

**SOUTH AFRICAN LAW COMMISSION**

**THIRD INTERIM REPORT**

**PROJECT 73**

**SIMPLIFICATION OF CRIMINAL PROCEDURE**

**(THE RIGHT OF THE DIRECTOR OF PUBLIC PROSECUTIONS TO APPEAL ON  
QUESTIONS OF FACT)**

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**TO DR P MADUNA, MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's second interim report on the simplification of criminal procedure dealing with the review of the right of the Director of Public Prosecutions to appeal on questions of fact.

**Y MOKGORO**

**CHAIRPERSON: SA LAW COMMISSION**

**DECEMBER 2000**

## **INTRODUCTION**

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

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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. During January 2000 the Commission published a discussion paper for general information and comment. The closing date for comments was 31 March 2000, but it was at the request of a number of respondents extended until 31 April 2000.

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 trial court, 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 and one must balance all relevant factors. Any proposed amendment should be principled, simplify the relevant procedures and improve the present system and should not be seen as an attempt at 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 criminal appeals generally. The Commission used this opportunity to also address these non contentious issues and its recommendations are included in the draft Bill.

1.10 Only once in the past was the present problem considered by a South African commission, namely the so-called Botha Commission which drafted the Criminal Procedure Act of 1977. 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 on the facts or misinterpreted the law. Review, on the other hand, is used when the procedure adopted 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 Since our law relating to criminal procedure is based upon English law, it is not necessary to deal with the Roman Dutch law in this regard.

2.3 After the second British occupation of the Cape the law of evidence and procedure was brought into line with the English system. At the establishment of the Union of South Africa a person who was convicted by an *inferior court* could appeal against the conviction 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.

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.

2.5 As noted, the person convicted and sentenced by a lower court was since 1910 entitled as of right to appeal without leave. During the 1990's the 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 judgment in *S v Ntuli*,<sup>1</sup> in which the

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1 1996(I) SA 1207 (CC).

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 for the necessary leave.*

## **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 on his own accord reserve any question of law that might have arisen during the trial for decision by the Appellate Division. 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. Already in 1935 the Appellate Division was given the right to increase the sentence imposed in spite of the fact that 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 the case.<sup>2</sup> 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

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

governed by the principles applicable to jury trials.)<sup>3</sup> 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<sup>4</sup> summed the then existing rules 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 trial court appeal to the Appellate Division against a conviction or sentence imposed by a superior court. If such leave was refused by the trial court, the accused could petition for leave 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 Appellate Division, in dealing with appeals from judges who were obliged to give reasoned judgments, was able to re-judge the merits of such cases more easily. Abuses of the jury system, e.g. the unjustified acquittal of illicit diamond dealers, 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 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*

3 *R v Feinstein* 1924 AD 240.

4 *SA Criminal Law & Procedure* 5<sup>th</sup> ed (1946) vol 1 p 599.

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 may 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 granting of bail. These provisions are discussed below.

#### **Section 310**

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.<sup>5</sup> *S v Zoko*<sup>6</sup> held that a decision whereby an accused is acquitted of the offence charged but convicted of a lesser offence is also appealable by the State. 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. 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

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 Supreme Court of Appeal may substitute the acquittal with a conviction and it may sentence the 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 DPP is the appellant, the costs so ordered have 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 and/or the accused in the sense that one or both parties have a material interest in an authoritative answer of the question

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

6 1983 (1) SA 871 (N).

of law.<sup>7</sup>

2.20 In *Attorney-General, Transvaal v Kader*<sup>8</sup> the respondent 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. The regional magistrate thereupon embarked on an enquiry in terms of section 189 during which the respondent testified that the main 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 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.

The Transvaal 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 of the court below.

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*<sup>9</sup> 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. Whether it was humanly intolerable for the respondent to have to testify was a question of fact and therefore unassailable on appeal by

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

8 1991 (4) SA 727 (A).

9 1948 (2) SA 677 (A).

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 Supreme Court of Appeal. 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 Supreme Court Appeal. 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.<sup>10</sup>

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 Others*<sup>11</sup> (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 of law, it must state the question reserved and

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

11 1993 (1) SACR 67 (A).



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*<sup>12</sup> 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. This remains a problem as illustrated by *S v Venter* 1999 (2) SACR 231 (SCA). For some reason or other trial judges often fail to comply with this requirement and for that simple reason the State's right of appeal is sometimes more illusory than real (see *Director of Public Prosecutions Natal v Magidela* 2000 (1) SACR 458 (SCA)). The section is also unclear because it does not prescribe the procedure to be followed upon the reservation of a question which gives rise to serious practical difficulties.<sup>13</sup>

2.26 If the reserved question is answered in favour of the State an acquittal may be substituted with a conviction and a suitable sentence may be imposed. *Ex parte Minister van Justisie: In re S v Seekoei*<sup>14</sup> 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 cases under section 310 (as interpreted in *S v Zoko (supra)*) and those under section 319.<sup>15</sup>

## **APPEALS AGAINST SENTENCE -**

### **Section 310A and section 316A**

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12 1985 (2) SA 560 (A).

13 Ibid.

14 1984 (4) SA 690 (A).

15 Cf the judgment of Streicher JA in *De Lange & Nyanda v S* (Supreme Court of Appeal case no 160/98 decided on 31 May 1999).

2.27 Despite some objections<sup>16</sup> 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 by a circuit court 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 the DPP 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 exists in terms of which an accused cannot, 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. <sup>17</sup> Du Toit et al<sup>18</sup> 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.

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 if it is of the opinion that the trial court passed an inadequate sentence.<sup>19</sup>

2.30 Before an appeal against 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 penal discretion. In other words, the same principles which apply to an appeal on sentence by an accused person apply to appeals by the Director of Public Prosecutions.<sup>20</sup>

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.<sup>21</sup>

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

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

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

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

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

21 See e g the facts in *S v Madlala* 1994 (1) SACR 245 (A,) *S v Di Blasi* 1996 (1) SACR 1 (A) and more recently *S v Salzwedel* 2000 (1) SA 786 (SCA).

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 DPP now has such a right. Similarly, the DPP may now appeal to the Supreme Court of Appeal against any decision of a high court to release an accused on bail, another 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 Supreme Court of Appeal usually take longer to reach the Supreme Court of Appeal than reaching a full court and, since the order granting bail is not suspended pending an appeal,<sup>22</sup> the appeal will usually have become academic by the time the matter is heard by the Supreme Court of Appeal.<sup>23</sup>

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22 On the Continent the rule is often that an appeal by the State suspends the release of the accused.

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

## CHAPTER 3

### THE RIGHT TO APPEAL: A COMPARATIVE OVERVIEW

3.1 This chapter 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.<sup>24</sup>

#### INTERNATIONAL HUMAN RIGHTS DOCUMENTS

3.2 Article 14 (5) of the International Covenant on Civil and Political Rights (hereinafter

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

referred to as the ICCPR)<sup>25</sup> 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 14(7) of the ICCPR is as follows:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 14 applies both to the reopening of a conviction and to the reopening of an acquittal. Read literally, it therefore prohibits even the power of an appellate court to quash a criminal conviction and to order a re-trial if new evidence or a procedural defect is discovered after the ordinary appeals process has been concluded. In its General Comment on Article 14(7),<sup>26</sup> however, the United Nations Human Rights Committee (the treaty body charged with implementing the ICCPR) expressed the view that the re-opening of criminal proceedings "justified by exceptional circumstances" did not infringe the principle of double jeopardy. The Committee draws a distinction between the "resumption" of criminal proceedings, which it considers to be permitted by Article 14(7), and "retrial" which is expressly forbidden.

3.3 The distinction between "resumption" and "retrial" has taken firm root in European human rights law, and is now reflected in Article 4(2) of Protocol 7 to the ECHR. When the ECHR was drafted in 1950, the original signatory States made no express reference to the prohibition on double jeopardy. In its early case law the Commission left open the question whether the principle could be implied into the right to a fair trial in Article 6.<sup>27</sup> In 1984, however, the Commission held that "the Convention guarantees neither expressly nor by implication the

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25 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.

26 General Comment 13/2 1, para 19.

27 See, for example, *X v Austria* (1970) 35 CD 15 I. The Convention institutions have, on occasion, implied into Article 6 guarantees which are absent from its text, but which are to be found in analogous texts of the UN or other international organisations: *Funke v France* A 256-A (1993) (protection against self-incrimination as provided in Article 14(3)(g) of the ICCPR; *S v Switzerland* A 220 (1991) (confidentiality of privileged communications as provided in Article 8(2)(d) of the American Convention on Human Rights, and Article 93 of the Standard Minimum Rules for the Treatment of Prisoners); *V and T v UK* (Application No. 24888/94, 4 December 1998) (confidentiality of juvenile proceedings as provided in Article 40 of the UN Convention on the Rights of the Child, and the United Nations Standard Minimum Rules for the Administration of juvenile justice).

principle of *ne bis in idem*".<sup>28</sup> Shortly after this decision, on 22 November 1984, Protocol 7 to the ECHR was opened for signature. It entered into force in respect of those states which had ratified it, on 1 November 1988.

3.4 Article 4 of Protocol 7 provides:

- (1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
- (2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
- (3) No derogation from this Article shall be made under Article 15 of the Convention.

3.5 Article, 4(l) thus embodies the principle against double jeopardy as it applies to the unilateral action of a prosecuting authority or private prosecutor. But Article 4(2) permits a case to be "re-opened" in accordance with the provisions of domestic law if there is "evidence of new or newly discovered facts" or if there has been "a fundamental defect in the previous proceedings".

3.6 Article 4(1) prohibits the bringing of proceedings only where the defendant has been "finally acquitted or convicted" of the offence now charged, "in accordance with the law and penal procedure" of the state in question. The Explanatory Report to Protocol 7 states that a decision is to be regarded as final for the purposes of Article 4(l)

if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have permitted the time limit to expire without availing themselves of them.

3.7 Article 7 of the African [Banjul] Charter on Human and Peoples' Rights<sup>29</sup> provides similarly. Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights

28 *S v Federal Republic of Germany* (1983) 39 DR 43.

29 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).

and Fundamental Freedoms<sup>30</sup> 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.

3.9 There is no international covenant on human rights the Commission is aware of which - in the case of an acquittal on the merits of the case - prohibits an appeal by the prosecuting authority or provides an acquitted person with the right not to have the acquittal set aside on appeal.

