

SOUTH AFRICAN LAW COMMISSION

REPORT

PROJECT 101

**THE APPLICATION OF THE BILL OF RIGHTS TO CRIMINAL PROCEDURE,
CRIMINAL LAW, THE LAW OF EVIDENCE AND SENTENCING**

MAY 2001

TO DR PM 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 report on the application of the bill of rights to criminal procedure, criminal law, the law of evidence and sentencing.

JUSTICE Y MOKGORO

CHAIRPERSON: SA LAW COMMISSION

MAY 2001

INTRODUCTION

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

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The project leader responsible for this project is the Honourable Mr Justice LTC Harms.

The Commission would like to express its appreciation to the GTZ and its project manager, Mr R Pfaff, for the technical and financial assistance rendered in this investigation.

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- Burchell & Milton *Principles of Criminal Law* (1997)
- Chaskalson, M et al *Constitutional Law of South Africa* (1996).
- Dawkins, K “Statutory presumptions and reverse onus clauses in the Criminal Law: In search of rationality” 1987 (3) *Canterbury Law Review* 215
- De Waal, J, Currie, I & Erasmus, G *The Bill of Rights Handbook* 4 ed (2001) 200.
- De Wet and Swanepoel *Strafreg* 4th ed .
- Dripps, D “The Constitutional Status of the Reasonable Doubt Rule” (1987) 75 *California Law Review* 1665.
- Du Toit Du Toit, E; DeJager, FJ; Piazes, A; Skeen, A S, Van der Merwe, S *Commentary on the Criminal Procedure* Juta, Cape Town.
- Glass, H “The Insufficiency of Evidence to Raise a Case to Answer” (1981) 55 *Australian Law Journal* 842.
- Healy, P “**R v Chaulk**: Some answers and some questions on insanity’ (1991) 2 CR (4th) 95.
- Healy, P ‘Risk, obligation and the consequences of silence at trial (1997) 2 *Canadian Criminal Law Review* 385.

- Rights and Freedoms* (1982) 335.
- Schwartz, 'Innocence - a Dialogue with Professor Sundby' (1989) 41 *Hastings Law Journal* 153.
- Schwikkard, PJ *The scope, content and normative value of the presumption of innocence in the South African law of criminal procedure and evidence* (1999) LLD thesis (Stellenbosch).
- Schwikkard, PJ et al *Principles of Evidence* (1997).
- Skeen, A "A Bill of Rights and the presumption of innocence" 1993 9 *SAJHR* 525.
- Steytler, NC *Constitutional Criminal Procedure* (1998).
- Stuart, D *Charter Justice in Canadian Criminal Law* 2 ed (1996) 15.
- S Sundby "The Virtues of a Procedural View of Innocence - a Response to Professor Schwartz" (1989) 41 *Hastings Law Journal* 171.
- Van der Merwe, SE 1994 *Obiter* 1
- Van der Merwe, SE 1997 *Stellenbosch Law Review* 348.

LIST OF CASES

Brooks v Tennessee 406 US (1972) 605.

Chambers v Mississippi 410 US 284 (1973).

Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer of Port Elizabeth Prison 1995 (4) SA 631 (CC).

Douglas v Alabama 380 US 415 1965.

Du Bois v R (1986) 23 DLR (4th) 503.

Ferreira v Levin NO & Wryenhoek v Powell NO 1996 (1) BCLR 1 (CC) at [79].

Ferry v Ramsey 277 US 88 (1928).

Haw Tua Tua v Public Prosecutor [1981] 3 All ER 14 .

Harksen v Lane NO 1998 (1) SA 300 (CC) at [53].

Jayasena v The Queen [1970] AC 618.

Key v Attorney General, Cape Provincial Division 1996 (4) SA 187 (CC).

Khan v S [1997] 4 All SA 435 (A).

Morrison v California 291 US 82 (1934).

National Coalition for Gay & Lesbian Equality v Minister of Justice 1998 (2) SACR 102 (W).

