SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 89

PROJECT 73

SIMPLIFICATION OF CRIMINAL PROCEDURE

(THE RIGHT OF THE ATTORNEY-GENERAL TO APPEAL ON QUESTIONS OF FACT)

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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PREFACE

This discussion paper (which reflects information gathered up to the end of October 1999) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The discussion paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by **31 March 2000** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Mr W van Vuuren. The project leader responsible for the project is The Honourable Mr Justice LTC Harms.

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CHAPTER 1

ORIGIN OF THE INVESTIGATION AND SOME INTRODUCTORY REMARKS

1.1 During 1989, the former Minister of Justice requested the Commission to investigate the possibility of simplifying criminal procedure, with particular reference to a number of questions, one of which was whether the State should be given the right of appeal against sentence. Owing to the extent of the investigation the Commission decided to publish several working papers dealing with different aspects of the investigation.

1.2 During 1997 the then Minister was approached by Advocate Kahn SC (the Attorney General of the Cape) to have the law changed to allow the Attorney-General (now Director of Public Prosecution) to appeal on a *question of fact* , i e, relating to the merits of the case.

1.3 The Minister requested the Law Commission to include an investigation into the matter in its programme as part of its investigation dealing with the simplification of criminal procedure. Such an investigation was subsequently included in the Commission's broader investigation in project 73 (Simplification of criminal procedure). At its meeting on 26 November 1998 the Commission's project committee resolved to proceed with the investigation.

1.4 As the law stands at present, an accused can appeal, subject to certain procedural qualifications, against any aspect of bail, a conviction or sentence in a criminal case. The accused may also have proceedings in lower courts reviewed and, in the case of the High Court, have irregularities dealt with by way of appeal or special entry.

1.5 The State, on the other hand, may appeal (also subject to similar procedural qualifications) against the grant of bail, an acquittal on a legal ground and also against an inadequate sentence. Experience has shown that these rights are used sparingly by the State. *What the State does not have is any right to appeal against a finding of not guilty in relation to the facts of the case - the so-called appeal on the merits*. The difference between questions of law and fact is often one of extreme difficulty to judge or apply and there are many reported cases dealing with the distinction. The same problem arose in the context of, for instance, tax appeals and because of the ever present difficulty the distinction in tax cases has been abolished without any deleterious effect.

1.6 In the present context there are conflicting policy considerations. The one is that an accused person has benefits and protections - some which are protected by the Constitution - which the prosecution, representing the community and the victims of crime, does not always enjoy. The administration of justice in South Africa (especially with regard to criminal procedure) has followed the English tradition and has always been characterised by liberality and respect for the individual.

1.7 On the other hand, there are the interests of society, whose members (not only the victims) also enjoy the rights contained in the Bill of Rights and are entitled to a just and fair decision in criminal cases. They have an interest in the conviction and sentencing of a person who is clearly guilty and who, because of incompetence or obvious errors in the court proceedings, go free. *It cannot be doubted that a significant number of criminals go unpunished due to numerous flaws in the administration of the criminal justice system*.

1.8 In considering the question whether a procedure such as the right to appeal should be changed, it is also imperative to consider whether the system, which denies the State a full right of appeal, satisfies present demands and whether changes may contribute towards achieving justice in the administration of the criminal law. Some regard must be given to cost and time factors and one must balance all the relevant factors. Any proposed amendment should be principled, simplify the relevant procedures and improve the present system and should not be seen as an attempted crisis management.

1.9 In the end the question essentially boils down to this: since the State has a right of appeal in connection with bail, sentence and questions of law, why should it not have a similar right in relation to factual matters? In other words, why should the right of appeal not be general? Because that is the issue, the intention of the Commission is not to reconsider the rights of the convicted to appeal or the existing rights of appeal afforded to the State - all subjects dealt with in earlier reports and, to some extent, in recent legislation - but to focus on the limited issue at hand. The Commission's brief is to simplify criminal procedure and in the course of the investigation it became clear that some changes, which are not directly related to the limited issue at hand, are also necessary. Some of these changes are cosmetic while others are aimed at simplifying the procedure. The Commission used this opportunity to also address these issues and its recommendations are included in the in the draft Bill.

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1.10 Only once in the past was the present problem considered by a commission, namely the

Botha Commission. Because of objections against a similar proposal, it decided to make no recommendations. The views of the Botha Commission will be dealt with later in this report.

CHAPTER 2

THE RIGHT TO APPEAL IN SOUTH AFRICAN CRIMINAL PROCEDURE

2.1 Appeal is one of the two forms of post-trial control in South African criminal procedure. An appeal is appropriate when it is alleged that the court came to a wrong conclusion or when the court misinterpreted the law. Review, on the other hand, is used when the method of trial is objected to. Although there are similarities between review and appeal, there are also important differences. Both procedures provide a remedy against incorrect decisions.

APPEALS OF CONVICTED PERSONS FROM LOWER COURTS

2.2 According to Roman-Dutch law the general rule was initially that neither the prosecution nor the convicted person could appeal in a criminal case. The harshness of this common law rule was, however, alleviated by statute in the Netherlands. As far as the prosecutor was concerned, he was allowed to appeal against a sentence which he considered too lenient.

2.3 After the second British occupation, the law of evidence and procedure was brought into line with the English system. An appeal was allowed against a finding of a magistrate only in the event of certain sentences being imposed. At the establishment of Union a person who was convicted by an inferior court could appeal not only against the conviction, but also against the sentence *as of right*. In order to place some perspective on the matter, it should be remembered that the sentencing jurisdiction of lower courts was limited to six months of imprisonment, something that was only increased in 1977. Regional courts did not exist.

2.4 The position at present is the following. Any person convicted of any offence by any lower court (district or regional court), even if such person is merely discharged upon conviction, may appeal against such conviction and against any resultant sentence or order. This general principle is subject to exceptions but they are not germane to the present inquiry and do not require further consideration.

2.5 As noted, the person convicted and sentenced by a lower court was since 1910 entitled as of right to appeal without leave of appeal. During the 1990's the SA Law Commission conducted an investigation into the limitation of the right of appeal from lower courts. The

Commission's investigation focussed on the right of an accused person to appeal and in the course of the investigation a number of screening procedures to exclude the prosecution of unfounded appeals was considered and rejected. In spite of its final recommendation, the unqualified right to appeal without leave was removed by the CRIMINAL PROCEDURE AMENDMENT ACT 76 OF 1997 which came into operation on 28 MAY 1999.

2.6 This amending act was precipitated by the judgement in ***S v Ntuli,***[1] in which the Constitutional Court declared that the provisions relating to judges's certificates for imprisoned convicted persons, namely section 309 (4)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), and by implication also section 305 thereof, to be in conflict with the Constitution.

2.7 *The amending legislation requires all persons convicted in the lower courts and who wish to appeal, to apply to the trial court for leave to appeal, failing which the accused person has the right to petition the Judge President of the High Court having jurisdiction*.

APPEALS FROM SUPERIOR COURTS

2.8 Until 1879 no appeal was allowed in criminal cases tried in the superior courts. Thereafter the rights of accused persons were somewhat extended. The Criminal Procedure and Evidence Act 31 of 1917, for instance, made provision for a special entry to be made if the proceedings were "irregular or not according to law". If such an entry were made, an appeal by leave of the judge was allowed against the conviction, but there was no remedy if the petition for a special entry was refused.

It also provided that the judge could *mero motu* reserve any question of law that might have arisen during the trial for decision by the Appeal Court. In addition, either the accused or the prosecutor could apply for such a reservation. On appeal, the court was entitled to give the order the court below should have made.

Of interest is the fact that the prosecution had the right to appeal the suspension of any sentence and that the court of appeal was entitled to set the suspension aside. In 1935 already the court of appeal was given the right to increase the sentence imposed even though the accused or the State had only appealed on the reserved question of law.

2.9 There was no right of appeal for either the accused or the prosecution on the merits of

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1 1996(l) SA 1207 (CC).

the case.[2] The reason for the limited right of appeal is historical and must be seen in the context of the criminal procedure at that time. As mentioned, all criminal cases which involved a possible sentence of imprisonment in excess of six months were heard by a superior court. That court consisted of a judge and a jury. (There were some exceptions but they were also governed by the principles applicable to jury trials.)[3] An appeal on fact where findings of credibility and demeanour are relevant, is not feasible against a judgment in a jury trial because a jury does not give reasons for its verdict.

2.10 This limitation upon the powers of the court of appeal gave rise to artificial rules. Gardiner & Lansdown [4] summed them up as follows:

> But the evidence on which a Court is entitled to convict is evidence on which reasonable men could properly convict. If the evidence cannot be so described, then the Appellate Division will set aside the verdict, not as deciding the facts itself, but because the Court of trial has not, in its opinion, discharged the duty cast upon it. That is a question of law.

2.11 After the Lansdown Commission had examined the desirability of granting a right of appeal from superior courts in 1947, the Appellate Division became, as far as the accused was concerned, a court of appeal in the full sense of the word. In terms of Act 37 of 1948 an accused could, with the leave of the court, appeal to the Appellate Division against his conviction or sentence before a superior court. If such leave was refused by the superior court, the accused could submit an application for leave to appeal to the Chief Justice.

2.12 At this stage it became more and more apparent that the jury system in South Africa had serious flaws. A fuller right of appeal for an accused was therefore imperative. In addition, jury trials were on the decline and the court of appeal, in dealing with appeals from judges who were obliged to give reasoned judgment, was able to re-judge the merits of such cases more easily.

Abuses of the jury system, e g acquitting every illicit diamond dealer, were initially dealt with by removing such cases from juries. But because of the numerous limitations of the right of an accused to have a jury trial, it fell in disuse and was later abolished.

2.13 The methods by which a criminal case can reach the Supreme Court of Appeal are

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2 ***Solicitor-General v Malgas*** 1918 AD 489.

3 ***R v Feinstein*** 1924 AD 240.

4 *SA Criminal Law & Procedure* 5th ed (1946) vol 1 p 599

these:

(i) An appeal against a conviction or sentence with the leave of the trial court.

(ii) An appeal on grounds of a special entry allowed by the trial court, based on an alleged irregularity (sections 317 and 318).

(iii) Consideration of a question of law reserved by the trial court, either *mero motu* or at the request of the State or the accused (section 319). If in these three cases leave is refused by the trial court, leave can be obtained from the Chief Justice.

(iv) An appeal by the Minister concerning a question of law on which a superior court gave a decision in a criminal case (section 333). This appeal can have no legal consequences for the accused and the acquittal stands, irrespective of the judgment of the Supreme Court of Appeal.

(v) If an appeal against a decision of a lower court is dismissed in the High Court, a convicted person could note an appeal to the Supreme Court of Appeal. In terms of section 21(2) read with section 20(4) of the Supreme Court Act, 59 of 1959, the High Court sitting as a court of appeal is required to grant leave before the appeal can be prosecuted further. If it refused leave to appeal, the convicted person is allowed to approach the Chief Justice for leave by petition.