## APPEALS BY THE PROSECUTION

3.10 The Commission quotes extensively from a recent study done on the provisions around the Commonwealth on the right of the prosecution to appeal (emphasis added):<sup>31</sup>

### APPEALS BY THE PROSECUTION FROM TRIALS ON INDICTMENT

#### INTRODUCTION

In recent years there has been from time to time in some parts of the Commonwealth criticism of criminal courts both for passing what are thought to be unduly lenient sentences, and for acquitting accused persons on what are seen, at least to laymen, as unduly technical grounds. This is not altogether surprising, as many societies have experienced increases in violent crimes, and in crimes of a sophisticated and international character often involving the illicit drugs trade, which have caused them concern, if not alarm. **And where those accused of involvement** are apprehended and prosecuted only to receive minimal sentences, or **to be acquitted on what are seen as unmeritorious points, there is bound to be a degree of anxiety, about, if not an undermining of public confidence in, the system of criminal justice.** . . .

Generally speaking trials in subordinate courts do not present a problem and prosecutors usually have the right to appeal acquittals, at least on points of law, and to appeal unduly lenient sentences or bring them up to the High Court for review. In trials on indictment however, which except in the largest Commonwealth jurisdictions normally take place before the High Court or equivalent, the rights of a prosecutor to appeal tend to be much

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

31 *“Appeals by the prosecution from trials on indictment - a short survey of provisions around the commonwealth”* The commonwealth legal advisory service - The British Institute of International and Comparative Law Charles Clore House, 17 Russell Square London WC1B, DR New Memoranda Series No. 8. June 1990.

more restricted. It is with these latter rights that we are concerned in this short study.

### **THE COMMON LAW POSITION**

**The reasons for the traditionally restricted rights of the prosecutor to appeal lie in the common law with its repugnance to the idea that a man should be put in a situation analogous to double jeopardy** (though, as will be seen below, it has been held that appeals by prosecutors do not in fact constitute double jeopardy). Examples of statements of this underlying principle can be found around the Commonwealth. In the 1949 Canadian case of *Cullen v. R*, Rand J said -

It is the supreme invasion of the rights of an individual to subject him by the physical powers of the community to a test which may mean the loss of his liberty or his life; and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy.'

And in the earlier English case of *Cox v Hakes*, Lord Halsbury, in referring to general principles of appeal by the prosecution, said -

... I for one would be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last court of appeal.

It has also been suggested that the reason for the lack of appeal against an acquittal lies in the fact that it would be inconsistent with the ancient right of a jury to return a perverse verdict.

### **PROSECUTORS' RIGHTS OF APPEAL**

The common law has however been modified by statute in varying degrees, both in the UK and the Commonwealth generally, and there are now five possible basic sets of situations in relation to trial on indictment -

- (a) no right of appeal by the prosecutor;
- (b) a right of appeal or "reference" on a point of law, but with no affect on the outcome of the trial giving rise to it;
- (c) a right of appeal against leniency of sentence;
- (d) a substantive right of appeal on a point of law against acquittal;
- (e) a substantive right of appeal on law, mixed law and fact, and fact alone, against acquittal.

These categories are not of course all mutually exclusive and there are in some jurisdictions combinations of the rights under (b) and (c), or under (c) and (d) or (e). Moreover, appeals may be brought sometimes only with leave of the trial court or the appeal court (or either), sometimes without the need to obtain leave, or sometimes under



a combination of restricted and unrestricted rights depending on the nature of the appeal.

The basic common law situation under (a) needs no further elaboration but each of the other categories merits further examination.

### **Right of appeal or reference on a point of law not affecting the outcome of the trial**

This was the first step towards appeals from trials on indictment taken in England and Wales. By section 36(1) of the Criminal Justice Act 1972 -

Where a person tried on indictment has been acquitted .... the Attorney-General may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to the court, and the court shall .... consider the point and give their opinion on it.

However the effect of such a reference was made quite clear by section 36(7)

A reference under this section shall not affect the trial in relation to which the reference is made or an acquittal in that trial.

Furthermore, the reference was limited to acquittals; there was no power to refer sentences. Similar provisions have been enacted in a number of jurisdictions, for example Kenya and Trinidad and Tobago.

### **Right of appeal against leniency of sentence**

Although it is circumscribed by conditions, the right has now been granted to the prosecution in England and Wales. By section 36(l) of the Criminal Justice Act 1988 --

If it appears to the Attorney-General -

- (a) that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient; and
- (b) that the case is one to which [Part IV] applies,

he may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person, and on such a reference the Court of Appeal may -

- (i) quash any sentence passed on him in the proceedings; and
- (ii) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him.

Cases to which Part IV of the Act applies are offences triable ONLY on indictment (i.e. only the most serious offences such as homicide, rape and robbery) or offences triable on indictment or summarily which are specified in an order of the Secretary of State. It is to be noted that no change is made to the situation whereby on an appeal by AN OFFENDER the Court of Appeal cannot increase the sentence!

A similar, though less restricted, right is granted to the Solicitor General in New Zealand; he has the right to appeal, with leave of the Court of Appeal, any sentence passed on a person on conviction on indictment (unless of course that sentence is fixed by law). And under a still less restricted right the Attorney-General of Sri Lanka may appeal, without leave, to the Court of Appeal -

....in all cases on the ground of inadequacy or illegality of the sentence imposed  
.... (by) the High Court.

### **Right of appeal on a point of law against acquittal**

This right can be seen in its most embryonic form in Western Australia where it exists only in respect of an acquittal by direction of the trial judge.

A more extended right of appeal has existed since 1930 under the Canadian Criminal Code which now gives power to the Attorney-General to appeal to the Court of Appeal, *inter alia* -

... against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone.

There is a mass of case law in Canada on the question of the distinction between "law" and fact" and one commentator has written that the distinction .... is a morass of irreconcilable precedents, *ad hoc* decisions, and judgments which tend to state that a "question of law alone" must be interpreted in the "strict sense" and then ignore that advice."

**It is to be noted that the right of the Attorney-General to appeal against acquittal has been challenged as contravening the guarantees against double jeopardy in the Canadian Charter of Rights and Freedoms. The Ontario Court of Appeal held however in *R v Morgentaler and others* that it did not do so.**

A similar right of appeal exists, for example, in Malawi, where -

The Director of Public Prosecutions may appeal to the court against any judgment, including a finding of acquittal, of the High Court if, and only if, he is dissatisfied with such judgment upon a point of law. Subject as aforesaid no appeal shall lie against a finding of acquittal made by the High Court.

and in New Zealand.

### **Right of appeal on law, mixed law and fact, or fact alone**

Although rights are sometime given only in respect of law and mixed law and fact, it is convenient to take these categories together, as once the element of fact is allowed into the appeal it must necessarily considerably widen its scope.

A transition from the previous category of rights to this one can be seen most simply in the case of Tasmania. Until recently the Attorney-General's right of appeal to the Court of Criminal Appeal was -

by leave of the Court (of Appeal) or upon the certificate of the judge of the court

of trial that it is a fit case for appeal, against an acquittal on a question of law alone.

However, by s.7 of the Criminal Code Amendment Act (No.83 of 1987) the word "alone" at the end of the provision was removed and the section is now construed as including questions of mixed fact and law.

**There are variations on this right. For example in the Northern States of Nigeria, where the rights of the prosecutor to appeal are found in both the Federal Constitution and the Criminal Procedure Code, an acquittal may be appealed as of right on a question of law, and with leave of the trial court or the appeal court on a question of fact or mixed law and fact. Similar rights exist in Sri Lanka.**

**Finally, for the most comprehensive power of all, one turns for example to Singapore whose law provides for an appeal by the Public Prosecutor against acquittal or sentence "on a question of fact or a question of law or on a question of mixed fact and law" without any need for leave.**

## **POWERS OF APPELLATE COURTS**

What, then, are the powers of the appellate court where the prosecutor's appeal is successful? Typical of its powers on appeal against sentence (whether by the prosecutor or the offender) are those contained in the New Zealand Crimes Act 1961 (RS Vol I) s.385(3) -

On an appeal against sentence the Court of Appeal, if it thinks that a different sentence should have been passed, shall either quash the sentence passed and pass such other sentence warranted in law (whether more or less severe) ... as the court thinks ought to have been passed or vary .... the sentence or any part of it or any condition imposed in it; and in any other case the court shall dismiss the appeal.

On a successful appeal against acquittal the court normally has powers to set aside the verdict of the trial court and either order a new trial or enter a verdict of guilty of the offence for which, in the court's judgment, the accused should have been convicted. In Canada the appellate court originally had the widest powers to order a retrial or to substitute a verdict of guilty of its own; however, since 1976 the latter power has been confined to cases which have been tried by a judge alone. Where an appeal is from a judge and jury the court can now, in allowing the prosecutor's appeal, only order a new trial.

**Wide as some of these powers may seem it is clear that, for, an appeal from acquittal on issues of fact to succeed, wholly exceptional circumstances must apply in view of the heavy burden of proof which lies on the prosecution.** In a 1931 Sri Lanka case (which was actually an appeal from an inferior court but to which exactly the same principles apply) Lyall Grant J, echoing sentiments referred to at the beginning of this study, said -

An appeal from an acquittal is a remedy which has no place in most parts of the British Empire. The general rule is that if a person has been fairly and properly

tried and acquitted, he ought not to be put in jeopardy twice for the same offence  
 .... **It is obviously not sufficient that the court should think that there is material on which another Magistrate might come to the conclusion that the accused was guilty. It must, I think, be satisfied that no other conclusion was reasonably possible but that the accused was guilty or that the Magistrate did not apply his mind to the whole evidence in the case.**

On the question of an appeal against an acquittal by a jury, Chief Justice Bora Laskin of the Supreme Court of Canada was, in the 1976 case of *Morgentaler v the Queen*, even more emphatic on the question of an appeal court's power to substitute a conviction -

.... I have been unable to find any reported Canadian case where an appellate Court, in setting aside a jury's verdict of acquittal, has entered a conviction on the very offence charged and of which the accused has been acquitted by a jury, and has not been content to order a new trial with accompanying directions. Counsel for the respective parties were unable to produce any such case, and I am not particularly surprised that they could not. Where a case is left to the jury on evidence that may be found to support a defence to the offence charged, and the accused is acquitted, the fact that the trial judge may have erred in charging the jury on the law would ordinarily result in a direction for a new trial... It must be an unusual case, indeed, in which an appellate court, which has not seen the witnesses, has not observed their demeanour and has not heard their evidence adduced before a jury, should essay to pass on its sufficiency, either as to a defence or in support of a charge, and thereupon to substitute its opinion for that of the jury and to enter a conviction (rather than ordering a new trial) where the jury has acquitted."

