements of crime: The elements of the general crime of corruption committed by the giver are the following: the giving by Y to X (the act); of a gratification; in order to influence Y to act in a certain way (the inducement); unlawfulness; intention."

# C. COMMON LAW CRIMES

**Fraud.**

| Source.<br>Cyber crime chapter 10 http://uir.unisa.ac.za › bitstream › handle by SM Maat |
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"Snyman defines fraud as "the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another." Hunt defines fraud as the "unlawful making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another".
The elements of fraud consist of:
- A misrepresentation
- prejudice or potential prejudice
- unlawfulness
- intention to defraud.

The act of fraud consists in the making of a misrepresentation. A misrepresentation is a distortion of the truth or something false. The misrepresentation can be made orally, in writing and through a persons conduct. One can imagine that fraud committed through the Internet would be in the form of written e-mails, websites and electronic documents. Writing would therefore include electronic digital data contained in computer systems and

networks. Technology has become so advanced that one can have "telephone" conversations via the Internet and the misrepresentation can then be made orally. Furthermore the misrepresentation may be express or implied. The criminal action can be in the form of a commission or can be perpetrated through an omission when there is a legal duty on the perpetrator to disclose certain facts.

Prejudice may consist of either actual prejudice or potential prejudice. Prejudice need not be in the form of financial loss and can be non-proprietary in nature. The concept potential prejudice means that objectively there is reasonable possibility of prejudice. The prejudice must not be fanciful or too remote. Prejudice in respect of a third party would be sufficient. It is irrelevant whether the person to whom the misrepresentation was made was not misled by the misrepresentation. It would be sufficient if there was potential prejudice at the time the misrepresentation was made.

Mens rea in the form of intention is a requirement. The perpetrator must be aware that the misrepresentation is in fact false (intention to deceive). The perpetrator must also have the intention to defraud in that he or she must have the intention to induce someone to follow a course of action that is prejudicial as a result of the misrepresentation. Intent in the form of dolus eventualis is sufficient to prove fraud. An intention to acquire an advantage is not a requirement."

**Theft.**

Source:
Potchefstroom Electronic Law Journal (PELJ) On-line version ISSN 1727-3781
PER vol.19 n.1 Potchefstroom 2016
http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1163 ARTICLES
Re-positioning the law of theft in view of recent developments in ICTS - The case of South Africa. Mzukisi N Njotini.

"Recently the law of theft in South Africa has been developed. These growths have consequently led to the acceptance of appropriation, an English principle, rather than contrectatio, when a study is made of the principles of the law of theft. Snyman provides justification for the move from contrectatio to appropriation in South Africa. He states the following: Contrectatio might have been a satisfactory criterion centuries ago when the economy was relatively primitive and primarily based on agriculture. In today's world with its much more complicated economic structure, it is far better to use the more abstract concept of appropriation to describe the act of theft than the term contrectatio, unless one discards the original meaning of the latter term and uses it merely as a technical erudite-sounding word to describe the act of theft.

Appropriation is here used to mean the intention to deprive the owner of the benefits of ownership. It is simply the assumption of control of or over the property of another person. This control does not necessarily translate into a touching or handling of property. It is equated with the gaining of possession of or meddling with property.

The meaning and importance of that which is enunciated by Snyman above can be deduced by examining the cases pertaining to the appropriation of certain intangible property. These are fully captured in, amongst others, the cases of S v Kotze, S v Mintoor, Nissan South Africa (Pty) Limited v Marnitz (stand 1 at 6 Aeroport (Pty) Limited intervening) and S v Ndebele.These cases acknowledge the impact that recent developments have made on the principles of theft. Of particular importance for the purposes of this paper is the traditional Roman law element of contrectatio. It has already been stated that this element requires that a physical touching or handling of property capable of being stolen be made. Within the South African context, contrectatio is interpreted to mean the assumption, touching or handling of the property of another.

The Ndebele case is significant to this paper. It criticises the decision of the court in the Mintoor case.In the Mintoor case the court had to decide whether electricity could be a subject of theft or not. In responding to this question the court reiterated the view that things which do not have corporeal existence are incapable of being stolen. Consequently, it was stated that electricity is energy and that energy is incapable of being stolen. Following this line of reasoning the court in the Ndebele case held that the Mintoor case disregarded existing authority and failed to consider the existing developments in the law of theft.184 The facts in the Ndebele case were briefly that the accused (Ndebele and others) faced a number of charges regarding inter alia the theft of vending machines and electricity belonging to Eskom. The position regarding the theft of the machines was easy to determine. These were tangible objects or property and a contrectatio in relation to them was established. The most difficulty question was whether or not electricity is capable of being stolen. In other words, is contrectatio of or over electricity possible? Following the decision in the Mintoor case, it was submitted on behalf of the accused that electricity "could not be stolen". In other words, a contrectatio in respect of electricity is impossible either in fact or the law.

Before it could comment on this, the court referred to a number of previous court decisions (for example, S v Kotze, S v Mintoor, Nissan South Africa (Pty) Limited v Marnitz (stand 1 at 6 Aeroport (Pty) Limited intervening) and S v Harper) and surmised that:

It appeared to me that there was a more than slight possibility (which would be more conveniently decided at the end of the case) that electricity is in fact capable of theft and that the law had already been advanced by judgements relating, in particular, to theft of incorporeals.