In addition, an appeal from a single judge can also be heard by the Full Court (a three-judge bench of the High Court concerned). An appeal against a decision of the Full Court requires special leave by the Supreme Court of Appeal.

APPEAL BY THE PROSECUTOR OR THE DIRECTOR OF PUBLIC PROSECUTIONS (FORMERLY THE ATTORNEY-GENERAL) ON QUESTIONS OF LAW

2.14 The Act provides for limited appeals by the State relating to findings of not guilty. The relevant provisions are section 310 (*Appeal from the lower court by the prosecutor*), and section 311 (*Appeal to the Appellate Division*). There is, in addition, the provisions of section 319 relating to the reservation of questions of law. Separate provision is also made for appeals against sentence by the State in sections 310A and 316B. Last, there is the right of appeal against the grant of bail. These provisions are discussed below.

Section 310 of the Criminal Procedure Act

2.15 Section 310 allows the State and private prosecutors to appeal against a decision in a

lower court, but only upon points of law. In terms of section 310(1), points of law include successful objections which may be raised *in limine* in terms of section 85(2) of the Act, i e, objections to the charge sheet. However, before the State may appeal in terms of section 310, a lower court must have handed down a decision on a question of law in favour of the accused.

2.16 The decision of a magistrate that the findings of fact do not support a conviction on the charge against the accused, or that the findings of fact do support a conviction of a crime other than the one with which the accused was charged are, amongst others, decisions upon a question of law.[5] ***S v Zoko*** [6] held that a decision whereby an accused is acquitted of the offence charged but convicted of a lesser offence is also appealable by the Sate. In this case the accused was charged with culpable homicide and the evidence established that the accused had intended to kill the deceased. Because he was not negligent, the magistrate found him not guilty of culpable homicide but guilty of assault with the intent to do grievous bodily harm. On appeal the conviction was changed to one of culpable homicide because the magistrate had erred in holding in law that a conviction of culpable homicide was not competent where there is an intention to kill.

2.17 An appeal in terms of section 310 proceeds on the basis of a stated case which is drawn up by the magistrate at the request of the DPP. In the stated case the magistrate sets out the findings of fact and the formulation of the question of law concerned. The reasons he decided the question of law in a particular way also form part of the stated case. Although the magistrate is obliged to formulate the findings of fact for purposes of the appeal, the court of appeal is not bound thereby and may have regard to the facts as they appear from the record.

Section 311 of the Criminal Procedure Act

2.18 Section 311 of the Act makes provision for an appeal on *questions of law* from the High Court *sitting as a court of appeal* (either from a lower court or from a single judge) to the Supreme Court of Appeal. It does not provide for an appeal on a question of law against a decision by the High Court sitting as a court of first instance. If the appeal by the State is successful, the SCA may substitute the acquittal with a conviction and it may sentence the

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5 ***S v Zoko*** 1983 (1) SA 871 (N) at 875C.

6 1983 (1) SA 871 (N).

accused appropriately. If the appeal fails, the court dismissing the appeal may order that the appellant pay the costs to which the accused may have been put in opposing the appeal. Where the attorney-general is the appellant, the costs which he is so ordered to pay has to be paid by the State.

2.19 The DPP has to obtain leave to appeal from the appropriate court and before leave is granted the court has to be satisfied that there are reasonable prospects of the appeal succeeding and that the appeal is of material importance for the State, or the State and the accused. One or both parties must have an interest in the authoritative answering of the question of law.[7]

2.20 In ***Attorney-General, Transvaal v Kader***[8] the respondent had refused to testify as a State witness in a criminal trial in the regional court, *inter alia*, with offences in terms of s 54(1) of the Internal Security Act 74 of 1982. The regional magistrate thereupon embarked on an enquiry in terms of s 189 of the Criminal Procedure Act during which the respondent testified that the chief reason why he did not want to testify was that he feared that he would not be able to withstand the stress of the court proceedings and that he would be mentally scarred for life, as well as that he feared ostracism by his community. At the conclusion of the enquiry the regional magistrate held that the respondent had not discharged the onus of showing that he had a just excuse for his refusal to testify, and sentenced him to two years' imprisonment.

A Provincial Division upheld his appeal, holding that the expression 'just excuse' in section 189 was not limited to a 'lawful excuse', and that if it were humanly intolerable for a person to testify, it would constitute a just excuse. It found on the facts that if the respondent had been compelled to testify he would have suffered severe psychic pain and there would moreover have been a very substantial risk of suicide, and accordingly held that it would have been humanly intolerable for the respondent to have to testify.

2.21 In an appeal by the Attorney-General in terms of section 311, the legal question concerned the meaning of 'just excuse' and the contention that it meant 'lawful excuse' only. The Appellate Division upheld the legal finding.

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7 ***Attorney-General, Transvaal v Nokwe & Others*** 1962 (3) SA 803 (T).

8 1991 (4) SA 727 (A).

2.22 It was also contended for by the Attorney-General that the provincial division had erred by not correctly applying the principles set out in ***S v Dhlumayo and Another***[9] in that it had not properly evaluated the evidence in the light of the findings of the trial magistrate. The AD held that a court of appeal which does not properly apply the guidelines set out in ***Dhlumayo's*** case does not commit an error of law; at most it would be guilty of dealing with the appeal on facts in an unsatisfactory manner. Such an 'error' can only be corrected if an appeal on the facts were available to the dissatisfied party, which it was not. Further, the question whether it was humanly intolerable for the respondent to have to testify was also a question of fact and therefore unassailable on appeal by the State.

Reservation of question of law under section 319

2.23 Section 319 provides that if any question of law arises on the trial in a superior court, that court may reserve that question for the consideration of the Appellate Division. The provision deals with three possibilities.

It provides for the court itself to formulate a question *mero motu*. In other words, if the court is in doubt about its decision to discharge the accused, it may formulate a legal question for the SCA. There are no recent instances of the use of this power.

Next, the accused may apply for the reservation of a legal question. As pointed out by Hiemstra (ed Kriegler), this is an anachronism and of no practical consequence because of the rights of appeal an accused has.

Last, it provides for the prosecutor to apply for the reservation of a legal question and provides the only ground on which the State may 'appeal'. In this regard it is similar in effect to section 310.[10]

2.24 The question whether a matter is one of law or of fact, is a vexed one and, in a sense, artificial. As pointed out, the rules on the matter were developed initially in order to give substance to the accused's limited right of appeal. ***Magmoed v Janse van Rensburg and***

9 1948 (2) SA 677 (A).

10 It was introduced subsequent to ***R v Herbst*** 1942 AD 434.

Others[11] (the so-called Trojan Horse case) decided that a genuine question of law is whether the proven facts bring the conduct of the accused within the ambit of the crime charged. Such a question involves an enquiry as to the essence and scope of the crime charged by asking whether the proven facts in the particular case constitute the commission of the crime. But a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime where there is no doubt or dispute as to what those ingredients are.

2.25 If the court decides to reserve a question, it must thereupon state the question reserved and direct that it be specially entered in the record and that a copy of the question be transmitted to the registrar of the Appellate Division. ***S v Nkwenja en 'n ander***[12] held that when a question of law as intended in section 319 is reserved, there must be certainty concerning all the facts to which the question relates and the trial Court must mention those facts in its judgment as part of the reserved question.[13] For some reason or other, trial judges consistently fail to comply with this requirement and for that simple reason the State's right of appeal is often more illusory than real. The section is also unclear because it does not prescribe the procedure to be followed upon the reservation of a question and this gives rise to serious practical difficulties.[14]

2.26 If the reserved question is answered in favour of the State, an order of acquittal may be substituted with a conviction and a sentence may be imposed. ***Ex parte Minister van Justisie: In re S v Seekoei***[15] held that by 'acquittal' in section 322 (4) is meant a finding whereby the accused is set free completely. Where someone stands trial on a charge and is then convicted of an offence whereof he, according to the provisions of the Act, could be convicted, it cannot be said that there was an "acquittal" (of the offence charged) as intended. The Court accordingly held that the trial Court should not have reserved certain questions of law where the accused, on a charge of housebreaking with intent to rob and robbery, had been convicted of housebreaking with intent to steal and theft as such conviction (which was a competent verdict on the charge) was not an 'acquittal'. There appears therefore to be a distinction without any reason between

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11 1993 (1) SACR 67 (A).

12 1985 (2) SA 560 (A).

13 This remains a problem as illustrated by ***Venter v S*** (SCA case no 381/97 of 7 Sept 1999).

14 Ibid.

15 1984 (4) SA 690 (A).

cases under section 310 (as interpreted in ***S v Zoko (supra)***) and the those under section 319.[16]

APPEALS AGAINST SENTENCE -

Section 310A and section 316A of the Criminal Procedure Act

2.27 Despite some objections[17] in extending the State's right of appeal to inadequate sentences, the Criminal Law Amendment Act, 107 of 1990, granted the Attorney-General the right to appeal against sentences imposed by lower and by superior courts. The change in the law was precipitated by "lenient" sentences imposed on circuit in a case concerning interracial violence. The public outcry - rightly or wrongly - was such that Mrs Helen Suzman introduced a motion in Parliament for the impeachment of the judge concerned.

2.28 The Attorney-General always had and still has the right, when the accused has appealed against his conviction and /or sentence, to apply to the court of appeal to increase the sentence. In addition, a rule of practice existed and still exists, in terms of which an accused could not, once notice has been given by the Attorney-General that an increase of sentence on appeal would be sought, stultify the application by unilaterally withdrawing the appeal. [18] Du Toit et al[19] are of the opinion that this right of the DPP should be used sparingly, as has been the right of the DPP to cross appeal, bearing in mind the same considerations.

2.29 Apart from these rights of the DPP, a court of appeal is entitled, where an accused appeals either on conviction or sentence (or both), to increase the sentence where it is of the opinion that the trial court passed an inadequate sentence.[20]

2.30 Before an appeal against the sentence by the DPP can succeed, the under- or over-emphasis of relevant factors must have resulted in an unreasonable or improper exercise of the

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16 Cf the judgment of Streicher JA in ***De Lange & Nyanda v S*** (SCA case no 160/98 decided on 31 May 1999.

17 JH van Rooyen *A perspective on the Criminal Law Amendment Bill* 1990 *SA Journal For Criminal Justice* 162 at 168.

18 ***S v Kellerman*** 1997 (1) SACR 1 (A).

19 Du Toit, E; DeJager, FJ; Piazes,A; Skeen, A S, Van der Merwe, S *Commentary on the Criminal Procedure* Juta, Cape Town at 30-42D.

20 Section 309(3) of the Criminal Procedure Act, 51 of 1977.

penal discretion. In other words, the same principles which apply to an appeal on sentence by an accused person apply to appeals by the DPP. [21]

2.31 The advantage of giving the State a right to appeal against a lenient sentence is evidenced by the few reported instances where this right of appeal has been utilised.[22]

2.32 Upon an application for leave to appeal or an appeal, the judge or the court, as the case may be, may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the application or appeal, taxed according to the scale in civil cases of the high court concerned.