This case was, of course, decided on the law as it existed before the statutory amendment referred to on page 5 above.

In seeking to obtain an order for a new trial under the Canadian Criminal Code the prosecutor must not only show that there was misdirection by the trial judge, but also that the verdict would not necessarily have been the same if the trial judge had properly directed the jury, or himself. In clear cases, however, the appellate court will order a verdict of guilty to be entered. The principles for so doing were stated in the 1983 case of *R v Courville*, where the issue had been self-induced intoxication by drugs -

Where all of the elements of the offence have been proved but the trial judge has erred in law in failing to draw the conclusion of guilt required by the facts as found by him, the court is empowered to enter a verdict of guilty.... That is the case here. There is really nothing left to be tried or determined.

## **EXERCISE OF RIGHTS OF APPEAL**

So much, then, for the law and procedure. But how are the provisions interpreted and what criteria are applied?

**Our enquiries show that in those jurisdictions which allow the prosecutor to appeal from trials on indictment the power is used sparingly.** There are obvious reasons for this such as the public expense involved in appeals and retrials and the embarrassment to the public prosecutor in losing appeals, with its attendant danger of

his department being branded as an instrument of persecution.

In cases of appeals against acquittal, or against the imposition of non-custodial sentences, there may be matters of tracing the accused, of re-arrest, and sometimes also of re-opening issues of bail. However, unless express provisions allow it there would normally be no power to re-arrest until such time as the appellate court orders a new trial, substitutes a verdict of guilty or imposes a custodial sentence. In Canada, for example, there are no provisions in the Criminal Code providing for conditions of bail where a person is neither an accused nor an appellant sentenced to custody. Presumably similar considerations would be given to bail as in the case of an accused awaiting his initial trial, although the balance would probably more easily be tipped in favour of granting it than in a case of remand before a first trial.

**Thus, an appeal against acquittal would, it is suggested, in practice be undertaken only where there has been a clear miscarriage of justice and normally where the offence is a serious one. ...**

## ENGLAND AND WALES <sup>32</sup>

3.11 The English system permits a large range of appeals against both conviction and 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.<sup>33</sup>

3.12 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 state 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.

3.13 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

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

33 Section 36 of The Criminal Justice Act, 1972.

question of law and fact, leave is required.

3.14 In the discussion paper the Commission pointed out that the appeal must be based on the grounds that (1) the conviction is in all circumstances unsafe<sup>34</sup> 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. However, the law has changed a little from what it was in the discussion paper. The test for an appeal against conviction by the defendant is now simply that the conviction is unsafe (Criminal Appeal Act 1968 as amended by the Criminal Appeal Act 1995). The Attorney General can refer a sentence passed by the Crown Court to the Court of Appeal if he considers it to be unduly lenient (Criminal Justice Act 1988 s.36). The Court can increase the sentence.

3.15 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.<sup>35</sup> 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<sup>36</sup> 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 is 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 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.<sup>37</sup>

### **CONTINENTAL SYSTEMS: GERMANY<sup>38</sup>**

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

3.17 The judgment on the merits rendered by a court of first instance can be appealed against

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

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

36 *Laws of England* 4<sup>th</sup> ed (reissue) par 1388.

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

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

("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

3.18 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.

3.19 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.
- (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**<sup>39</sup>

3.20 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.**<sup>40</sup> **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.**<sup>41</sup>

3.21 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 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.

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

3.23 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

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

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

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



drawn from undisputed or found facts.<sup>42</sup> The total absence of a foundation for a finding of fact is an error of law.

3.24 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

3.25 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 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

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

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.

3.26 The amendment and the implications thereof was discussed in *S v Van den Berg*<sup>43</sup>. 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 representative probably knew about the presumption, but failed to inform the court about its applicability.

3.27 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.

3.28 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

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43 1996 (1) SACR 19 (N).

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 <sup>44</sup>:

'... 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 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

### THE COMMISSION'S RECOMMENDATIONS IN THE DISCUSSION PAPER AND COMMENTS RECEIVED

4.1 In the discussion paper the Commission concluded that there exists an unfortunate perception that while crime is rampant, nothing much is done to protect society and that the rights contained in the Bill of Rights - which the State ought to 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. Emphasis was placed upon the words of O'Linn J's already quoted in the previous chapter.<sup>45</sup>

4.2 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 of and respect for the system. The public will then know that there is an independent reappraisal of the matter available. Criticisms directed at individual judicial officers will be deflected.

4.3 The lack of skills at the prosecutorial level gives rise to serious problems. Where the prosecutor is inexperienced or incompetent the fair trial model also collapses. The extent of this problem has recently received some judicial attention.<sup>46</sup>

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45 *S v Van den Berg* 1996 (1) SACR 19 (N).

46 In *S v Van den 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).

4.4 The failure of the prosecutor to be an adversary is amply illustrated in *S v Manicum*<sup>47</sup> 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 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 if she had cared, was not able to contribute a single morsel of cross-examination to assist the magistrate to unravel the issue."<sup>48</sup>

4.5 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.

4.6 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.

4.7 This Commission is under an obligation to simplify the criminal procedure. For this reason the Commission deemed it necessary to bring the provisions of the Criminal Procedure Act into line with the Constitution and the provisions applicable to civil cases (where appropriate). 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. The multiple provisions dealing with appeals cannot be justified and a simple appeal for the accused and a similar appeal by the State would contribute to the simplification of the criminal procedure. In the result

- 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.

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47 1998 2 SACR 400 (N).

48 At 403h-i.

4.8 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,<sup>49</sup> the question remains one of great difficulty.<sup>50</sup> 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.

4.9 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 will also be necessary.

4.10 It was assumed what was said concerning the DPP will also apply to a private prosecutor.

## CONCLUSION AND RECOMMENDATION

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

4.12 The Commission therefore recommended that the Criminal Procedure Act be amended 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 and to reduce the ways in which appeals may be prosecuted.

4.13 As stated above some of the Commission's proposed amendments were not strictly relevant to the issue, but since the Committee's brief was also to simplify the Act, other obvious and noncontentious matters were also dealt with. In particular, the sections under scrutiny were checked for consistency with the Constitution.

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49 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).

50 Latterly, *S v Venter* 1999 (2) SACR 231 (SCA) and *De Lange & Nyanda* (Supreme Court of Appeal case 160/98 of 31 May 1999).

## **COMMENTS ON THE COMMISSION'S DISCUSSION PAPER**

4.14 For the sake of convenience the comments received on the Commission's recommendations are discussed under the following headings:

- \* Support for the extension of the right of the Director of Public Prosecutions to appeal on questions of fact;
- \* Objections to the extension of the right of the Director of Public Prosecutions to appeal on questions of fact; and
- \* Comments on recommendations aimed at simplifying the appeal procedures.

### **SUPPORT FOR THE EXTENSION OF THE RIGHT OF THE DIRECTOR OF PUBLIC PROSECUTIONS TO APPEAL ON QUESTIONS OF FACT**

4.15 Mr JJ Smit, Director of Public Prosecutions Bophuthatswana, supports the principle that the State should have the right to appeal on a question of fact against a decision of a lower court as well as a High Court. He points out that in fact this is the case in the erstwhile Bophuthatswana since 1992 when Act 51 of 1977 was amended by the Bophuthatswana Criminal Procedure Amendment Act, 62 of 1992. The procedure set out in the discussion paper is preferred since it is the same as that of an accused who appeals. The reasons for introducing the right outlined in the discussion paper are supported.

4.16 The Criminal Procedure Section in the Directorate:- Judicial Training (Criminal Courts) - Justice College supports certain of the proposed amendments, in particular the proposal providing for an appeal by the State on questions of fact. The view is expressed that the Commission's evaluation in Chapter 4 of Discussion Paper 89, particularly paragraphs 4.19 to 4.30, aptly sums up the position. Section 9 (1) of the Constitution provides for everyone's right to "equal protection and benefit of the law", and granting the State the right to appeal on fact will ensure that this right can be enforced.

4.17 The South African Police Service is of the view that public interest in the criminal justice system should rather be seen as representative of society and demands that criminals should be punished. Society has always in one way or another been affected by crime and acquittal of



criminals often lead to questions the public and the press cannot answer or fail to understand. The creation of a right to appeal ought to restore credibility and respect for the criminal justice system. It will ensure that guilty persons do not escape punishment. The South African Police Services supports the views and recommendations contained in the discussion paper.

4.18 The Director of Public Prosecutions, Pietermaritzburg, fully supports the introduction of the proposed amendments. He does not foresee any practical problems in respect of the wording of the proposed amendments. He proposes that the reference to the high court in the last line of the proposed amended version of section 309(3) must also be amended to read "court" instead of the existing "division".

4.19 The Director of Public Prosecutions, Eastern Cape, supports the principle that a DPP should have the right to appeal on questions of fact. He is of the view that the time is ripe for such a development. The introduction of the principle that a DPP can appeal against an inadequate sentence had no dire consequences. The public is upset about a perceived failure of the criminal justice system to tackle crime adequately and a situation in which an unjust verdict must simply be accepted because there is no legal remedy to correct it, is unacceptable. From time to time that a criminal court takes the line of least resistance by basing a discharge on a question of fact, thus saving the problem of having to deal with a stated case on appeal. Another difficulty sometimes encountered is that a lower court thwarts a possible State appeal on a question of law by wording the stated case in such a way that the State has no chance of success.

4.20 He is of the view that even if a trial court has in fact no intention of blocking a State appeal procedure, aggrieved members of the public could still acquire such a perception in a given case and feel (even if wrongly) that an appeal by the State was deliberately blocked. It would be far better to avoid such perceptions by having a transparent appeal procedure on facts. He proposes that the new title "Director of Public Prosecutions" should be used instead of "Attorney-General". The proposed amendments do not set out the test which a court of appeal should apply before allowing a State appeal on fact. In his view it is correct to leave this to the courts of appeal to evolve a suitable formula. Legislative provision for the appropriate test could prove to be problematic.

4.21 The judges of the High Court, Pietermaritzburg point out that the discussion paper has been circulated amongst the Judges of that Court and, without exception, everybody is in favour

of the proposed right of appeal subject to leave being granted.

4.22 At the request of the Law Society of the Cape of Good Hope its Criminal Law and Procedure Committee met to consider discussion paper. The Committee noted with approval the comments in paragraph 4.20 of the discussion paper. The problem of having to countenance acquittals based on the incompetence or lack of experience is a matter the committee has commented on in the past. To maintain the integrity of the system, incompetent people should not be allowed to deal with complex matters. The consequence of such appointments is costs for both the State and the defence. A wrong public perception is created as a result of incompetent personnel.