Consequently, the court examined the meaning and importance of contrectatio for the purposes of the law of theft in South Africa. It acknowledged that according to Roman-Dutch law only corporeal or movable things are capable of being stolen. Therefore, the property stolen must be "... 'n selfstandige deel van die stoflike natuur'. In other words, the thing must belong to the owner or form part of the latter's estate. However, it applied S v Harper (where it was said that an incorporeal is capable of being stolen) and held that contrectatio is or should not only be constituted by the physical touching or handling of property. It is or should also be constituted by an appropriation of a "characteristic which attaches to a thing and by depriving the owner of that characteristic". This is the case because if it were to be held that:

Electricity is incapable of being stolen, then anyone would be entitled without permission of the owner to attach a load to his batteries and deplete the energy within them, thereby rendering the batteries useless. Yet nothing will have been stolen. Nothing physically has been taken from the battery; however, its characteristics have changed.

In view of the aforementioned, the court concluded that electricity can, despite the fact that it amounts only to energy and is incorporeal property, be the object of theft.

In addition to this, two occurrences are identified that mark the expansion of the principles of theft beyond their traditional format. These are the legislative and judicial interventions. The legislative intervention came in the form of the Game Theft Act and the Copyright Act, among others. These acts particularly acknowledge that there is a change in modern legal thinking regarding the proper understanding of theft. The Game Theft Act accepts that contrectatio fraudulosa can be carried out to property which traditionally was regarded as being incapable of being stolen. Such property includes wild animals. In this respect, the Game Theft Act protects the rights that the owners have over this property. The Copyright Act protects the intellectual property of a person. This is the products of a person's mind, such as the ideas. The Copyright Act particularly forbids others from wrongfully appropriating or interfering with this property.

Furthermore, the courts have also read the principles of theft to mean that appropriation can be undertaken in respect of other intangible or incorporeal objects. An example is the case of S v Graham. In this case, company (A) was on the verge of being liquidated. During this period, A received a cheque amounting to thirty-seven thousand one hundred and fifty three rand eighty eight cents (R 7 153.88). It was later established that the cheque had been erroneously sent to A. A Managing Director of A (Graham) was aware of the mistake. However, Graham paid and/or caused the cheque to be paid to the overdrawn bank account of A. Graham thought that A would recover from its debts and thereafter be in a position to repay the money. However, A was finally wound up. At the time of its winding up only a portion of the money was repaid. Graham was charged in his personal capacity with the theft of the cheque and/or the sum of money paid to A. The question was whether the paying of the cheque into A's account amounted to theft or not. The court conceded to the fact that traditionally theft amounts to a physical and actual appropriation of property. In this respect, tangible and corporeal objects, save where these are expressly or impliedly excluded, constitute the aforesaid property. However, the court stated that the principles of theft are founded on a "living system". This system is flexible and adaptable. In addition, this flexibility enables the system to be in touch with current realities and to be able to respond to existing societal conditions. Consequently, the court concluded that money is capable of being stolen even in cases where it is represented by entries in books of accounts, such as credits.

Having examined the developments described above, it is now possible to investigate the position of data in the law of theft. The importance of doing so is drawn from the fact that data has now become a "public good". Private and

public institutions, governments, businesses and individuals expend time, effort and money to gather information. Following these efforts, they then (reasonably) believe that they have real rights in or over this information. Furthermore, information or other data can be used in order to prevent other crimes, for example, money laundering and terrorism or terrorist financing."

**Contempt of court.**

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

"1 Definition: Contempt of court consists in unlawfully and intentionally
(a) violating the dignity, repute or authority of a judicial body or a judicial officer in his judicial capacity; or
(b) publishing information or comment concerning a pending judicial proceeding which constitutes a real risk of improperly influencing the outcome of the proceeding or to prejudice the administration of justice in that proceeding.1
2 Elements of the crime The elements of the crime are the following: (a) (i) the violation of the dignity, etcetera of the judicial body or judicial officer; or (ii) the publication of information or commentary concerning a pending judicial proceeding, etcetera; (b) the administration of justice by the courts; (c) unlawfulness; and (d) intention.
3 Unusual features of crime The crime is characterised by the following unusual features:
Firstly, contempt of court manifests itself in a variety of forms, some of which have requirements all of their own (eg the requirement in cases of publication of information which has the tendency to prejudice the outcome of a case that the case must still be pending (sub iudice). In fact, the expression "contempt of court" can be regarded as a collective noun for a number of different crimes that have certain features in common.
Secondly, certain cases of contempt of court are dealt with, not by the ordinary criminal processes, but by civil law. These are cases where there has been non-compliance with a court order in a civil case, and where the litigant in whose favour the court has made the order seeks to implement it by requesting the court to punish the defaulting party for contempt of court if the order is not complied with. It has now been settled, however, that these so-called cases of "civil contempt" also constitute the crime of contempt of court: The Director of Public Prosecutions is free to charge a person with contempt of court in these cases too.
A third peculiarity of this crime is that its perpetration may sometimes call for a drastic procedure in terms of which a judge or magistrate may convict and punish somebody for contempt of court committed inside the court in the presence of the judge or magistrate."

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