Bail appeal

2.33 Until 1995 the State had no right to appeal against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail. By the introduction of section 65A by Act 75 of 1995, the Director of Public Prosecution now has such a right. Similarly, the DPP may now appeal to the SCA against any decision of a high court to release an accused on bail, also a right that did not exist previously.

2.34 Leave to appeal is required and the State may be ordered to pay the costs of the accused.

2.35 A problem identified is that the appeal from a single judge lies to the Supreme Court of Appeal. There is no reason why it should not first lie to the Full Court as is the case with other appeals. Appeals to the SCA usually take longer to reach the SCA than reaching a full court and, since the order granting bail is not suspended pending an appeal,[23] the appeal will usually have become academic by the time the matter is heard by the SCA.[24]

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21 ***S v Shapiro*** 1994 (1) SACR 112 (A).

22 See e g the facts in ***S v Madlala*** 1994 (1) SACR 245 (A) and ***S v Di Blasi*** 1996 (1) SACR 1 (A).

23 On the Continent the general rule is that an appeal by the State suspends the release of the accused.

24 Cf ***S v Ramokhosi*** 1999 (1) SACR 497 (SCA).

CHAPTER 3

THE RIGHT TO APPEAL: A COMPARATIVE OVERVIEW

3.1 In this chapter the Commission discusses primarily the right of the State to appeal in criminal cases with reference to international human rights documents and to practices in a

some foreign jurisdictions.[25]

INTERNATIONAL HUMAN RIGHTS DOCUMENTS

3.2 Article 14 (5) of the International Covenant on Civil and Political Rights (hereinafter referred to as the ICCPR)[26] provides that everyone convicted of a crime shall have the right to have his conviction and sentence reviewed according to law by a higher tribunal. Article 7 of the African [Banjul] Charter on Human and Peoples' Rights,[27] provides similarly. So, too Article 2 of Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.[28]

The latter, in express terms, accepts the right of the State to appeal against an acquittal and provides that if such an appeal is successful, the accused shall not be entitled to a further appeal. The ICCPR accepts implicitly the right of appeal of the state because it does not deny it. It assumes that a court of appeal may increase a sentence and that the accused has no further appeal as of right.

3.3 There is no international covenant on human rights the Commission is aware of that prohibits an appeal by the prosecuting authority in the case of an acquittal on the merits of the case, or, conversely, creates a right for an acquitted person not to have the acquittal set aside on appeal.

ENGLAND AND WALES [29]

3.4 The English system permits a large range of appeals against both conviction and

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25 *Criminal Procedure Systems in the European Community,* C van den Wyngaert; C Cane; HH Káhn;F McAuly;Butterworths, 1993, London at 100 et seq.

26 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

27 African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

28 Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117.

29 Information obtained from *Criminal Procedure Systems in the European Community,* at 100 et seq.

sentence. These are basically designed to ensure that the defendant's trial was a fair one, and that there was no irregularities in its conduct, also that there is some consistency in the process. For the most part only the defendant (and not the prosecutor) may appeal. Provision is, however, made for the prosecutor to appeal on a point of law from the magistrates' court and he may bring an Attorney-General's reference after an acquittal by the jury in cases where the prosecution takes the view that the judge has misrepresented the law.[30]

3.5 In ordinary appeals by the accused, the Crown Court has the jurisdiction to increase sentence. An appeal on a stated case is open to an accused against conviction and to the prosecutor on acquittal. The magistrates states a case for the opinion of the High Court and the High Court may uphold, reverse or amend the decision or remit the case for reconsideration.

3.6 It is more difficult to appeal against a conviction on indictment, mainly because it usually involves questioning the verdict of the jury. Initially there was no right of appeal until the Criminal Appeal Act of 1907, which established the Court of Criminal Appeal. At that stage the right of appeal was limited to matters of law, similar to the position in South Africa under the 1917 Act. There is an appeal as of right where a question of law is involved. On an appeal on a mixed question of law and fact, leave is required.

The appeal must be based on the grounds that (1) the conviction is in all circumstances unsafe[31] or unsatisfactory, (2) that the trial judge made a wrong decision on a question of law or (3) that there was a material irregularity in the course of the trial.

The court is notoriously reluctant to interfere on the first of these grounds. In other words, there is not a full or substantial appeal on the merits.[32] One of the reasons is that the jury does not give reasons for its decision and another is that a jury is presumed to be right. Halsbury [33] points out that in order to establish that a conviction is unsafe or unsatisfactory, it will not generally be sufficient to show that the case against the appellant as a weak one, or that the verdict is against the weight of the evidence, or that the trial judge felt some doubt about it. The

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30 Section 36 of The Criminal Justice Act, 1972.

31 Before 1966 the test was whether the conviction was unreasonable or cannot be supported having regard to the evidence.

32 Delmas-Marty *The Criminal Process and Human Rights* p 75.

33 *Laws of England* 4th ed (reissue) par 1388.

Court of Appeal is not prepared to usurp the functions of the jury. It is for this same reason that the prosecution does not have a right of appeal on the merits. It is historically based and linked to the constitutional history of that country. [34]

CONTINENTAL SYSTEMS: GERMANY[35]

3.8 Germany is taken as representative of the Continental systems. The detail differences between the different countries are for present purposes of little consequence.

3.9 The judgment on the merits rendered by a court of first instance can be appealed against ("Berufung") by either the prosecuting authority or the accused, either challenging the judgment or just part of it, for example the sentence. The proceedings involve a reconsideration of the whole matter. The prosecutor has to assume a neutral role and he may even lodge an appeal in favour of an accused.
The decision of the first appellate court proceedings can only be challenged before a second on questions of law ("Revision").

UNITED STATES OF AMERICA: CALIFORNIA

3.10 California is taken as an example. It confirms the fact that the State ('the people') does not have a right of appeal, save on very limited legal grounds.

3.11 The provisions dealing with the right to appeal are found in the Penal Code (sections 1235-1246) and the provisions relevant for this investigation are quoted:

> 1235. (a) Either party to a felony case may appeal on **questions of law alone**, ...
>
> 1238. (a) An appeal may be taken by the people from any of the following:
> (1) An order setting aside all or any portion of the indictment, information, or complaint.
> (2) An order sustaining a demurrer [legal exception] to all or any portion of the indictment, accusation, or information.

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34 ***Benson v North Ireland Road Transport Board*** [1942] AC 520, [1942] All ER 465 (HL).

35 Information obtained from *Criminal Procedure Systems in the European Community*, at 160 et seq.

(3) An order granting a new trial.

(4) An order arresting [suspending] judgment.

(5) An order made after judgment, affecting the substantial rights of the people.

(6) An order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed or modifying the offense to a lesser offense.

(7) An order dismissing a case prior to trial made upon motion of the court pursuant to Section 1385 whenever such order is based upon an order granting the defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code.

(8) An order or judgment dismissing or otherwise terminating all or any portion of the action including such an order or judgment after a verdict or finding of guilty or an order or judgment entered before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

(9) An order denying the motion of the people to reinstate the complaint . . ..

(10) The imposition of an unlawful sentence, ...

CANADA [36]

3.12 Where a defendant is charged with an indictable offence and is found guilty of a summary conviction offence **the prosecutor has the right to appeal on issues of fact. An acquittal may only be set aside where the verdict is unreasonable or not supported by the evidence.**[37] **Where a ruling by the trial judge makes the outcome of the trial a foregone conclusion, the prosecutor may seek a dismissal of the charges and proceed with an appeal.** [38]

3.13 Section 676 defines the rights of appeal of the Attorney-General or counsel instructed for purpose of proceedings by indictment: the Attorney-General may appeal to the court of appeal against a judgment or a verdict of acquittal of a trial court in proceedings on indictment, upon **a question of law alone.** Leave to appeal is not required. Section 676(3) affords an equivalent

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36 See *1996 Tremeear's Criminal Code* David Watt and Michelle Fuerst (Carswell, Ontario) 1142 et seq.

37 ***R v Crocker*** (1986), 73 N.S.R. (2d) 151 (CA); ***R v Sall*** (1990), 54 C.C.C. (3d)48 (Nfld. T.D.).

38 ***R v Davis*** (1977), 37 C.R.N. S. 302, C.C.C. (2d) 388 (Ont.C.A.).

right of appeal against a verdict of unfit to stand trial. A judgment or verdict of acquittal includes an acquittal of the offence charged where the defendant has nonetheless been found guilty of a lesser offence.

3.14 The Attorney-General may appeal against a sentence imposed at the trial with leave unless the sentence imposed is fixed by law.

3.15 If a trial judge finds all the facts necessary to reach a conclusion in law, and in order to reach that conclusion the facts can simply be accepted as found, a court of appeal may disagree with the conclusion reached without trespassing on the factual findings of the trial judge since the disagreement concerns a question of law and not the facts or the inferences to be drawn from them. Failure to appreciate the evidence amounts to an error of law only where it is based on a misapprehension of some legal principle. A question of law also arises where a finding that the prosecutor has not proven guilt beyond a reasonable doubt is based upon an erroneous approach to or treatment of evidence adduced at the trial, a self-misdirection with respect to relevant evidence or where there is error as to the legal effect rather than the inferences to be drawn from undisputed or found facts.[39] The total absence of a foundation for a finding of fact is an error of law.

3.16 On an appeal from acquittal an appellate court has no jurisdiction to consider the reasonableness of a trial court's verdict. The question whether the proper inference has been drawn from the facts established in evidence and also the sufficiency of evidence are questions of fact. **The prosecutor may appeal an acquittal on a matter of fact where the trial judge has failed to appreciate or has disregarded evidence**. The prosecutor does not have the right to appeal an acquittal on the ground that the verdict of the jury was perverse on a question of fact. A finding of fact, in the absence of a misdirection as to a governing principle or a disregard of relevant evidence, is not appealable by the prosecutor.

NAMIBIA

3.17 In 1993 the Namibian Criminal Procedure Act was amended to make provision for the right of the Attorney-General to appeal on questions of fact (especially secs 310 and 311). For the sake of brevity only the provision in respect of appeals against decisions of lower courts (s

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39 ***R v B*** (G) (1990), 77 C.R. (3d) 370, 56 C.C.C. (3d) 181 (S.C.C).