4.23 Mr AP De Vries, SC, Director of Public Prosecutions, Witwatersrand Local Division, points out that the discussion paper submitted for comment canvasses all relevant issues and necessitates only a short discussion.

4.24 He points out that an accused's right to appeal against his conviction/sentence or any adverse decision is an internationally accepted (human) right. Fairness dictates that the State should be afforded a similar right. The granting of this right to the State should primarily be rooted in (a) fairness and (b) the interests of society. In the present criminal justice system the odds are heavily stacked against the State. The increase of sophisticated criminals, the lack of experienced prosecutors and judicial officers are some of the elements which have affected the efficient administration of justice. Further, a current perception is that the rights of an accused are treated preferentially to those of society in general. This has resulted in the perception that the system protects criminals and neglects the victims. There can be little, if any, doubt that affording the State a right to appeal on facts would go a very long way to restore credibility and respect in the justice system.

4.25 In its most essential form an appeal is a review of the findings and decisions of a lower court based on certain facts and not a retrial on the same facts. If the findings or decisions of the lower court are found, on good grounds, to be defective then the appeal court must in the interests of justice correct them. In these circumstances an accused person cannot be allowed to claim as a right the benefit of a decision which is objectively not in accordance with justice. To allow this would bring the administration of justice into disrepute and would negate the essential right of every member of society to the proper administration of justice. In this context, any objection on the basis of the double jeopardy principle is devoid of any merit. The State's

right to appeal against sentence (section 310A) has, since its inception, operated properly and has fulfilled its function. An appeal on facts should be afforded to the State on the same basis and with the same limitations. Practice has indicated that the right to appeal against sentence is exercised with circumspection and there is no doubt that the same will apply to an appeal on facts. The limited and cautious exercise of the right to appeal against sentence should allay any fears that the State will exercise the right to appeal on facts indiscriminately. There can be no doubt that the State's right to appeal on facts will be a formidable weapon in the State's arsenal, perhaps not so much to use than to wield. (See paragraphs 4.19 - 4.24 of the discussion paper.) It will have a very positive effect on society in general and victims of crime in particular. It will impact on the dispensing of justice by judicial officers and could well curb the unscrupulous criminal who wishes to take advantage of shortcomings in the system.

#### **OBJECTIONS TO THE EXTENSION OF THE RIGHT OF THE DIRECTOR OF PUBLIC PROSECUTIONS TO APPEAL ON QUESTIONS OF FACT**

4.26 In dealing with these, some of the smaller issues will be canvassed between brackets and the major objections will be considered later.

4.27 Mr TJ Monyemangene, magistrate Pretoria North, raises objections to the proposed amendments. He is of the view that granting the State and more particularly the DPP the right to appeal on a question of fact will not only be unfair to the accused but also unconstitutional. In the first place the double jeopardy principle negates this and the plea of *autrefois acquit* will be obsolete. The accused person cannot be tried twice on the basis of the very same set of facts, notwithstanding the fact that it be due to error on the side of the judicial officer or incompetence on the part of the State as well. The State, and more particularly the DPP is not in a position to be objective, whereas the judicial officer adjudicates all the facts before him presented by both parties. Hence an accused person will be prejudiced if the DPP is granted the right to appeal on an acquittal. The extension of this right could only result in more cases going on appeal and promote tension in the relationship between State as prosecuting authority and judicial officer as separate entity. (In the view of the Commission the arguments contained in the last three sentences are devoid of any merit and need not be addressed.)

4.28 Dr L Jordaan, of the Department of Criminal Law and Procedure, UNISA, questions the validity of the argument that a prosecution appeal against an acquittal on the merits was never introduced in South African law because, at the time when juries presided in superior courts in

South Africa, appeals were not possible against acquittals. She submits that the jury-system argument amounts to an oversimplification of the development of South African law in this area and the discussion paper fails to explain why a state appeal against an acquittal purely on the factual merits has not been introduced by the legislature since abolition of the jury system.

4.29 Closer scrutiny of the historical development of the institutions of appeal and review in Roman-Dutch, English law and eventually South African law, reveals that these remedies were introduced essentially to serve the interests of an accused person who had been wrongly convicted.<sup>51</sup> This is also evident from an overview of the historical development of the institutions of appeal and review by Jordaan.<sup>52</sup> In English law, the source of the rule (prohibiting state appeals against acquittals on the merits) is not ascribed solely to the fact that juries preside in superior courts but the rationale underlying the rule has been identified as "... the right of a person who has been acquitted by a court of competent jurisdiction after a trial on the merits of a criminal charge, to be spared the renewed jeopardy of an appeal against acquittal".<sup>53</sup> (With respect, there has never been a rule prohibiting appeals by the prosecution - the situation simply was that the right of appeal had never been granted. No-one in English law had a right of appeal as of right.)

4.30 The Supreme Court of Appeal emphasised the traditional policy and practice in South African law in *Magmoed v Janse van Rensburg*<sup>54</sup>, namely that an acquittal on the merits by a competent court in a criminal case should be treated as final and conclusive. The court preferred to give a narrow interpretation to the concept "question of law", observing that to hold otherwise "would be opening the door to appeals by the prosecution against acquittals contrary to the traditional policy and practice of our law". Her own research has led her to believe that the absence of legislation which provides for a state appeal purely on the facts can be ascribed to the policy identified in the *Magmoed* case.

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51 See the report of the Botha Commission RP 78/1971 at 31, citing from Coutts *The Accused* at 19 that "[a] Survey of appeals procedures reveals the fact that they are primarily aimed at safeguarding the interests of the accused ... rather than at the protection of the interests of the public".

52 *Aspects of double jeopardy* Unpublished doctoral thesis 1997 319 - 327, 416-425.)

53 See Paliwala and Cottrell "Appeals by the prosecution against sentences and acquittals: a survey of the situation in some commonwealth countries Secretariat 2, quoting from the Australian case of *Thompson v Mastertouch TV Series Pty Ltd* (1978) TRRS 306, 115, 119-120.

54 1993 (1) SACR 67 (A) at 101 h.

4.31 Secondly, the discussion paper states that the question whether a matter is one of law or of fact is a vexed one, and, in a sense, artificial. She concedes that our law in this regard has not always been altogether clear. During the period before provision was made for a full right of appeal by the accused against the merits of his conviction, the content given by the courts to the concept "question of law" could perhaps be described as artificial. However, in *Magmoed v Janse Van Rensburg* the Supreme Court of Appeal made it fairly clear what amounts to a genuine question of law. The importance of the decision in *Magmoed* lies also in the broader principle borne out in the case, ie that a narrow interpretation should be given to the concept "question of law". The underlying policy is that the accused's interest in finality ought to be protected. (Dr Jordaan has, unfortunately not considered that cases in the SCA after *Magmoed* had to deal with the same vexed problem and that the answer is not self-evident.)

4.32 Thirdly, in the comparative study contained in the discussion paper it is stated<sup>55</sup> that 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. Dr Jordaan points out that this is correct. She, however, refers to the double jeopardy 'Provisions of the International Covenant on Civil and Political Rights'.<sup>56</sup> In broad terms, these provisions state that no one shall be liable to be tried or punished for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of each country. She submits that the inclusion of the word "finally" implies that all possible appeal procedures provided for by the state law have been exhausted.

4.33 The right of the state to appeal against the merits of an acquittal has not as yet been challenged in international tribunals. Dr Jordaan is of the view that in terms of the wording of the above-mentioned provisions the decisive question is whether an accused had been finally acquitted in accordance with the law and penal procedure of his country. It may be argued that the word "law" also includes the constitutional law of a country. The South African double jeopardy provision (s 35(3)(m)) does not include the word "finally" to describe the acquittal. It merely states that "every accused person has a right to a fair trial which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted."

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55 At 15 - 16.

56 Article 14(7) and article 4 of Protocol 7 of the European Convention on Human Rights.

4.34 She is of the view that it may be argued that because the drafters did not add the proviso that the accused should have been "finally" acquitted, they intended to afford the accused protection also against state appeals. Hence it may depend on the interpretation of the South African double-jeopardy provision whether a prosecution appeal against an acquittal on the merits will be found to comply with international standards.

4.35 With reference to the right of the State to appeal on questions of fact in Germany she points out that it needs to be explained why the prosecutor may appeal against an acquittal handed down in a lower court on both matters of fact and the law. The reason is that the proceedings in the so-called *Amtsgericht* is of a summary nature and the adjudicators in these lower courts are not only judges, but also lay-people. Legal commentators point out that, because there is a greater risk that mistakes may be made in these courts, both parties may appeal on matters of fact and law against decisions of these courts.<sup>57</sup> The appeal is also not purely on the record. In fact, both the prosecution and the accused have a right to a new trial before a court of second instance. From superior courts the prosecution may appeal on a point of law only. (It is the understanding of the Commission that in the *Amtsgericht* the judges are assisted by lay persons, much like assessors in South Africa. The lay persons do not decide cases on their own. It is further the understanding that the last statement is correct if the reference to "superior courts" is a reference to courts of appeal and not trial courts.)

4.37 Dr Jordaan points out that a person accused of a serious crime in America may elect to be tried by a jury or by a judge sitting as sole adjudicator of the facts and the argument that jury trials is the reason why the State cannot appeal on questions of fact is therefore invalid. A judge in a so-called bench trial cannot acquit against the evidence and must give reasons for his findings. Therefore, the grounds on which his verdict of acquittal is based, is identifiable. The state is nevertheless prohibited from appealing against an acquittal handed down in a bench trial, even if it was based on erroneous legal grounds.<sup>58</sup> It follows that there are other considerations behind the prohibition on prosecution appeals against acquittals.<sup>59</sup> (The Commission cannot accept the argument. In both appeals even the accused has a very limited effective right of appeal on the merits. For the prosecution to have a right of appeal in bench trials on the merits

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57 See Roxin C *Strafverfahrensrecht* 24 ed 1995 at 391.

58 See in general Office of legal policy "*Report to the Attorney-General on double jeopardy and government appeals of acquittals*" University of Michigan Journal of Law Reform 1989 at 883.