310) is quoted. It provides as follows:

> '310(1) The Prosecutor-General or, if a body or a person other than the Prosecutor-General or his or her representative, was the prosecutor in the proceedings, then such other prosecutor, may appeal **against any decision given in favour of an accused in a criminal case in a lower court**, including -
> (a) any resultant sentence imposed or order made by such court;
> (b) any order made under s 85(2) by such court, to the High Court, provided that an application for leave to appeal has been granted by a single Judge of that Court in Chambers.
> (2) . . ..
> (3) The Prosecutor-General or other prosecutor shall, at least 14 days before the day appointed for the hearing of the application, cause to be served by any police official or the deputy sheriff upon the accused in person a copy of the notice, together with a written statement of the rights of the accused in terms of ss (4): Provided that if any police official or the deputy sheriff is not able so to serve a copy of the notice, it may be served in any other manner that may on application be allowed.
> (4) The accused may . . . lodge a written submission with the registrar, and the registrar shall submit it to the Judge who is to hear the application, and shall send a copy thereof to the Prosecutor-General . . ..
> (5)(a) Any decision of a Judge under ss (1) in respect of an application for leave to appeal referred to in that section, may be set aside by the Supreme Court . . ..
> (b) ....
> (6) . . ..
> (7) If any application for leave to appeal referred to in ss (1) or an application to set aside a decision referred to in ss (5) or an appeal in terms of this section brought by the Prosecutor-General is refused or dismissed, the Judge or the Court, as the case may be, may order that the State pay the accused concerned the whole or any part of the costs to which such accused may have been put in opposing any such application or appeal, taxed according to the scale in civil cases of the court concerned.

3.18 The amendment and the implications thereof was discussed in ***S v Van den Berg***[40]. The accused was arraigned in a magistrate's court on charges of unlawfully dealing in rough and uncut diamonds. Throughout the trial no mention was made of the issue whether the diamonds in question were indeed rough and uncut. At the close of the State case the defence relied on this omission by the prosecution and the court discharged the accused. The defence had not contested any of the evidence given by the State. Furthermore, no mention had been made by any of the parties involved in the dispute, as to the applicability of a statutory provision which created a presumption in favour of the State in that the accused had to prove, on a balance of probabilities, that the diamonds in question were not rough and uncut. Neither the magistrate nor the prosecutor was seemingly aware of this presumption. The accused's legal

40 1996 (1) SACR 19 (N).

representative probably knew about the presumption, but failed to inform the court about its applicability.

3.19 After the accused was discharged, the Prosecutor-General instituted appeal proceedings. The Court remarked that the purpose of the amended section 310 was to assist the State. Namibia is a developing country and the prosecution suffered from constraints caused by lack of financial means, experience and proper qualifications. The accused's legal representative had evidently exploited the ignorance of the magistrate and prosecutor. This exploitation had led to the mistaken discharge of the accused. The Court stressed that the role of the court in criminal matters, and the primary aim of criminal procedure, was to ensure that substantial justice was done. The accused was, because of actions of the defence lawyer, not entitled to claim a vested right in the finality of an acquittal by a lower court.

3.20 Mr Justice O'Linn, who gave the judgement, was of the opinion that a court of law should not protect an accused from purported prejudice arising merely from the fact that the State is given a provisional right of appeal to reverse a lower court decision where that decision mistakenly allowed the acquittal of an accused. In his view, the role of the court in criminal matters and the primary aim of criminal procedure should be to ensure that substantial justice is done. In view of the importance of this judgement to the subject of the Commission's current investigation reference is made in detail to the courts reasoning in defending the State's right to appeal on questions of fact. The Court referred with approval to the words of some eminent Judges when interpreting the provisions of section 247 of Act 31 of 1917 [41]:

> '. . . to see that substantial justice is done, to see that an innocent person is not punished and that a guilty person does not escape punishment'.
> These words were used by Wessels CJ in ***R v Omar*** 1935 AD 230 at 323, when interpreting the provisions of s 247 of Act 31 of 1917, relating to the role of the Court and the powers and duties relating to the calling and recalling of witnesses.
> . . .. It is in line with the dictum of Curlewis CJ in ***R v Hepworth*** 1928 AD 265 at 277. . . .
>
> > 'By the words "just decision in the case" I understand the Legislature to mean to do justice as between the prosecution and the accused. A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied by both sides. A Judge is an administrator of justice, not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done. . . . The intention of s 247 seems to me to give a judge

41 1996 (1) SACR 28-33.

> in a criminal trial a wide discretion in the conduct of the proceedings, so that an innocent person be not convicted or a guilty person get free by reason, inter alia, of some omission, mistake or technicality.'

Although these words were used in connection with the role of the court when applying the then s 247 of Act 31 of 1917, **the words express the basic aim of the courts and the provisions of the Criminal Procedure Act to ensure substantial justice, by ensuring that an innocent person is not punished and that a guilty person does not escape punishment.**

A perception exists in some circles that the fundamental right to a fair trial focuses exclusively on the rights and privileges of accused persons. These rights, however, must be interpreted and given effect to in the context of the rights and interests of the law-abiding persons in society and particularly the persons who are victims of crime, many of whom may be unable to protect themselves or their interests because they are dead or otherwise incapacitated in the course of crimes committed against them.

Another perception which needs careful thought is the role of the State in criminal law and criminal proceedings. The prosecution in a criminal case acts formally in the name of the State, but is not an entity acting in its own cause. The counsel and/or lawyers acting for the State are officers of the Court who are expected also to divulge to the Court matters favourable to the accused and, as such, they not only have to attempt to ensure that a guilty person does not escape punishment but that an innocent person is not convicted and punished. The prosecution in our criminal law and procedure is not the all-powerful, specialised, competent, and even evil entity with all the means at its disposal, bent on the conviction and punishment at all costs of a hapless and helpless innocent. **The prosecution should rather be seen as the representative of society, of the people and of the victims of crime.**

In a developing country such as Namibia the prosecution suffers from all the constraints caused by lack of financial means, experience and proper qualifications and is not always dealing with the unrepresented, ignorant, innocent criminal who is being charged with a minor offence. No, **the prosecution often has to confront intelligent, well-educated, callous and dangerous criminals committing grave crimes, often members of powerful crime syndicates, with all the expertise and means at their disposal to frustrate and defeat the ends of justice.** Furthermore, **the prosecution must overcome formidable hurdles,** including that it must prove its case beyond all reasonable doubt, after being compelled to provide, before trial, full particulars of its case, including the statements of its witnesses. In contrast, the defence is not compelled to provide particulars of the defence or to disclose the statements and identity of defence witnesses beforehand and not even at the time of plea; the prosecution is required to maintain complete openness; not so the defence, and the defence is never required to prove the defence beyond reasonable doubt, not even in regard to issues where a statutory presumption purports to place a burden of proof on the accused in respect of the particular element or issue.

Notwithstanding the escalation of crime and the progressive disillusionment of the public with the enforcement of the law and the system of justice as applied in the Courts of law, the claims for further concessions to accused persons proliferate without corresponding and balancing measures to ensure not only that innocent persons are not punished but also to ensure that the guilty do not escape punishment.

. . ..

It is clear that the amendment introduced a provisional right of appeal, inter alia

to combat abuses and miscarriages of justice of this nature and to attempt to ensure that substantial justice is done, not only in that an innocent person is not punished but also in that a guilty person does not escape punishment.
If an accused is discharged as a result of tactics such as these described, it is really such tactics which place the accused in jeopardy. The State should not be blamed for attempting to reverse such a pyrrhic victory.
In enacting the substituted s 310 of the Criminal Procedure Act, the Legislature also attempted to restore some balance between prosecution and accused in providing for a right of appeal by the State against lower court decisions in criminal cases, compared to the accused's unconditional right of appeal.
It is also consistent with the approach in ***R v Hepworth*** and ***R v Omar*** (supra). In ***R v Hepworth*** it was said that the aim of the criminal procedure provision there discussed was to 'do justice as between the prosecution and the accused'.
This provision also goes some way in giving effect to the letter and spirit of art 10 of the Constitution of the Republic of Namibia, where it states in a mandatory form:
'All persons shall be equal before the law.'
. . ..
Although the Constitution of the Republic of Namibia enumerates the various requirements for a fair trial, one would have thought that it would expressly prohibit appeals by the State as envisaged in the substituted s 310, if such was the intention. The retrospectivity which is prohibited in subart (3) of art 12 does not prohibit appeals by the State to test the correctness of a decision in a criminal case.

[Emphasis added.]

CHAPTER 4

WHETHER A RIGHT OF APPEAL ON QUESTIONS OF FACT SHOULD NOT BE EXTENDED TO THE STATE

THE COMMISSION'S EVALUATION

INTRODUCTION

4.1 In the formulation of recommendations cognisance will be taken of possible objections to the proposed change, international developments, international Human Rights documents and

the Bill of Rights and its possible implications for the right to appeal.[42]

PURPOSE OF THE RIGHT TO APPEAL OR REVIEW

4.2 To err is human and protection against error is necessary.[43] Judicial officers are fallible with regard to the findings of fact and of law. A court once removed from the heat of a trial is often better able to judge the rationality of factual conclusions, the correct finding of the law and the fairness of the proceedings.[44] Through appeal and review proceedings consistency and uniformity in the application of the law may be achieved. It furthers equality before the law. A right of the prosecuting authority to appeal, although seldom if ever protected in constitutions, recognises these realities and values and it is therefore an essential component of a deliberative and rational decision-making process, a core characteristic of a judicial system which gives expression to the value of the rule of law.

INTERNATIONAL HUMAN RIGHTS DOCUMENTS AND INTERNATIONAL DEVELOPMENTS

4.3 The question is dealt with in chapter 3. It is significant to note that not a single International Human Rights documents denies the State a right of appeal in a criminal case. In other words, there is no internationally recognised basic human right an accused person has not to be subjected to an appeal in the event of a discharge or the imposition of an inadequate sentence.

INTERNATIONAL DEVELOPMENTS

4.4 From the brief comparative study in chapter 3 certain definite patterns emerge:

In all **continental systems** the prosecuting authority has at least one right of appeal against an acquittal of an accused on the merits of the case.

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42 See in general Jordaan *Appeal by the Prosecution* [1999] 32 CILSA 1, an article based upon the author's doctoral thesis.

43 Bassiouni (1993 280) 3 *Duke journal of Comparative and International Law* 235 286.

44 HC Nicholas *The Credibility of Witnesses* 1985 *SALJ* 32.

In the **Anglo-American systems** with their innate belief in jury systems - in the USA it is constitutionally mandated - factual finding of a jury are sacrosanct. In the result even the accused has a very limited effective right of appeal on the merits. For the prosecution to have under these circumstances a right of appeal on the merits is unthinkable.

It is of some significance to take note of the fact that in **Canada** there is a right of appeal by the Attorney-General on the merits against a decision of the lower courts where, presumably, there is no jury. In the higher courts where jury trials take place, the situation is different. India, too, allows an appeal by the prosecution on matters of fact.[45]

Closer home, and more relevant to the South African position, is the **Namibian** experiment. Its Criminal Procedure Act was namely amended to make provision for the right of the Attorney-General to appeal all matters, including questions of fact.

THE CURRENT POSITION IN SOUTH AFRICA

4.5 In terms of the Criminal Procedure Act the State (in general terms) can appeal in respect of proceedings from the lower courts as well as from the High Courts -

(a) questions of law;

(b) inadequate sentences; and

(c) the granting of bail

There is no appeal on the merits of the acquittal.

4.6 An important consideration is whether or not an extension of the right to appeal would be constitutionally sound. Section 35(3) (o) does not constitutionalise the current rules and procedures of appeal and review, but from them the core elements of appeal and review can be extracted. These include:

(a) the reconsideration of a court decision (or a review of proceedings) by a higher court,

(b) a reconsideration of the merits of decisions on law or fact (or the fairness of the proceedings) on the basis of the full record of the proceedings (and such additional information as need be), and

(c) the exercise of the right within reasonable time limits.

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45 **Cf *Kalawati v The State of Himachal Pradesh*** AIR 1953 SC 131 [40 CN 35].

The Constitution is silent on the right of the State to prosecute appeals and the emphasis is on the right of an accused person. If one bears in mind that the supposed negative right of not to have an acquittal reconsidered is a right of the accused and not one of the State, the omission is significant. Once it is accepted that the provisions concerning appeals on bail, sentence and on legal points are not unconstitutional,[46] there is no reason to imagine that an appeal on the merits by the State would be. The appeal is merely an extension of the proceedings in the lower court.[47]

OBJECTIONS TO THE STATE'S RIGHT TO APPEAL ON FACTS

4.7 The main objection against the extension of the right of the prosecuting authority to appeal matters of fact is the so-called **double jeopardy principle**. The argument is that "an accused who has been acquitted on the facts - 'on the merits' - is in a similar position with regard to appeals by the State as to a retrial, in that he may not be put in 'jeopardy' twice for the same offence: *nemo debit bis vexari pro una et eadem causa*."[48] The same argument was raised in opposition to the amendment in 1990 which permitted State appeals on sentence.[49]

4.8 The double jeopardy rule in its traditional form is part of the Bill of Rights, namely that an accused person may not be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.[50] *The extended meaning contended for in the objection is not part of the objection.* As mentioned, the appeal proceedings are simply an extension of the same proceedings.

4.9 In 1971 the Botha Commission of Inquiry [51] considered the question in another legal and

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46 Cf ***S v Sonday*** 1994 (2) SACR 810 (C).

47 ***Kalawati v The State of Himachal Pradesh*** supra

48 Van Rooyen 1970 *CILSA* 360. Cf ***R v Brasch*** 1911 AD 525.

49 An edited version of the submission was published in 1990 *South African Journal of Criminal Justice* 162.

50 This is not an absolute rule because it is arguable that a retrial in the event of formal defects in the hearing is permitted. The Act, in any event, permits it.

51 *Commission of Inquiry into Criminal Procedure and Evidence* RP78/1971 Government Printer Pretoria at 30.

social context (at the time the State did not have the right to appeal against the grant of bail or a sentence imposed and there was no Bill of Rights). The Commission realized that the double jeopardy argument is flawed because an appeal on legal points was permissible and tried to address the dilemma thus:

> 8.03. The considerations are different where a question of law is in issue, because it is in the public interest that the applicable law be maintained. Where an accused is thus acquitted merely because of the trial court's erroneous view as to what the law is, the law is not maintained, and it is in the public interest that the law applicable be determined and declared by a superior court, not only for the specific case, but for all future cases of a similar kind. Although it is in the public interest that an alleged offender should be brought before the court and on conviction be punished, the public interest is not further served by an appeal against the acquittal on the peculiar facts of the particular case of such an alleged offender.

4.10 The rationalization is unconvincing. The public interest is not simply to have the law declared. The public interest goes much wider and it includes that guilty persons who have been subjected to a fair trial should not be acquitted because of error or incompetence. What the report failed to consider is the fact that a successful appeal by the State under the existing regime - i e an appeal on a question of law - potentially has serious personal consequences for the accused. He may be found guilty and sentenced to imprisonment for whatever term is appropriate. Another aspect overlooked in the report is that the court of appeal retains a discretion to disallow an appeal if it is of the view that by upholding the appeal an injustice to the accused will be done.[52]

4.11 The public interest question was dealt with in detail by O'Linn J in ***S v Van den Berg***[53] when he quoted Wessels CJ in ***R v Omar*** 1935 AD 230 at 323 that the role of the court is

> ... to see that substantial justice is done, to see that an innocent person is not punished and that a guilty person does not escape punishment'

and those of Curlewis CJ in ***R v Hepworth*** 1928 AD 265 at 277:

> ' A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are

52 ***Magmoed v Janse van Rensburg and Others*** 1993 (1) SA 777 (A) at 827G-828C.

53 1996 (1) SACR 28-33.

> applied by both sides. A Judge is an administrator of justice, not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done. . . "

O'Linn J was conscious that these words were used in another context, but proceeded to state that

> "the words express the basic aim of the courts and the provisions of the Criminal Procedure Act to ensure substantial justice, by ensuring that an innocent person is not punished and that a guilty person does not escape punishment.
> A perception exists in some circles that the fundamental right to a fair trial focuses exclusively on the rights and privileges of accused persons. These rights, however, must be interpreted and given effect to in the context of the rights and interests of the law-abiding persons in society and particularly the persons who are victims of crime, many of whom may be unable to protect themselves or their interests because they are dead or otherwise incapacitated in the course of crimes committed against them."

4.13 These views also present another perspective on another paragraph of the Botha Commission report which reads:

> 8.02. I suppose that it must be conceded that it sometimes happens that a trial Court wrongly acquits an accused on the facts or imposes an inadequate sentence, but that is no sufficient reason why the state should be given the right to appeal in such cases. The interests of the State and those of a condemned person are not comparable, and considerations which justify a right of appeal to a condemned person to appeal against his conviction on the merits and against the punishment imposed, do not hold good for the State.

4.14 As mentioned, many legal systems with exemplary human rights background accept the right as axiomatic.

4.15 There is no doubt, as was pointed out in ***Magmoed v Janse van Rensburg and Others***[54] that the procedures of our criminal justice system and the decisions of our courts evince a general policy of concern for an accused person in a criminal case and that a similar concern for the interests of the prosecutor cannot be detected. The various measures to protect the interests of the accused and to ensure that he is not wrongly convicted place, *pro tanto*, limitations on the power of the prosecution to obtain a conviction. In the light of the law as it stands, Corbett CJ was unable and unwilling to extend the State's right to appeal on questions of fact.

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54 The Trojan Horse case 1993 (1) SACR 67 (A); 1993 (1) SA 777 (A).

The question can validly raised whether, within a constitutionally protected fair trial system, an undue lack of concern for the interests of prosecutor can any longer be justified.

4.16 The same arguments were raised by Prof van Rooyen when he objected to the introduction of the right of appeal against sentence. He also relied upon the Botha Commission report which raised the same argument in this context. Despite these objections, the Act was amended during 1990 and gave the State the right to appeal against sentences imposed by both lower and higher courts. There has been no call to repeal the provision and it is serving its purpose. The same arguments can be raised against the right of the state to appeal the grant of bail, but the Legislature nevertheless introduced the right during 1995.

4.17 Another objection raised by the Botha Commission (par 8.04) was that such an appeal against an acquittal on the merits could, in the nature of things, seldom succeed. (The same holds good for appeals against sentence and the grant of bail.) One would hope that it will be the case, but it does not affect the principle of the matter. Courts of appeal do not easily or eagerly interfere with factual findings.

4.15 Then there is the question of costs, also raised by the Botha Commission (par 8.05). This is not a new problem or concern. It has been addressed in the original provisions of the Act of 1977 contained in section 311(2), also in the introduction of an appeal against sentence in sections 310A and 316B (but for reasons that are not at all clear, not in sections 310 and 317) and in that against the grant of bail (section 65A): *If the state is unsuccessful, it has to pay the accused's costs*. It has also been dealt with similarly in the Namibian statute. In any event, there is the provision of the Bill of Rights which entitles an accused person to have a legal practitioner assigned by the state at state expense, if substantial injustice would otherwise result. *The possibility of an adverse costs order will have an inhibiting effect upon the DPP to appeal cases without merit*.

4.16 It can also be argued that an extension of the right to appeal to the Director of Prosecutions may result in numerous unmeritorious appeals being lodged or in a clogging of court roles or an increased workload which neither the courts nor the court officials would be able to cope with. This argument has little merit. It will be necessary for the state to obtain leave to appeal and in that way unmeritorious appeals will be weeded out timeously. One must assume that the DPP is a responsible independent functionary who will not abuse any procedural right

accorded to the State. *In any event, any amendment should limit the right of appeal to the DPP and not extend it to any dissatisfied public prosecutor.*

4.17 A substantial increase in the work load of the courts is unlikely. The introduction of the right to appeal against sentence has not brought about any substantial number of appeals, but those that were prosecuted were of substance.

In the Supreme Court of Appeal there has been not quite a handful of such cases since the introduction of the right some ten years ago. Its workload ought not to be affected in any significant degree because appeals on fact should, in principle, be dealt with by the Full Court.

It must, in addition, be borne in mind that since the introduction of the requirement of leave to appeal from lower courts in May 1999, the number of appeals to be heard by the High Courts must of necessity be reduced.

REASONS FOR EXTENDING THE RIGHT OF APPEAL OF THE STATE TO QUESTIONS OF FACT

4.18 Many issues have been raised in the previous section while considering the validity of the objections to the amendment suggested. They will not necessarily be repeated.

4.19 The question of public policy and interest remains paramount. There exists unfortunately a perception that while crime is rampant, nothing much is done to protect the interests of society, and that the rights contained in the Bill of Rights (for example, the right to human dignity, the right to life, the right to freedom and security of the person and the right to property) - rights which the State must protect - are being violated on an unprecedented scale by criminals who in many instances go unpunished due to numerous flaws in the criminal justice system. O'Linn J's words need repeating:

> "**The prosecution should rather be seen as the representative of society, of the people and of the victims of crime.**"

> **"In a developing country . . . the prosecution suffers from all the constraints caused by lack of financial means, experience and proper qualifications and is not always dealing with the unrepresented, ignorant, innocent criminal who is being charged with a minor offence. No, the prosecution often has to confront intelligent, well-educated, callous and dangerous criminals committing grave crimes, often members of powerful crime syndicates, with all the expertise and means at their disposal to frustrate and defeat the ends of justice. . .."**
>
> "**Notwithstanding the escalation of crime and the progressive disillusionment of the public with the enforcement of the law and the system of justice as applied in the Courts of law, the claims for further concessions to accused persons proliferate without corresponding and balancing measures to ensure not only that innocent persons are not punished but also to ensure that the guilty do not escape punishment.**

4.20 The credibility of the criminal justice system is under strain. Acquittals which the press and the public cannot or wish not to understand, contribute thereto in no mean measure. There are also acquittals which are the result of bias (real or perceived), incompetence or lack of skill and experience which bring the justice system in disrespect. The existence of a right of appeal ought to contribute materially to restore the credibility and respect. The public will then know that there is an independent reappraisal of the matter available. Criticisms directed at individual judicial officers will be deflected.