59 For a discussion of these other considerations, see Jordaan "Appeal by the prosecution and the right of the accused to be protected against double jeopardy" CILSA 1999 at 20-22.

is unthinkable. It would not make sense to grant the prosecution a right of appeal in bench cases because it would offend against the equal protection provision of the US constitution. On a practical level, no-one would be prepared to submit to a bench trial, knowing that it had a risk of an appeal by the prosecution.)

4.37 The discussion paper argues that "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". Read in the sense that the institutions of appeal and review are remedies essentially available to a convicted person, this statement cannot be questioned. Dr Jordaan, however, doubts that this statement was uttered in the context of the desirability of state appeals against acquittals. A reconsideration by a court of appeal of factual findings made by a trial court which had resulted in a conviction may lead to a finding that there is reasonable doubt that the accused is guilty of the crime charged. In accordance with the presumption of innocence, a finding that the state had failed to prove the guilt of the accused beyond reasonable doubt, requires that the conviction be set aside. However, a reconsideration by a court of appeal of factual findings which had resulted in an acquittal in the trial court creates the risk that an innocent person may be convicted. The core value which underpins the double-jeopardy rule is protection of the innocent against being convicted.

4.38 Giving the state more than one opportunity to get a conviction creates the risk that an innocent person may in fact be convicted. Dr Jordaan refers to Friedman<sup>60</sup> who explains that "[i]n many cases an innocent person will not have the stamina or resources effectively to fight a second charge. And knowing that a second proceeding is possible an innocent person may plead guilty at the first trial. But even if the accused vigorously fights the second charge he maybe at a greater disadvantage than he was at the first trial because he will normally have disclosed his complete defence at the former trial. Moreover, he may have entered the witness box himself. The prosecutor can study the transcript and may thereby find apparent defects and inconsistencies in the defence evidence to use at the second trial".

4.39 Dr Jordaan contends that the considerations advanced by Friedman are equally valid to state appeals on the factual merits of an acquittal (a view with which the Commission cannot agree simply because not one of the considerations apply to an appeal). In her view the further arguments advanced in the discussion paper, ie that very few acquittals will be appealed against

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60 Double Jeopardy 1969 at 4.

and that a court of appeal will be reluctant to set aside an acquittal, do not address the concerns of the double-jeopardy prohibition: the minimisation of the possibility or risk that an innocent person may be convicted. A state appeal on the merits of an acquittal creates precisely this kind of risk.

4.40 Dr Jordaan refers to the Botha Commission's report where it was pointed out (at 31 of its report) that:

"Omdat 'n verhoorhof die voordeel het om die getuies te sien en aan te hoor, en dus in 'n baie gunstiger posisie is om hul geloofwaardigheid te bepaal .... [sou dit] in die omstandighede uiters onbillik wees om 'n vrygespreekte beskuldigde aan een of twee appèlle te onderwerp ... Die algemene indruk wat die beskuldigde as persoon, en die hele atmosfeer van die verhoor, op die voorsittende regterlike beampte maak, is uiters belangrik, maar dit is faktore wat vir slegs die verhoorhof beskikbaar is."

(Dr Jordaan does not deal with the criticism in the previous report of this sweeping statement.) She submits that the discussion paper sidesteps a proper interpretation of the constitutional guarantee against double jeopardy by offering the explanation that "appeal proceedings are simply an extension of the same proceedings". (Dr Jordaan likewise does not deal with the authorities quoted by the Commission in support of this statement.) On this basis one may also argue that a retrial upon the setting aside of an acquittal and a further appeal on a point of law against the finding of the court in the second trial, and another trial following the second appeal amount to the "same proceedings".

4.41 Determination of the stage of proceedings at which the accused's right to finality becomes operative demands a purposive interpretation of the constitutional guarantee against double jeopardy. This involves a consideration of the values which the rule seeks to protect. (It is of interest also that the so-called continuing-jeopardy theory was rejected in the context of state appeals in American constitutional double-jeopardy jurisprudence.) The discussion paper also questions why the state may appeal against a grant of bail, a sentence and an acquittal on a point of law, but not against the factual merits of an acquittal. She explains that an appeal against the granting of bail does not implicate double jeopardy: there is not a second trial after a previous acquittal or conviction. Secondly, an appeal against sentence also does not implicate double jeopardy. It will demand a very broad purposive interpretation, negating the literal meaning of the words in the guarantee to come to the conclusion that an appeal by the state against sentence amounts to a violation of the rule. Thirdly, an appeal on a question of law may be justified on the basis that it serves the public interest that the applicable law be maintained. An



appeal on a point of law arguably complies with the criteria of reasonableness and justification required for limitation of rights.<sup>61</sup> (Dr Jordaan does not deal with the consequences of such appeals, a matter dealt with by the Commission.)

4.42 Dr Jordaan emphasises that the appeal on a point of law and sentence is an exceptional remedy. Friedland<sup>62</sup> warns that:

"[o]ne danger in conceding any form of Crown appeal is that after it has been in operation for some time the legal profession tends to forget that the remedy is an exceptional one and the procedure becomes accepted as normal and routine .... The accused should not be subjected to a second proceeding after an error-free trial in which the prosecutor's only complaint is that the jury acquitted in spite of evidence of guilt. There must necessarily be such acquittals in a system which requires a very high degree of proof before the accused can be convicted ... All the double jeopardy dangers are present in this situation including the danger that the prosecutor will use the threat of an appeal to force the accused to plead guilty at the first hearing. Assuming that a Crown appeal is desirable at all, there should be some finding of error before a second trial can be justified".

4.43 Dr Jordaan concedes that it is of great concern that accused persons are, from time to time, acquitted as a result of prosecutorial incompetence. This is a problem encountered in many jurisdictions. The Department of Justice will have to find appropriate ways and means of addressing the problem of prosecutorial incompetence. However, failure of the prosecutor as an adversary and the perception of the public that the guilty are (as a result) set free, do not per se justify infringement of the accused's constitutional right to be protected against double jeopardy. In *Williams*<sup>63</sup> the Constitutional Court pointed out that the fact that society has not yet established mechanisms to deal with certain problems, does not justify infringement of fundamental rights of the individual. Implementation of the recommendation in the discussion paper that the state's right to appeal be extended to questions of fact means that the accused will be afforded less protection against double jeopardy in the new constitutional dispensation than in terms of the common law and should be rejected on the ground that it amounts to a violation of the fundamental human right to be protected against double jeopardy. (The Commission believes that since the appeal will be decided on the record, it will hardly ever be a remedy for prosecutorial incompetence.)

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61 See Cilsa XXX1 1999 at 22 -23 for the arguments in this regard.

62 Double Jeopardy 1969 at 296.

63 1995 (7) BCLR 861 (CC).

4.44 Mervyn E. Bennun, a former lecturer in law at the University of Exeter, argues that there are serious flaws in the reasons advanced for the views expressed by the Commission; and, secondly, that the proposed changes are not needed as existing law is broadly sufficient to deal with the problems which the suggested changes are designed to address.

4.45 He points out that a criminal trial is not to be seen as some form of game, and it is unhelpful to insist that the parties must set-out to engage with each other on a level playing-field. A fair trial does not require equality between prosecution and defence; indeed it is difficult to conceive what this might actually mean. The presumption of innocence is, however, central to the idea of a fair trial. It loads the dice against the prosecution so that in the absence of proof (conventionally tested against a standard of "reasonable doubt" in Anglo-Saxon jurisprudence) the outcome of the trial must be deemed to be a foregone conclusion. Moreover, the prosecution must generally discharge its burden without any assistance from the defence, for there can be no expectation that the defence will, or can be compelled to, make good any deficiencies in the prosecution's case. The prosecution as an arm of the State will invariably, for all practical purposes, have far greater resources at its disposal for the preparation and conduct of its case than the defence can possibly muster, notwithstanding the availability of legal aid.

4.46 His view is that a better basis for analysis is to seek for a balance between the interests of both prosecution and defence that there should be a fair trial; and, on the other hand, the need for finality, certainty, and legitimacy in the context of the efficient deployment of the available resources. He points out that misunderstanding the jurisprudence of criminal trials leads also to problematical implications of the observation by Mr Justice O'Linn in *S v. van den Berg*, as quoted in the discussion paper, to the effect that the criminal court's role and the primary aim of criminal procedure "should be to ensure that substantial justice is done".

4.47 He is of the view that if these comments are intended to be a general review of the jurisprudence of criminal trials then they are not unreasonable though a little superficial. If this passage, however, is the basis of a justification of a right in the prosecution to appeal against an acquittal then it must be said that it arouses the greatest possible disquiet. It is alarming that they may be relied on to justify making in South Africa a change that should not have been made in Namibia.

4.48 It was apparently O'Linn J's view that the defence had not been conducted to accepted ethical standards. O'Linn J stated unequivocally that the defence had exploited the ignorance of

the magistrate and of the prosecutor. Elsewhere in his judgment O'Linn J referred to what might be called the logistical handicaps under which prosecutions were conducted in Namibia at the time: a lack of proper funding and of experienced and qualified staff. These factors can be extended further and other reasons why a trial might be regarded as unsatisfactory can be noted: the failure of the State to provide and to ensure and protect the independence and impartiality of the Bench; the lack of independent and competent defence and prosecution advocates; and the failure to ensure the application of the rules of natural justice. All these matters obviously render a trial unsatisfactory, and indeed all are matters which have troubled the South African legal system in the past. Implicit in the view taken of the trial in Van den Berg's case is that, even if one limits the problems to those referred to by O'Linn J, it is still possible to characterize the trial as a "fair" one. This cannot possibly be right. O'Linn J himself made the point that substantial justice means not only that the defence should have its interests protected, but the prosecution also.

4.49 In the Discussion Paper, the point is made that -

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.

According to him this statement is misleading in the context of the present discussion, for it suggests that a "fair trial" is possible despite error or incompetence and this is the faulty basis of the entire paper. A trial which is characterized by error or incompetence - as clearly occurred in Van den Berg's case - is simply not a fair trial, and it is for that reason that the proceedings should be set aside. It would be impossible to state that the result, whether an acquittal or a conviction, is a just or a fair one; the outcome is unsafe, and even though a retrial might lead to superficially the same conclusion it must not be permitted to stand.

4.50 The provisions for prosecution appeals with regard to bail and sentence are very different from what is being proposed and cannot possibly constitute any argument in support thereof.