4.21 The lack of skills at the prosecutorial level gives rise to serious. Where the prosecutor is inexperienced or incompetent the fair trial model also collapses. The extent of this problem has recently received some judicial attention.[55]

4.22 The failure of the prosecutor to be an adversary is amply illustrated in ***S v Manicum***[56] where the prosecutor showed a total lack of interest in or commitment to the prosecution. On appeal the judge commented as follows on the conduct of the prosecutor:

> "When I said it was alarming I was not being extravagant with language. There were the two contradictory versions and to think that a prosecutor would in these circumstances

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55 In ***S v Van der Berg*** 1995 4 BCLR 479 (Nm) O'Linn J said the following about Namibia: "In a developing country like Namibia, the prosecution suffers from all the constraints caused by lack of financial means, experience and proper qualifications". See also Van Dijkhorst 1998, 136. ***S v Motsasi*** 1998 2 SACR 35 (W).

56 1998 2 SACR 400 (N).

> have no questions, is incredible. It demonstrates a total lack of competence on the part of the prosecutor and a deplorable attitude of the authorities to put a case in the hands of a prosecutor who just did not care, did not want to care and who, even it she had cared, was not able to contribute a single morsel of cross-examination to assist the magistrate to unravel the issue."[57]

4.23 The mere existence of the possibility of an appeal will mean that judicial officers will be more careful in judging cases and the "opting out" of difficult cases on specious grounds will no longer be possible.

4.24 The country and its legal system is in transition. Judicial ethics is becoming a burning issue. Without a reassessment in the ordinary course of appeals of acquittals, it may be difficult to determine whether a judicial officer has acted unethically in finding a person not guilty.

4.25 This Commission is under an obligation to simplify the criminal procedure. For this reason the Commission deems it necessary to bring the provisions of the Criminal Procedure Act into line with the provisions of the Supreme Court Act. The Commission also deemed it necessary to consider the provisions in respect of appeals on bail and concluded that they be brought into line with the provisions dealing with the requirement of leave to appeal. Reference has from time to time been made to the multiple provisions dealing with appeals. All this can be simplified by allowing the State a simple appeal in terms similar to those regulating appeals of accused persons.

The requirement of stated cases and the complications associated with them will fall away.

So will special entries.

And separate provisions relating to appeals on sentence and on bail.

4.26 Important is that the problems associated with determining whether an appeal is one of fact or of law will fall away. In spite of well developed case law,[58] the question remains one of

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57 At 403h-i.

58 Cf ***Magmoed*** *supra;* ***Attorney-General, Transvaal v Nokwe*** 1962 (3) SA (T); ***S v Petro Louise Enterprises*** 1978 (1) SA (T); ***Secretary for Inland Revenue v Cadac Engineering*** 1965 (2) SA (A); ***Grobbelaar v Workmen's Compensation Commissioner*** 1978 (3) SA (T); ***Attorney-General Transvaal v Kader*** 1991 (4) SA 727 (A).

great difficulty.[59] It is no wonder that in income tax appeals, as a result of requests from the (then) Appellate Division, the distinction was abandoned after many years of expensive and unnecessary litigation.

4.27 It needs repeating that the right of appeal of the state will have to be subject to restraints, such as leave to appeal and limiting the right to the DPP. A general obligation to pay costs if the appeal is unsuccessful is also necessary.

4.28 It is assumed what has been said so far concerning the DPP will also apply to a private prosecutor.

CONCLUSION AND RECOMMENDATION

4.29 Having carefully considered the numerous countervailing factors, the Commission is of the view that, for the reasons set out, on balance there is merit in extending the right of the State to appeal on questions of fact:

4.30 The Commission therefore recommends that the Criminal Procedure Act be amended as set out in Annexure A to make provision for the right of the State (Director of Prosecutions or Prosecutor) to appeal on questions of fact from both lower and superior courts.

4.31 As stated above some of the proposed amendments are not strictly relevant to the issue, but since the Committee's brief is to simplify the Act, other obvious and noncontentious matters are dealt with. In particular, the sections under scrutiny were checked for consistency with the Constitution and the Supreme Court Act 59 of 1959. Sections are quoted in full in order to make the scheme understandable.

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59 Latterly, ***Venter v S*** (SCA case 381/97 of 7 Sept 1999) and ***De Lange & Nyanda*** (SCA case 160/98 of 31 May 1999).

Annexure A

Proposed amendments to the CPA in relation to appeals on fact by the State

Note: Some of the amendments are not strictly relevant to the issue, but since the Committee's brief is to simplify the Act, other obvious and noncontentious matters are dealt with. In particular, the sections under scrutiny were checked for consistency with the Constitution and the Supreme Court Act.

All sections relevant to appeals are referred to or quoted in full in

order to make the scheme understandable.

AMENDMENT BILL

CRIMINAL PROCEDURE ACT AMENDMENT BILL, 1999

BILL

To amend the Criminal Procedure Act, 1977, so as to provide for the attorney-general to appeal on questions of fact; to bring the provisions of the Criminal Procedure Act into line with the provisions of the Supreme Court Act; to bring the provisions dealing with bail appeals into line with the provisions dealing with appeals by accused persons and the Director of Public Prosecutions; and to provide for matters connected therewith.

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

______ Words underlined with a solid line indicate insertions in existing enactments

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

1. Section 65 of the Criminal Procedure Act, 1977 (hereinafter referred to as the Principal Act) is hereby amended by-

(a) the substitution for paragraph (a) of subsection (1) of the following paragraph:

"65 Appeal to superior court with regard to bail

(1) (a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the **high**

[superior] court having jurisdiction or to any judge of that court if the court is not then sitting.

(b) The appeal may be heard by a single judge."

(b) by the deletion of paragraph (c):

"(c) **[A local division of the Supreme Court shall have jurisdiction to hear an appeal under paragraph (a) if the area of jurisdiction of the lower court in question or any part thereof falls within the area of jurisdiction of such local division.]**

(2) An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts.

(3) The accused shall serve a copy of the notice of appeal on the attorney-general and on the magistrate or, as the case may be, the regional magistrate, and the magistrate or regional magistrate shall forthwith furnish the reasons for his decision to the court or judge, as the case may be.

(4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."

(c) the insertion of subsection (5):

"(5) The provisions of sections 309B and 309C shall apply, mutatis

mutandis, to an appeal under this section."

2. **Section 65A of the Principal Act is hereby amended by-**

(a) the substitution for paragraph (a) of subsection (1) of the following paragraph:

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

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

(b) The provisions of section 310A in respect of an application or appeal

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

(b) the substitution for paragraph (a) of subsection (2) of the following paragraph:

"(2)(a) The attorney-general may appeal to the **full court of a high Court** **[Appellate Division]** against a decision of a **high** **[superior]** court **sitting as court of first instance** to release an accused on bail."

(b) The provisions of section 316 in respect of an application or appeal

referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the attorney-general appeals in terms of paragraph (a) of this subsection.

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

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

3. Section 309 of the Principal Act is hereby amended by-

(a) the substitution for paragraph (a) of subsection (1) of the following paragraph:

309 Appeal from lower court by person convicted

"(1)(a) Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to section 309B, appeal against such conviction and against any resultant sentence or order to the **high court** **[provincial or local division]** having jurisdiction."

(b) the substitution for paragraph (b) of subsection (1) of the following

paragraph:

"(b) Where, in the case of a regional court, a conviction takes place within the area of jurisdiction of one **high court** **[provincial division]** and any resultant sentence or order is passed or, as the case may be, is made within the area of jurisdiction of another **high court** **[provincial division]**, any appeal against such conviction or such sentence or order shall be heard by the last mentioned **court** **[provincial division]**.

(2) An appeal under this section shall be noted and be prosecuted within the period and in the manner prescribed by the rules of court: Provided that the magistrate against whose decision or order the appeal is to be noted, or if he or she is unavailable any other magistrate of the court concerned, may on application and on good cause shown, extend such period."

(c) the substitution for subsection (3) of the following subsection:

"(3) The **high court** **[provincial or local division]** concerned shall thereupon have the powers referred to in section 304 (2)**[, and, unless the appeal is based solely upon a question of law,]** the **court** **[provincial or local division]** shall, in addition to such powers, have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence: Provided that, notwithstanding that the **court** **[provincial or local division]** is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to

such division that a failure of justice has in fact resulted from such irregularity or defect.

(3A) An appeal under this section may be disposed of by a High Court in chambers on the written argument of the parties or their legal representatives, if the parties agree thereto and the Judge President so directs in an appropriate case.

(4) When an appeal under this section is noted, the provisions of-

(a) ......

(b) sections 307 and 308A shall mutatis mutandis apply with reference to the sentence appealed against."

(d) the substitution for subsection (5) of the following subsection:

"(5) When a **high court** **[provincial or local division of the Supreme Court]** gives a decision on appeal against a decision of the magistrate's court and the former decision is appealed against, such **[division of the Supreme]** Court has the powers in respect of the granting of bail which a magistrate's court has in terms of section 307."

"309B Application for leave to appeal

(1) An accused who wishes to appeal against any decision or order of a lower court must, within 14 days or within such extended period as may be allowed on application and on good cause shown, apply to that court for leave to appeal against the decision or order..."

(balance not now relevant)

“309C Petition procedure

(1) If an application for leave to appeal under section 309B (1) or for an extension of the period referred to in that subsection or for the extension of the period within which an appeal must be noted in terms of section 309 (2) (hereinafter referred to as an application for condonation), or an application to call further evidence as contemplated in section 309B (4), is refused, the accused may, within 21 days of such refusal or within such extended period as may on good cause be allowed, by petition addressed to the Judge President of the division of the High Court having jurisdiction, submit an application for leave to appeal or for condonation or for leave to call further evidence, or all such applications, as the case may be.’
(balance not now relevant)

“309D Explanation of certain rights to unrepresented accused”
(detail not now relevant)

4. Section 310 of the Principal Act is hereby amended by-

(a) the substitution for subsection (1) of the following subsection:

“310 Appeal from lower court by prosecutor

(1) When a lower court has in criminal proceedings given a decision in favour of the accused **[on any question of law, including an order made under section 85 (2)]**, the attorney-general or, if a body or a person other than the attorney-general or his representative, was the prosecutor in the

proceedings, then such other prosecutor may **subject to subsection (3), appeal against the acquittal or other decision to** [**require the judicial officer concerned to state a case for the consideration of]** the **high court [provincial or local division]** having jurisdiction**[, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law]**."

(b) **the deletion of subsection (2):**

(2) "**[When such case has been stated, the attorney-general or other prosecutor, as the case may be, may appeal from the decision to the provincial or local division having jurisdiction.**]"

(c) **the substitution for paragraph (a) of subsection (3) of the following paragraph:**

"(3)**(a)** The provisions of section 309 (2) **and 309 (3)(a) as well as sections 309B, 309C and 309D** shall apply **mutatis mutandis** with reference to an appeal under this section."

(d) **the insertion of paragraph (b) in subsection (3) of the following paragraph:**

"(b) The attorney-general or other prosecutor shall, at least 14 days before the day appointed for the hearing of the application, cause to be served by the deputy sheriff upon the accused in person a copy of the notice: Provided that if the sheriff is not able so to serve a copy of the notice, it may be served in any other manner that may on application be allowed."

(e) **the substitution for subsection (4) of the following subsection:**

"(4) If the appeal is allowed, the court which gave the decision appealed from shall, subject to the provisions of subsection (5) and after giving sufficient notice to both parties, reopen the case in which the decision was given and deal with it in the same manner as it should have dealt therewith if it had given a decision in accordance with the law as laid down by the **high court** **[provincial or local division]** in question."

(f) **the substitution for subsection (5) of the following subsection:**

"(5) In allowing the appeal, whether wholly or in part, the **high court** **[provincial or local division]** may itself **convict and or** impose such sentence or make such order as the lower court ought to have imposed or made, or it may remit the case to the lower court and direct that court to take such further steps as **high court** **[provincial or local division]** considers proper."

(g) **the insertion of subsection (6):**

"(6) Upon an application for leave to appeal referred to in subsection (3)(a) or an appeal in terms of this section, the magistrate or the court, as the case may be, may order that the State or other prosecutor pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the application or appeal, taxed according to the scale in civil cases of the high court concerned."

(5) **Section 310A of the Principal Act is hereby amended by-**

(a) **the substitution for subsection (1) of the following subsection:**

"310A Appeal by attorney-general against sentence of lower court

(1) The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the **high court** **[provincial or local division]** having jurisdiction [**, provided that an application for leave to appeal has been granted by a judge in chambers**.]"

(b) the deletion of subsection (2)

(2)(a) **[A written notice of such an application shall be lodged with the registrar of the provincial or local division concerned by the attorney-general, within a period of 30 days of the passing of sentence or within such extended period as may on application on good cause be allowed.**

(b) The notice shall state briefly the grounds for the application.]

(c) the substitution for subsection (3) of the following subsection:

"(3) The attorney-general shall, at least 14 days before the day appointed for the hearing **of the application for leave to appeal**, cause to be served by the **[deputy]** sheriff upon the accused in person a copy of the notice**[, together with a written statement of the rights of the accused in terms of subsection (4)]:** Provided that if the **[deputy]** sheriff is not able so to serve a copy of the notice, it may be served in any other manner that may on application be allowed."

(d) the deletion of subsection (4)

"[(4) An accused may, within a period of 10 days of the serving of such a

notice upon him, lodge a written submission with the registrar concerned, and the registrar shall submit it to the judge who is to hear the application, and shall send a copy thereof to the attorney-general.]"

(e) the substitution for subsection (5) of the following subsection:

"(5) Subject to the provisions of this section, section 309 **(2) and 309(3)(a) as well as sections 309B, 309C and 309D** shall apply mutatis mutandis with reference to an appeal in terms of this section."

(f) the substitution for subsection (6) of the following subsection:

(6) Upon an application for leave to appeal **[referred to in subsection (1)]** or an appeal in terms of this section, the **magistrate** **[judge]** or the court, as the case may be, may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the application or appeal, taxed according to the scale in civil cases of the provincial or local division concerned.

6. Section 311 of the Principal Act is hereby amended by-

(a) the substitution for subsection (1) of the following subsection:

"311 Appeal to Supreme Court of Appeal [Appellate Division]

(1) Where the **high court** **[provincial or local division]** on appeal, whether brought by the attorney-general or other prosecutor or the person

convicted, gives a decision in favour of **any party** **[the person convicted on a question of law]**, **any other party** **[the attorney-general or other prosecutor against whom the decision is given]** may appeal to the [**Appellate Division of the**] Supreme Court **of Appeal**, which may **[shall, if it decides the matter in issue in favour of the appellant,]** set aside or vary the decision appealed from and**[, if the matter was brought before the provincial or local division in terms of]** -

(a) **[section 309 (1),]** re-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the **Supreme Court of Appeal** **[said Appellate Division]** may consider desirable; or

(b) **[section 310 (2),]** give such decision or take such action as the **high court** **[provincial or local division]** ought, in the opinion of the **Supreme Court of Appeal** **[said Appellate Division]**, to have given or taken (including any action under section 310 (5)), and thereupon the provisions of section 310 (4) shall mutatis mutandis apply."

(b) the substitution for subsection (2) of the following subsection:

"(2) If an appeal brought by the attorney-general or other prosecutor **[under this section or section 310]** is dismissed, the court dismissing the

appeal may order that the appellant pay the respondent the costs to which the respondent may have been put in opposing the appeal, taxed according to the scale in civil cases of that court: Provided that where the attorney-general is the appellant, the costs which he is so ordered to pay shall be paid by the State."

7. Section 313 of the Principal Act is hereby amended by-

(a) the substitution for the section of the following section:

"313 Institution of proceedings de novo when conviction set aside on appeal or review

The provisions of section 324 shall mutatis mutandis apply with reference to any <u>**decision**</u> **[conviction and sentence]** of a lower court **[that are]** set aside on appeal or review on any ground referred to in that section."

8. Section 314 of the Principal Act is hereby amended by-

(a) the substitution for subsection (1) of the following subsection:

"314 Obtaining presence of convicted or acquitted person in lower court after setting aside of sentence or order

(1) Where a sentence or order imposed or made<u>**, or an acquittal,**</u> by a lower court is set aside on appeal or review and the person convicted <u>**or acquitted**</u> is not in custody and the court **[setting aside the sentence or order]** remits the matter to the lower court **[in order that a fresh sentence or order may be imposed or made]**, the presence before that court of **that [the]** person **[convicted]** may be obtained by means of a written notice addressed to that person calling upon him to appear at a stated place and time on a stated date in order that <u>**the matter may be dealt with in terms of the remittal**</u> **[such sentence or order may be imposed or made**.]

(2) The provisions of section 54 (2) and 55 (1) and (2) shall mutatis mutandis apply with reference to a written notice issued under subsection (1).

9. Section 315 of the Principal Act is hereby amended by-

(a) the substitution for subsection (1) of the following subsection:

"315 Court of appeal in respect of <u>high</u> [superior] court judgments

(1) In respect of appeals **[and questions of law reserved]** in connection with criminal cases heard by a **high** **[provincial or local division or a special superior court]**, the court of appeal shall be the **full court of that high court** **[Appellate Division of the Supreme Court (in this Chapter referred to as the Appellate Division)]**, except in so far as subsection **(2) [(3)]** otherwise provides.

(b) the substitution for subsection (2) of the following subsection:

"(2)(a) If an application for leave to appeal in a criminal case heard by a single judge **[of a provincial or local division]** (irrespective of whether he or she sat with or without assessors) is granted under section 316, the court or judge or judges granting the application shall, if it, he or she or, in the case of the judges referred to in subsection (8) of that section, they or the majority of them, is or are satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal does [**not]** require the attention of the Supreme Court of Appeal, direct that the appeal be heard by **that court** **[a full court]**.

(b) Any such direction by the court or a judge of a **high court** **[provincial or local division**] may be set aside by the **Supreme Court of Appeal** **[Appellate Division]** on application made to it by the accused or the attorney-general or other prosecutor within **one month** **[21 days]**, or such longer period as may on application to the **Supreme Court of Appeal** **[Appellate Division]** on good cause be allowed, after the direction was given.

(c) Any application to the **Supreme Court of Appeal** **[Appellate Division]**

under paragraph (b) shall be submitted by petition addressed to the Chief Justice, and the provisions of section 316 (6), (7), (8) and (9) shall apply mutatis mutandis in respect thereof."

(c) the deletion of subsection (3):

(3) **[An appeal which is to be heard by a full court, shall be heard-**

(a) in the case of an appeal in a criminal case heard by a single judge of a provincial division, by the full court of the provincial division concerned;

(b) in the case of an appeal in a criminal case heard by a single judge of a local division other than the Witwatersrand Local Division, by the full court of the provincial division which exercises concurrent jurisdiction in the area of jurisdiction of the local division concerned;

(c) in the case of an appeal in a criminal case heard by a single judge of the Witwatersrand Local Division-

(i) by the full court of the Transvaal Provincial Division, unless a direction by the judge president of that provincial division under subparagraph (ii) applies to it; or

(ii) by the full court of the said local division if the said judge president has so directed in the particular instance.]

(4) An appeal in terms of this Chapter shall lie only as provided in sections 316 to 319 inclusive, and not as of right."

(d) the substitution for subsection (5) of the following subsection:

"(5) In this Chapter-

(a) 'court of appeal' means, in relation to an appeal which in terms of subsection **(1)** **[(3)]** is heard or is to be heard by a full court, the full court concerned and, in relation to any other appeal, the **Supreme Court of Appeal** **[Appellate Division]**;

[(b) 'full court' means the court of a provincial division, or the Witwatersrand Local Division, sitting as a court of appeal and constituted before three judges.]"

10. Section 316 of the Principal Act is hereby amended by-

(a) the substitution for subsection (1) of the following subsection:

"316 Applications for condonation, for leave to appeal and for leave to lead further evidence

(1) An accused convicted of any offence before a **high** **[superior]** court may, within a period of fourteen days of the passing of any sentence as

a result of such conviction or within such extended period as may on application (in this section referred to as an application for condonation) on good cause be allowed, apply-

[(a) if the conviction was by a special superior court, to that court or any judge who was a member of that court or, if no such judge is available, to any judge of the provincial or local division within

whose area of jurisdiction the special superior court sat; and

(b) **if the conviction was by any other court,]** to the judge who presided at the trial or if he is not available or, if in the case of a conviction before a circuit court the said court is not sitting, to any other judge of the **high court with jurisdiction** **[provincial or local division of which the aforesaid judge was a member when he so presided]**,

for leave to appeal against his conviction or against any sentence or order following thereon (in this section referred to as an application for leave to appeal), and an accused convicted of any offence before any such court on a plea of guilty may, within the same period, apply for leave to appeal against any sentence or any order following thereon."

(b) the substitution for subsection (1A) of the following subsection:

"(1A)(a)No appeal shall lie against the judgment or order of a full court given on appeal to it **[in terms of section 315 (3)]**, except with the special leave of the **Supreme Court of Appeal** **[Appellate Division]** on application made to it by the accused or, where a full court has for the purposes of such judgment or order given a decision in favour of the accused [**on a question of law]**, on application **[on the grounds of such decision made to that division]** by the attorney-general or other prosecutor against whom the decision was given.

(b) An application to the **Supreme Court of Appeal** **[Appellate Division]** under paragraph (a) shall be submitted by petition addressed to the Chief Justice within **one month** **[21 days]**, or such extended period as may on application by petition so addressed on good cause be allowed, after the judgment or order against which appeal is to be made was given.