4.51 The discussion paper reviews as a supposed objection to the proposed change, the implications for the operation of the principle that an accused person may not be subjected to a second trial for the same offence following an acquittal on the facts. He submits that the discussion paper falls down in its application of the "double jeopardy" rule in the context of its proposals. It argues that, following a trial, any attempt to retry the accused must necessarily be

contrary to the rule, and it replies that in fact the appeal is "simply an extension of the same proceedings". This is correct, but surely this can only be so on condition that the first proceedings were in fact a proper trial in which the accused was placed genuinely in jeopardy. It seems that in principle a plea of *autrefois acquit* or *autrefois convict* should be available in such a case, but it does not seem to be unreasonable or contrary to principle if, on raising such a plea, the court should be able to consider a prosecution argument that the first proceedings were so defective as to be a nullity.

4.52 There does not seem to be direct authority on the point. However, it has been established that the plea of *autrefois acquit* is available only if the previous acquittal has been on the merits. It may be the case that clarity is needed to ensure that, where proceedings have been concluded in what purports to be an acquittal, there shall be no barrier to these being set aside on the grounds that there has been a miscarriage of justice. It does not seem to be against principle to ensure that the "double jeopardy" rule should not apply in such a case. This appears to be the view taken by the court in Moodie's case,<sup>64</sup> where a conviction was set aside on appeal on the grounds that the presence of the deputy sheriff in the jury room during its deliberations had been a fatal irregularity. Hoexter ACJ said,

Counsel for the accused argued that there was a *lis terminata* when the accused was convicted. That argument is not sound. In the present case the conviction of the accused did not produce a *lis terminata* because it was set aside on appeal.

This fact also disposes of the argument that the accused was in jeopardy during the trial at which he was convicted. This court held that the judgment convicting the accused was invalid by reason of an irregularity in the procedure which occurred before the verdict. It held in effect that no verdict given by the jury could in those circumstances be legally valid, and it follows that the accused never was in jeopardy of being legally convicted at his trial.

4.53 This and other cases reviewed by Du Toit *et al*<sup>65</sup> seem to support the case being made out here. While there may be a semantic objection to describing what took place at the proceedings as a "verdict" if there was no jeopardy behind it, the principle is clear. With respect, it suggests that the present law may possibly require - at most - amendment to clarify the situation regarding mistrials because of some of the reasons advanced by the discussion paper such as bias or incompetence, rather than procedural irregularities as in *Moodie's* case. He

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64 *S v Moodie* 1962 (1) SA 587 (A) at 596.

65 Etienne du Toit, et al. *Commentary on the Criminal Procedure Act* Cape Town, South Africa: Juta & Co., 1997, p 15-9.

submits, however, that these changes would not be to create a right for the prosecution to appeal against an acquittal on the facts but to make provision for a re-trial. If the improprieties of the first hearing which purported to be a trial are the reason why the prosecution wishes to have the evidence heard again, then these further proceedings must not be regarded as placing the accused in jeopardy a second time. The alternative is to accord legitimacy to grossly defective proceedings which have been conducted in violation of the rules of natural justice.

4.54 *Van den Berg's* case is a clear example of this. The essence of the *autrefois convict* or *autrefois acquit* pleas is that there has already been a proper trial which placed the accused genuinely in jeopardy of conviction. Where a trial is so flawed that, whatever the outcome, it cannot stand, then it may well be the case that space needs to be made in South African criminal procedure for the verdict to be set aside and a new trial ordered. However, this is not what the discussion paper envisages. The discussion paper claims that it is part of the public interest that "guilty persons who have been subjected to a fair trial should not be acquitted because of error or incompetence." The discussion paper says:

The credibility of the criminal justice system is under strain. Acquittals which the press and 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 into disrespect.

These statements are unexceptionable but raise issues which need consideration. Proceedings under such a shadow can clearly not be described as "good" or "fair" trials, nor can they be permitted to stand unchallenged: the discussion paper makes it clear how the legitimacy of the criminal justice system is endangered. However, we must begin to deal with the matter in the spirit which must characterize the criminal justice system from the outset.

4.55 He submits that any attempt to deal with unsatisfactory acquittals which "the public cannot live with" by the means proposed will simply leach away hard-won gains in the struggle to establish legitimacy for the criminal justice system. If trials are faulty because of the quality of the personnel responsible for them, then in the long term the only correct remedy is to address that problem: that is the illness, and the quality of the trial is no more than the symptom and the proposed changes are merely cosmetic and ad hoc. We must keep our eyes focused at every moment on the correct horizon, even it is the more distant one. We do not solve our problems by hunting down someone we wish to convict by means of an *ad hoc* procedure which confuses the separate roles and functions of the various components of the court. If the argument were

in favour of a procedure for a retrial, setting aside the first proceedings on the grounds of their unsatisfactory nature, then it would be another matter. This is, however, precisely what the proposed changes to the Criminal Procedure Act do not envisage; their entire thrust is along the lines of an appeal.

## **COMMENTS ON RECOMMENDATIONS AIMED AT SIMPLIFYING THE APPEAL PROCEDURES**

### **Ad the proposed amendment, the insertion of subsection (5) to section 65:**

4.56 Justice College is of the view that due to the urgent nature of bail appeals (*Prokureur - Generaal, Vrystaat v Ramokhosi* 1997 (1) SACR 127 (0)) it would be unwise to extend the provisions of section 309B and 309C and thereby Rule 67 of the Magistrate's Court Act, 1944 (Act 32 of 1944) to such appeals because of the length of time then available to a magistrate to supply reasons for his/her decision. At present, in terms of section 65 (3), the magistrate is required to forthwith furnish the reasons for his decision" whereas if leave is first to be sought a number of time periods come into play that could delay such hearing. This has also been the view in no less than three (as yet) unreported judgments from various High Courts, namely Witwatersrand (*Siwela v S*), Eastern Cape (*Maseko v S*) and Western Cape (*Mohammed v S*). It is thus not clear why it was thought necessary to make the 'leave to appeal' provisions applicable to bail appeals. The State could also, when attempting to appeal the granting of bail, suffer, as delays here could then also prejudice the State. It is suggested that the status quo be retained.

4.57 The Director of Public Prosecutions, Eastern Cape points out that clause 1 (b) of the proposed amendments seek to amend section 65 (5) of Act 51 of 1977 by requiring leave to appeal also in bail appeals. At present, the weight of judicial opinion in at least three Divisions of the High Court is that in spite of recent amendments requiring leave to appeal against rulings in lower courts, there is no such requirement in the case of a bail appeal. He is in favour of retaining the principle that there be an automatic right of appeal against refusal of bail. Bail appeals are always urgent, and the process of requiring leave to appeal, and if refused, a petition, will add considerably to the delay in disposing of bail appeals. As far as he is aware, High Courts are not inundated with fruitless bail appeals, and so there is no real need to limit bail appeals.

4.58 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good

Hope recommends that the proposed amendment to Section 65, specifically the proposed insertion of subsection (5) (The provisions of sections 309B and 309C shall apply, *mutatis mutandis*, to an appeal under this section), be rejected for the following reasons -

- \* the accused's liberty is at stake, a right guaranteed by the Constitution prior to conviction;
- \* whatever the outcome of the appeal, the verdict follows on the trial. The procedure is cumbersome and laborious.

The committee points out that the 'urgency' is not adequately addressed in this procedure. This will add to the legal costs of the accused, who in the majority of cases cannot meet his/her financial obligations. This suggests that the State is trying to save costs by violating of the rights of the accused. There are enough problems where an accused has to obtain legal aid for a bail application. The committee is of the view that the envisaged procedure will still not necessarily alleviate the burden of the High Court, which in fact can only be alleviated by increasing the judiciary and prosecutorial staff.

**Ad the proposed amendment, the substitution of subsection (2) of Section 65A:**

4.59 Justice College agrees that the proposed amendment is necessary to expedite appeals from a High Court as court of first instance, but the suggested proposition takes away any subsequent appeal to the Supreme Court of Appeal against the full High Court's decision. A suitable amendment would thus be necessary to ensure this is retained.

**Ad the proposed amendment, the substitution of section (3) of Section 309:**

4.60 Justice College proposes that the punctuation of the suggested substituted subsection (3) in its current form require attention and suggests that in the second line of text a full stop be inserted after 304(2)." , and that the sentence. "The court..." begin with a capital "T".

**Ad the proposed amendment, the substitution of subsection (3) (a) of section 310:**

4.61 Justice College is of the view that it appears to be unnecessary to make the provisions of section 309D applicable *mutatis mutandis* (with the necessary changes) to appeals by the prosecutor. (Section 309D deals solely with the explanation of rights to unrepresented accused.)

**Ad the proposed amendment, the substitution of subsection (3) (b) of section 310:**

4.62 Justice College suggests that the reference to "deputy sheriff ' ought merely refer to "sheriff.

**Ad the proposed amendment, the insertion of sub section (6) in section 310:**

4.63 Justice College proposes that:

- (i) the reference to "magistrate" should be replaced with "presiding officer" as the former excludes a regional magistrate by definition; and
- (ii) The reference to "high" court in the second last line ought to be replaced by the word "that' 'and the word "concerned" omitted.

**Ad the proposed amendment, the substitution of subsection (5) of section 310A:**

4.64 Justice College proposes that the reference to section 309D is unnecessary.

**Ad the proposed amendment, the substitution of subsection (6) of section 310A:**

4.65 Justice College proposes that:

- (i) the reference to "magistrate" ought to be replaced by the word "presiding officer";and
- (ii) the reference "provincial or local division concerned" ought to read "that court".

**Ad the proposed amendment, the substitution of subsection (1) of section 314:**

4.66 Justice College proposes that:

- (i) the heading to section 314 ought to read:



"Obtaining presence of acquitted or convicted person in lower court after setting aside of acquittal, sentence or order"; and

- (ii) that the words "an acquittal," be inserted prior to "sentence"?

**Ad the proposed amendment, the substitution of subsection (2) of section 315:**

4.67 Justice College proposes that in the second last line the words "does not require" should be replaced with "requires".

**Ad the proposed amendment to section 316B:**

4.68 The Director of Public Prosecutions, Eastern Cape points out that clause 11 amends section 316 B of the Criminal Procedure Act. Section 316(B)(1) refers to an appeal by a Director of Public Prosecutions or other prosecutor, whereas subsections and (3) only refer to a Director of Public Prosecutions. He suggests that the concept or other prosecutor be applied consistently.

**Ad the proposed substitution of subsection (1) of section 321:**

4.69 Justice College proposes that the references throughout to "superior court ' should all be amended to read "High court".

**Ad section 324 of the Criminal Procedure Act, 1977**

4.70 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope points out that while the South African judicial system recognises the concept of double jeopardy, it appears that these provisions would operate in conflict therewith. It would perhaps be more appropriate for the court of appeal to have the discretion to require a re-prosecution depending on its views of the nature and extent of the irregularity.

**General comment**

4.71 Justice College proposes that:

- (i) Whilst these various amendments are being sought it would be appropriate to amend all these sections by removing the words "attorney-general" and replacing them with "Director of Public Prosecutions" as well as "with the necessary changes" being inserted wherever "mutatis mutandis "appears.
  
- (ii) During July, 1999 a proposal for an amendment to section 309(4) was submitted to HDW as the current wording of section 309(4) only covers situations where leave to appeal is granted but excludes a sentenced prisoner's right to have his or her bail extended, or for that matter, the right to apply for bail, pending petition of the Judge President following a refusal of leave to appeal in a magistrates court. The suggested wording for the text reads as follows:
  - “(4) When an appeal under this section is contemplated, the provisions of section 307 and 308A shall, with the necessary changes, apply with reference to any sentence or order against which an application in terms of section 309B is made or pending a petition in terms of section 309C; Provided that where a court has convicted an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether to grant or extend bail, apply the provisions of section 60(11) (a) or (b), as the case may be, and the court shall take into account-
    - (a) the fact that the accused has been convicted of such offence; and
    - (b) the sentence which the court has imposed.”

## CHAPTER 5

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

#### THE COMMISSION'S EVALUATION

##### INTRODUCTION

5.1 In the formulation of recommendations cognisance will be taken of possible objections to the proposed changes, international developments, international Human Rights documents and the Bill of Rights and its possible implications for the right to appeal and the comments received on the discussion paper.<sup>66</sup>

##### PURPOSE OF THE RIGHT TO APPEAL OR REVIEW

5.2 To err is human and protection against error is necessary.<sup>67</sup> 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

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

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

the fairness of the proceedings.<sup>68</sup> 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**

5.3 The question is more fully dealt with in chapter 3. For purpose of evaluation it is significant to note that not a single International Human Rights document denies the State a right of appeal in a criminal case. In other words, there is no internationally recognised basic human right that an accused person has not to be subjected to an appeal in the event of a discharge or the imposition of an inadequate sentence. The only provision which should be considered in this regard is the double jeopardy protection.

## **INTERNATIONAL DEVELOPMENTS**

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

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 would not make sense to grant the prosecution a right of appeal in bench cases because it would offend against the equal protection provision of the US constitution. On a practical level, no-one would be prepared to submit to a bench trial, knowing that it had a risk of an appeal by the prosecution.

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.<sup>69</sup>

In the **UK and the Commonwealth generally**, there are now five possible basic sets of situations in relation to trial on indictment -

- (a) no right of appeal by the prosecutor;
- (b) a right of appeal or "reference" on a point of law, but with no affect on the outcome of the trial giving rise to it;
- (c) a right of appeal against leniency of sentence;
- (d) a substantive right of appeal on a point of law against acquittal;
- (e) a substantive right of appeal on law, mixed law and fact, and fact alone, against acquittal.

These categories are not all mutually exclusive and there are in some jurisdictions combinations of the rights under (b) and (c), or under (c) and (d) or (e). Moreover, appeals may be brought sometimes only with leave of the trial court or the appeal court (or either), sometimes without the need to obtain leave, or sometimes under a combination of restricted and unrestricted rights depending on the nature of the appeal.

In those jurisdictions which allow the prosecutor to appeal from trials on indictment the power is used sparingly. There are obvious reasons for this such as the public expense involved in appeals and retrials and the embarrassment to the public prosecutor in losing appeals, with its attendant danger of his department being branded as an instrument of persecution. In cases of appeals against acquittal, or against the imposition of non-custodial sentences, there may be matters of tracing the accused, of re-arrest, and sometimes also of re-opening issues of bail.

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

Closer home, and more relevant to the South African position, is the experiment in **Namibia** and those parts of the country which formed part of Bophuthatswana where provision was made for the right of the Attorney-General to appeal all matters, including questions of fact.

## **THE CURRENT POSITION IN SOUTH AFRICA**

5.5 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 an acquittal.

5.6 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.

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,<sup>70</sup> 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.<sup>71</sup>

## OBJECTIONS TO THE STATE'S RIGHT TO APPEAL ON FACTS

### Infringement of the protection against double jeopardy

5.7 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 debet bis vexari pro una et eadem causa*.”<sup>72</sup> The same argument was raised in opposition to the amendment in 1990 which permitted State appeals on sentence.<sup>73</sup>

This objection has again been raised in the comments on the discussion paper by Dr Jordaan and Mr Monyemangene.

5.8 Dr Jordaan argues that the proposed amendment would infringe the double jeopardy rule. She submits that a reconsideration by a court of appeal of factual findings made by a trial court which had resulted in a conviction may lead to a finding that there is reasonable doubt that the accused is guilty of the crime charged. In accordance with the presumption of innocence, a finding that the state had failed to prove the guilt of the accused beyond reasonable doubt, requires that the conviction be set aside. However, a reconsideration by a court of appeal of factual findings which had resulted in an acquittal in the trial court creates the risk that an innocent person may be convicted. The core value which underpins the double-jeopardy rule is protection of the innocent against being convicted.

5.9 Secondly she argues that there is a difference in appeals by the state against bail, against

70 Cf 1 S v *Sonday* 1994 (2) SACR 810 (C).

71 *Kalawati v The State of Himachal Pradesh* supra

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

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

sentencing and questions of law and appeals by the state on facts. An appeal against the granting of bail does not implicate double jeopardy: there is not a second trial after a previous acquittal or conviction. Secondly, an appeal against sentence also does not implicate double jeopardy. It will, according to her, demand a very broad purposive interpretation, negating the literal meaning of the words in the guarantee to come to the conclusion that an appeal by the state against sentence amounts to a violation of the rule. In her opinion an appeal on a question of law may be justified on the basis that it serves the public interest that the applicable law be maintained. An appeal on a point of law arguably complies with the criteria of reasonableness and justification required for limitation of rights.

### **Evaluation of objection relating to double jeopardy principle**

5.10 The right against double jeopardy is of recent heritage in international instruments but it has a venerable history at common law and in national constitutions. The double jeopardy rule in its traditional form is also endorsed in our Constitution in that it provides 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.<sup>74</sup> In South African law the maxim *ne bis in idem* is upheld by the defences of *autrefois acquit* and *convict*. In the Commission's view two core values underlie this right. The first is the need to secure finality of judgments. It is in the interest of an accused person as well as the administration of justice that there should be finality in criminal cases. The re-prosecution of an accused person for the same conduct subjects him to the same embarrassment, expense and ordeal. The second value is the safeguarding against state oppression by placing constraints on the prosecution authority when it seeks to institute successive prosecutions with regard to the same conduct.

5.11 *The extended meaning contended for in the objection is not part of the rule. As mentioned, the appeal proceedings are simply an extension of the same proceedings and is not a retrial. This view was confirmed in Attorney-General, Eastern Cape v D<sup>75</sup> in the following terms:*

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74 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.

75 1997 (1) SACR 473 (ECD at 475).



An appeal is not a retrial or a trial *de novo*. It merely obliges the Court to make a decision on a record of the evidence placed before the court *a quo*. As such it is an extension or continuation of the *lis* between the State on the one hand and the accused person on the other.

5.12 In 1971 the Botha Commission of Inquiry<sup>76</sup> considered the question in another legal and social context (at the time the State did not have the right to appeal against the granting 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.

5.13 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 clear 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.<sup>77</sup>

5.14 The public interest question was dealt with in detail by O'Linn J in *S v Van den Berg*<sup>78</sup> when he quoted Wessels CJ in *R v Omar* 1935 AD 230 at 323 that the role of the court is:

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

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

78 1996 (1) SACR 28-33.

... 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 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.”

5.15 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.

5.16 As mentioned in chapter 3, many legal systems with exemplary human rights background accept the right as axiomatic.

5.17 There is no doubt, as was pointed out in *Magmoed v Janse van Rensburg and Others*<sup>79</sup> that the procedures of our criminal justice system and the decisions of our courts evince a

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

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

5.18 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. **It remains a policy decision on which views legitimately may differ. Policy is not immutable and social and political forces do impinge on it and changing circumstances often require a proper rethink of the underlying rationale.**

5.19 It needs to be pointed out that in *S v Sunday and Another*<sup>80</sup> the power of a court of appeal to increase the sentence imposed upon an offender was found not to offend the Constitution. In *Attorney-General Eastern Cape v D*<sup>81</sup> the court pointed out that this power was originally based on the common law but it has now been statutorily enshrined. The provisions of section 310A which empowers the Director of Public Prosecutions to appeal against sentence merely provide a procedure where under the State can appeal against the sentence. Furthermore, the court held that there is nothing inherently unfair about the procedure and refused to refer the matter to the Constitutional Court as there was in the court's view no reasonable prospect of success. Professor Steytler also argues that the procedure is constitutional because a legitimate objective is served if a too lenient sentence is imposed because it undermines society's confidence in the

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80 1994 (2) SACR 810 (C).

81 1997(1) SACR 473 (ECD) at 475.

administration of justice.<sup>82</sup> With reference to American case law Steytler argues that the same importance of finality which attaches to a conviction does not apply to sentences. Sentences are by definition imprecise and an accused has no right to know beforehand what the exact limit of the sentence will be. There is no need for double jeopardy protection in such a case because the need for finality to assuage an accused's anxiety before the court returns its verdict on guilt or innocence cannot be said to apply in equal measure to the determination of a proper sentence.

5.20 Professor Steytler<sup>83</sup> also argues that the prosecutor's right to appeal on questions of law is not unconstitutional. He points out that after an acquittal the prosecutor may appeal on a point of law and the court of appeal may direct, if it finds in favour of the prosecution, that the lower court reopens the case and proceed with it in the correct way. The same applies where a High Court is the trial court. The prosecutor may challenge an acquittal if the trial judge reserves a question of law for consideration by the Supreme Court of Appeal and where the latter decides the question in favour of the prosecution, it may order a trial *de novo*. He argues that where an acquittal is based on a wrong answer to a legal question, and not the merits, an appeal on the question of law, although militating against an accused's interest in finality, cannot be said to be an abuse of prosecutorial power. In his view it is a proper application of state power to ensure that the law is correctly applied in the instant case as well as in future cases. Dr Jordaan also concedes that such an interpretation is justified and she regards it as a justifiable limitation of the double jeopardy rule.