(c) The accused or attorney-general or other prosecutor shall, when submitting in accordance with paragraph (b) the application for special leave to appeal, at the same time give written notice that this has been done to the registrar of the court against whose decision he wishes to appeal**[, and thereupon such registrar shall forward a certified copy of the record prepared in terms of subsection (5) for the purposes of such judgment or order, and of the reasons for such judgment or order, to the registrar of the Appellate Division.]**

(d) The provisions of subsections (2), (7), (8) and (9) shall apply mutatis mutandis with reference to any application and petition contemplated in paragraph (b) of this subsection.

(e) Upon an appeal under this subsection the provisions of section 322 shall apply mutatis mutandis with reference to the powers of the **Supreme Court of Appeal** **[Appellate Division].**

(2) Every application for leave to appeal shall set forth clearly and specifically the grounds upon which the accused desires to appeal: Provided that if the accused applies verbally for such leave immediately after the passing of the sentence, he shall state such grounds and they shall be taken down in writing and form part of the record.

(3) When in any application under subsection (1) for leave to appeal it is shown by affidavit-

(a) that further evidence which would presumably be accepted as true, is available;

(b) that if accepted the evidence could reasonably lead to a different verdict or sentence; and

(c) save in exceptional cases, that there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial,

the court hearing the application may receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court.

(4) Any evidence received in pursuance of an application under subsection (1) for leave to appeal, shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial."

(c) the substitution for subsection (5) of the following subsection:

"(5)(a) If an application under subsection (1) for leave to appeal is granted and the appeal is not **[under section 315 (3)]** to be heard by the full court **[of the provincial or local division from which the appeal is made**], the registrar of the court granting such application shall cause notice to be given accordingly to the registrar of the court of appeal without delay, and shall cause to be transmitted to the said registrar a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal: Provided that, instead of the whole record, with the consent of the accused and the attorney-general, copies (one of which shall be certified) may be transmitted of such parts of the record as may be agreed upon by the attorney-general and the accused to be sufficient, in which event the court of appeal may nevertheless call for the production of the whole record.

(b) If an application under subsection (1) for leave to appeal is granted and the appeal is under **[section 315 (3)]** to be heard by the full court **[of the provincial or local division from which the appeal is made]**, the registrar shall without delay prepare a certified copy of the record,

including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal: Provided that, instead of the whole record, with the consent of the accused and the attorney-general, copies (one of which shall be certified) may be prepared of such parts of the record as may be agreed upon by the attorney-general and the accused to be sufficient, in which event the court of appeal may nevertheless call for the production of the whole record."

(d) the substitution for subsection (6) of the following subsection:

"(6) If an application under subsection (1) for condonation or leave to appeal is refused or if in any application for leave to appeal an application for leave to call further evidence is refused, the accused may, within a period of **one month** **[twenty-one days]** of such refusal, or within such extended period as may on good cause be allowed, by petition addressed to the Chief Justice submit his application for condonation or for leave to appeal or his application for leave to call further evidence, or all such applications, as the case may be, to the **Supreme Court of Appeal** **[Appellate Division, at the same time giving written notice that this has been done to the registrar of the provincial or local division (other than a circuit court) within whose area of jurisdiction the trial took place, and of which the judge who presided at the trial was a member when he so presided, and such registrar shall forward to the Appellate Division a copy of the application or applications in question and of the reasons for refusing such application or applications]**."

(e) the substitution for subsection (7) of the following subsection:

"(7)(a) The petition shall be considered in chambers by two judges of the **Supreme Court of Appeal** **[Appellate Division**] designated by the Chief Justice.

(b) If the judges differ in opinion, the petition shall also be considered in chambers by the Chief Justice or by any other judge of the **Supreme Court of Appeal** [**Appellate Division**] to whom it has been referred by the Chief Justice."

(f) the substitution for subsection (8) of the following subsection:

"(8) The judges considering the petition may-

(a) call for any further information from the judge who heard the application for condonation or the application for leave to appeal or the application for leave to call further evidence, or from the judge who presided at the trial to which any such application relates;

(b) order that the application or applications in question or any of them be argued before them at a time and place appointed;

(c) whether they have acted under paragraph (a) or (b) or not-

(i) in the case of an application for condonation, grant or refuse the application and, if the application is granted, direct that an application for leave to appeal shall be made, within the period fixed by them, to the court or judge referred to in subsection (1) or, if they deem it expedient, that an application for leave to appeal shall be submitted under subsection (6) within the period fixed by them as if it had been refused

by the court or judge referred to in subsection (1);

(ii) in the case of an application for leave to appeal or an application for leave to call further evidence, grant or refuse the application or, if they are of the opinion that the application for leave to call further evidence should have been granted, they may, before deciding upon the application for leave to appeal, or, in the case where the court or judge referred to in subsection

(1) has granted the application for leave to appeal but has refused leave to call further evidence, set aside the refusal of the said court or judge to grant leave to call further evidence and remit the matter in order that further evidence may be received in accordance with the provisions of subsection (3); or

(c) refer the matter to the **Supreme Court of Appeal** **[Appellate Division]** for **argument and** consideration, whether upon argument or otherwise, and that **court** **[division]** may thereupon deal with the matter in any manner referred to in paragraph (c)."

(g) the substitution for subsection (9) of the following subsection:

"(9)(a) The decision of the **Supreme Court of Appeal** **[Appellate Division]** or of the judges thereof considering the petition, as the case may be, to grant or refuse any application, shall be final.

(b) For the purposes of subsection (7) any decision of the majority of the judges considering the petition, shall be deemed to be the decision of all three."

(h) the substitution for subsection (10) of the following subsection:

"(10) Notice shall be given to the **parties** **[attorney-general]** concerned **[and the accused]** of the date fixed for the hearing of any application under this section, and of any place appointed under subsection (8) for any hearing."

11. Section 316B of the Principal Act is hereby amended by-

(a) the substitution for subsection (1) of the following subsection:

"316B Appeal by attorney-general [against sentence of superior court]

(1) Subject to subsection (2), the attorney-general **or, if a body or a person other than the attorney-general or his representative, was the prosecutor in the proceedings, then such other prosecutor may appeal** **[to the Appellate Division]** against a **decision in favour of the accused or** sentence imposed upon an accused in a criminal case in a **high** **[superior]** court.

(b) the substitution for subsection (2) of the following subsection:

"(2) The provisions of section **315 and** 316 in respect of an application or appeal referred to in **those sections** **[that section]** by an accused, shall apply mutatis mutandis with reference to a case in which the attorney-general appeals in terms of subsection (1) of this section.

(3) Upon an appeal in terms of subsection (1) or an application referred to in subsection (2), brought by the attorney-general, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court."

12. Section 317 of the Principal Act is hereby repealed:

"317 Special entry of irregularity or illegality"

[To be repealed]

13. Section 318 of the Principal Act is hereby repealed:

"318 Appeal on special entry under section 317"

[To be repealed]

14. Section 319 of the Principal Act is hereby repealed:

"319 Reservation of question of law"

[To be repealed]

15. Section 320 of the Principal Act is hereby amended by-

(a) the substitution for the section of the following section:

"320 Report of trial judge to be furnished on appeal

The **trial** judge **[or judges, as the case may be, of any court before whom a person is convicted]** shall **[, in the case of an appeal under section 316 or 316B or of an application for a special entry under section 317 or the reservation of a question of law under section 319 or an application to the court of appeal for leave to appeal or for a special entry under this Act]**, furnish to the registrar a report giving his, her or their opinion upon the case or upon any point arising in the case, and such report, which shall form part of the record, shall without delay be forwarded by the registrar to the registrar of the court of appeal."

16. Section 321 of the Principal Act is hereby amended by-

(a) the substitution for subsection (1) of the following subsection:

“321 When execution of sentence may be suspended

(1) The execution of the sentence of a superior court shall not be suspended by reason of any appeal against a conviction [**or by reason of any question of law having been reserved for consideration by the court of appeal**], unless-

(a) ......

(b) the superior court from which the appeal is made **[or by which the question is reserved**] thinks fit to order that the accused be released on bail or that he be treated as an unconvicted prisoner until the appeal **[or the question reserved]** has been heard and decided:

Provided that when the accused is ultimately sentenced to imprisonment the time during which he was so released on bail shall be excluded in computing the term for which he is so sentenced: Provided further that when the accused has been detained as an unconvicted prisoner, the time during which he has been so detained shall be included [**or excluded]** in computing the term for which he is ultimately sentenced **[, as the court of appeal may determine.]**

(2) If the court orders that the accused be released on bail, the provisions of sections 66, 67 and 68 and of subsections (2), (3), (4) and (5) of section

307 shall mutatis mutandis apply with reference to bail so granted, and any reference in-

(a) section 66 to the court which may act under that section, shall be deemed to be a reference to the superior court by which the accused was released on bail;

(b) section 67 to the court which may act under that section, shall be deemed to be a reference to the magistrate's court within whose area of jurisdiction the accused is to surrender himself in order that effect be given to any sentence in respect of the proceedings in question; and

(c) section 68 to a magistrate shall be deemed to be a reference to a judge of the superior court in question."

17. Section 322 of the Principal Act is hereby amended by-

(a) the substitution for subsection (1) of the following subsection:

"322 Powers of court of appeal

(1) In the case of an appeal **in terms of this Act [against a conviction or of any question of law reserved]**, the court of appeal may-

(a) allow the appeal **[if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice]**; or

(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

(c) make such other order as justice may require:

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or

defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect."

(b) the substitution for subsection (2) of the following subsection:

"(2) Upon <u>**any**</u> **[an]** appeal **[under section 316 or 316B]** against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial.

(3) Where a conviction and sentence are set aside by the court of appeal on the ground that a failure of justice has in fact resulted from the admission against the accused of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings, the court of appeal may remit the case to the trial court with instructions to deal with any matter, including the hearing of such evidence, in such manner as the court of appeal may think fit."

(c) by the deletion of subsection (4):

"(4) **[Where a question of law has been reserved on the application of a prosecutor in the case of an acquittal, and the court of appeal has given a decision in favour of the prosecutor, the court of appeal may order that such of the steps referred to in section 324 be taken as the court may direct.]"**

"(5) The order or direction of the court of appeal shall be transmitted by the registrar of that court to the registrar of the court before which the case was tried, and such order or direction shall be carried into effect and shall

authorize every person affected by it to do whatever is necessary to carry it into effect.

(6) The powers conferred by this section upon the court of appeal in relation to the imposition of punishments, shall include the power to impose a punishment more severe than that imposed by the court below or to impose another punishment in lieu of or in addition to such punishment."

"324 Institution of proceedings de novo when conviction set aside on appeal

Whenever a conviction and sentence are set aside by the court of appeal on the ground-

(a) that the court which convicted the accused was not competent to do so; or

(b) that the indictment on which the accused was convicted was invalid or defective in any respect; or

(c) that there has been any other technical irregularity or defect in the procedure,

proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original charge, suitably amended where necessary, or upon any other charge as if the accused had not previously been arraigned, tried and convicted: Provided that no judge or assessor before whom the original trial took place shall take part in such proceedings."