5.21 The Commission disagrees with the arguments put forward by Dr Jordaan that there is no comparison between a prosecution appeal against bail, sentence or a question of law on the one hand and an appeal on facts on the other hand. Such appeals represent a broadening of the state's power to institute and prosecute appeals and in particular the right of the state to appeal on questions of law provide sufficient motivation to support an extension of the prosecution's right to appeal to questions of fact. Even if it is accepted that such an extension infringes the protection against double jeopardy, which, in the Commission's view, it does not, it can be argued that it is a justifiable limitation of the protection against double jeopardy.

5.22 Another objection raised by the Botha Commission (par 8.04) was that such an appeal

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82 N Steytler *Constitutional Criminal Procedure - A commentary on the Constitution of the Republic of South Africa*, 1996 Butterworths 1998 at 385.

83 *Constitutional Criminal Procedure - A commentary on the Constitution of the Republic of South Africa*, 1996 at 387.

against an acquittal on the merits could, in the nature of things, seldom succeed. (The same holds good for appeals against sentence and the granting 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.

5.23 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 Director of Public Prosecutions to appeal cases with little merit.*

5.24 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 Director of Public Prosecutions 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 Director of Public Prosecutions and not extend it to any dissatisfied public prosecutor.*

5.25 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.

### **Insufficient justification to extend the prosecution's right to appeal**

5.26 The views of Mr M Bennun have been set out above. They will not be repeated. In the main they are based upon the double jeopardy argument put forward by Dr Jordaan and which have been dealt with above.

In addition, he argues in effect that the object of the proposal is to validate unfair trials. That is in the Commission's view a misconception. If a trial is unfair, an appeal by the DPP cannot make it fair and it cannot lead to a conviction.

5.27 For the reasons set out in paragraph 5.21 the Commission is unable to support the proposition of Mr Mennun that the right of the state to appeal against sentences, bail or on questions of law cannot be used to support an extension of the state's right to appeal to include questions of fact. **The Commission concedes that the right to appeal on questions of fact should be limited to those cases where a miscarriage of justice occurred on the evidence before the court. The intention is not to give the state a second bite of the cherry.** The state cannot rectify its own errors on appeal.

### **Evaluation of comments on recommendations aimed at simplifying the appeal procedures**

5.28 It was submitted in the comments that due to the urgent nature of bail appeals (*Prokureur - Generaal, Vrystaat v Ramokhosi* 1997 (1) SACR 127 (0)) it would be unwise to extend the provisions of section 309B and 309C and thereby Rule 67 of the Magistrate's Court Act, 1944 (Act 32 of 1944) to such appeals because of the length of time then available to a magistrate to supply reasons for his/her decision. At present, in terms of section 65 (3), the magistrate is required to forthwith furnish the reasons for his decision whereas if leave is first to be sought a number of time periods come into play that could delay such hearing. It is thus not clear why it was thought necessary to make the 'leave to appeal' provisions applicable to bail appeals. The State could also, when attempting to appeal the granting of bail, suffer, as delays here could then also prejudice the State. It is suggested that the status quo be retained.

5.29 Upon re-evaluation the Commission concedes that there is merit in not extending the requirement of leave to appeal to bail proceedings and recommends no changes to the existing

procedure.

5.30 The Commission accepts the proposed amendments by Justice College contained in paragraphs 4.59-4.71 and recommends that the draft Bill be amended accordingly.

## **RECOMMENDATION**

5.31 The Commission recommends that provision be made for the Director of Public Prosecutions to appeal on questions of fact as provided for in the draft Bill in Annexure A.

## **Annexure A**

### **Proposed amendments to the CPA in relation to appeals, including the simplification of appeals, appeals on fact by the State, and abolition of stated cases and related matters**

#### **AMENDMENT BILL**

#### **CRIMINAL PROCEDURE ACT AMENDMENT BILL, 2001**

#### **BILL**

**To amend the Criminal Procedure Act, 1977, so as to provide for the Director of Public Prosecutions to appeal on questions of fact and to simplify appeals by a convicted person and the Director of Public Prosecutions; to bring the provisions of the Criminal Procedure Act relating to appeals into line with the provisions of the Constitution and those applicable to civil cases; 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:-

**6. 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 High [superior] court<sup>84</sup> 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.

- (g) by the deletion of paragraph (c):<sup>85</sup>**

**(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.]**

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

- (3) The accused shall serve a copy of the notice of appeal on the [attorney-general] Director of Public Prosecutions 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.

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

84 The Act uses in other parts the pre-Constitutional terminology. It is assumed that the high courts will have been organised in terms of the Constitution by the time this bill is before Parliament.

85 This deletion is dependent upon the abolition of local divisions as envisaged by the Constitution.



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

**65A Appeal by [attorney-general] Director of Public Prosecutions against decision of court to release accused on bail**

(1)(a)

The **[attorney-general] Director of Public Prosecutions** 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 a **[n attorney-general] Director of Public Prosecutions**, 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 the necessary changes** with reference to a case in which the **[attorney-general] Director of Public Prosecutions** appeals in terms of paragraph (a) of this subsection.

(b) the substitution for paragraph (a), (b) and (c) of subsection (2) of the following paragraphs:

(2) (a) T h e **[attorney-general]** Director of Public Prosecutions 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 the necessary changes with reference to a case in which the **[attorney-general]** Director of Public Prosecutions 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 a **[n attorney-general]** Director of Public Prosecutions, 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.

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

- (3) If the appeal of the **[attorney-general] Director of Public Prosecutions** 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].

(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]** 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 court [division] that a failure of justice has in fact resulted from such irregularity or defect.

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

- (4) When an appeal under this section is contemplated, the provisions of section 307 and 308A shall, with the necessary changes, apply with reference to any sentence or order against which an application in terms of section 309B is made or pending an application in terms of section 309C: Provided that where a court has convicted an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether to grant or extend bail, apply the provisions of section 60(11) (a) or (b), as the case may be, and the court shall take into account-

(a) the fact that the accused has been convicted of such offence; and

(b) the sentence which the court has imposed.

**(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 C]** court has the powers in respect of the granting of bail which a magistrate's court has in terms of section 307.

**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]** Director of Public Prosecutions or, if a body or a person other than the **[attorney-general]** Director of Public Prosecutions 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) in subsection (3) of the following paragraph:**

(3)(a) The provisions of section 309 (2) and 309 (3A) as well as sections 309B and 309C shall apply with the necessary changes with reference to an appeal under this section.

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

(b) The Director of Public Prosecutions or other prosecutor shall, at least 14 days before the day appointed for the hearing of the application, cause to be served by the 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 presiding officer 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 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] Director of Public Prosecutions against sentence of lower court**

- (1) The **[attorney-general] Director of Public Prosecutions** 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]** Director of Public Prosecutions 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 the necessary changes with reference to an appeal in terms of this section.

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

(5) Upon an application for leave to appeal **[referred to in subsection (1)]**

or an appeal in terms of this section, the presiding officer **[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 court **[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]** Director of Public Prosecutions 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]** with the necessary changes, apply.

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

- (2) If an appeal brought by the **[attorney-general]** Director of Public Prosecutions 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]** Director of Public Prosecutions 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]**, with the necessary changes, apply with reference to any decision [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 acquittal, sentence or order**

- (1) Where **an acquittal**, sentence or order imposed or made by a lower court is set aside on appeal or review and the person acquitted or convicted 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 or her to appear at a stated place and time on a stated date in order that the matter may be dealt with in terms of the remittal **[such sentence or order may be imposed or made.]**

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 high [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]** requires 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

**[ p e t i t i o n ]**  
a p p l i c a t i o n  
 addressed to the  
 Chief Justice, and  
 the provisions of  
 section 316 (6), (7),  
 (8) and (9) shall  
 apply **[mutatis**  
**mutandis]** with the  
necessary changes  
 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

(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 or her 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 Director of Public Prosecutions 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 application addressed to the Chief Justice within one month **[21 days]**, or such extended period as



may on application by **[petition]** application 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]** Director of Public Prosecutions 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 the necessary changes** with reference to any application and **[petition] an application** contemplated in paragraph (b) of this subsection.

(e)

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

(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 Supreme Court of Appeal **[court of appeal]** without delay, and shall cause to be

transmitted to the said registrar a certified copy of the record prepared in terms of the rules of that court [, **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 prepared in terms of the rules of that court, [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] application

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]** application 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 **[ p e t i t i o n ]** application 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)(d) of the following subsection:

- (8) The judges considering the **[petition]** application may-  
 ...  
 (d) 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)(a) of the following subsection:**

(9) (a) The decision of the Supreme Court of Appeal [Appellate Division] or of the judges thereof considering the [ p e t i t i o n ] application, as the case may be, to grant or refuse any application, shall be final.

**(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 Director of Public Prosecutions[attorney-general against sentence of superior court]**

(1) Subject to subsection (2), the **[attorney-general]** Director of Public Prosecutions or, if a body or a person other than the [attorney-general] Director of Public Prosecutions 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 the necessary changes with reference to a case in which the **[attorney-general]** Director of Public Prosecutions or other prosecutor appeals in terms of subsection (1) of this section.

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

- (3) Upon an appeal in terms of subsection (1) or an application referred to in subsection (2), brought by the **[attorney-general]** Director of Public Prosecutions or other prosecutor, the court may order that the State or such 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 appeal or application, taxed according to the scale in civil cases of that court.

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

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

14. **Section 319 of the Principal Act is hereby 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] High** 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] High** 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.]**

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

(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]** with the necessary changes, 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] High** 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] High** court in question.

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

- (a) **the substitution for subsection (1)(a) 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) the substitution for subsection (2) of the following subsection:**

- (2) Upon any [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.

**(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.]

**ANNEXURE B**

**LIST OF RESPONDENTS**

- (b) Mr JJ Smit, Director of Public Prosecutions Bophuthatswana.

- (c) The Criminal Procedure Section in the Directorate:- Judicial Training (Criminal Courts) - Justice College.
- (d) The South African Police Services.
- (e) The Director of Public Prosecutions, Pietermaritzburg.
- (f) The Director of Public Prosecutions, Eastern Cape.
- (g) The judges of the High Court, Pietermaritzburg.
- (h) Law Society of the Cape of Good Hope - Criminal Law and Procedure Committee.
- (i) Mr AP De Vries, SC, Director of Public Prosecutions, Witwatersrand.
- (j) Mr TJ Monyemangene, magistrate Pretoria North.
- (k) Dr L Jordaan, of the Department of Criminal Law and Procedure, UNISA.
- (l) Mervyn E. Bennun, a former lecturer in law at the University of Exeter.