Pennington v Minister of Justice 1995 3 BCLR 270 (C).

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) at [41].

Scagell v Attorney-General of the Western Cape 1996 11 BCLR 1446 (CC).

United States v Romano 382 US 136 (1965).

R v Chaulk 1990 3 SCR 1303 (SCC).

R v Cohn (1985) 10 CRR 142.

R v Downey 1992 13 CR (4th) 129 (SCC).

R v Du Bois 1986 23 DLR (4th) 503 (SCC).

R v Gardiner [1982] 2 SCR 368 (SCC) at 415.

R v Heholdt(3) 1956 (2) SA 722 (W).

R v Keegstra 1990 3 SCR 697 (SCC).

R v Kritzinger 1952 (2) SA 402 (W).

R v Laba 1995 34 CR (4th) 360 (SCC).

R v Louw 1918 AD 344.

R v Machinini(2) 1944 WLD 91.

R v Noble [1997] 1 SCR 874.

R v Oakes (1986) 50 CR (3d) 1 (SCC).

R v O'Connor (1995) 103 CCC (3d) 1 (SCC).

R v P(MB) 1994 29 CR (4th) 209 (SCC).

R v Pearson (1992) 3 SCR 665 (SCC).

R v Schwartz 1989 66 CR (3d) 251 (SCC).

R v Thielke 1918 AD 373.

R v Wholesale Travel Group 1992 8 CR (4th) 145 (SCC).

R v Whyte 1988 64 CR (3d) 123 (SCC).

S v Amerika 1990 (2) SACR 480 (C).

S v Beckett 1987 (4) SA 8 (C).

S v Bhulwana; S v Gwadiso 1996 1 SA 388 (CC).

S v Bkenlele 1983 (1) SA 515 (O).

S v Campbell 1991 (1) SACR 435 (Nm).

S v Coetzee 1997 3 SA 527 (CC).

S v De Villiers 1999 (1) SACR 297 (O).

S v Dlamini; S v Dladla; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC).

S v Du Plessis 1970 (2) SA 562 (E).

S v Fransman 1999 (9) BCLR 981 (W).

S v Gwala 1989 4 SA 937 (N).

S v Heller(2) 1964 (1) SA 524 (W).

S v Huma(2) 1995 (2) SACR 411 (W).

S v Hlongwane 1982 4 SA 321 (N).

S v Hudson 1998 (2) SACR 345 (W).

S v Jama 1998 (2) SACR 237 (N).

S v Julies 1996 4 SA 313 (CC).

S v Khumalo 1991 (4) 310 (A).

S v Lavhengwa 1996 (2) SACR 453 (W).

S v M 1999 (1) SACR 664 (C).

S v Makwanyane 1995 (2) SACR 1 (CC).

S v Mathebula 1997 (1) BCLR 123 (W).

S v Mbatha; S v Prinsloo supra 1996 3 BCLR 293 (CC).

S v Meaker 1998 (2) SACR 73 WLD.

S v Mhlongo unreported decision DCLD of Didcott J, case no CC176/88, quoted in (1989) 2 SACJ 402-404.

S v Mpetha 1983 (4) SA 262 (C).

S v Nassar 1995 1 SACR 212 (Nm).

S v Ndlangamandla 1999 (1) SACR 391 (W).

S v Nkwanyana 1990 (4) SA 735 (A).

S v Ntsele supra 1997 11 BCLR 1543 (CC) at [4].

S v Ostilly 1977 (2) SA 104 (D).

S v Phuravhatha 1992 (2) SACR 544 (V).

S v Qozo 1994 (1) BCLR 10 (Ck).

S v Rittmann 1992 (2) SACR 110 (Nm).

S v Siebert 1998 (1) SACR 554 (A).

S v Shepard 1967 (4) 170 (W).

S v Shongwe 1998 (2) SACR 321 (T).

S v Shuping 1983 (2) SA 119 (BSC).

S v Tyebela 1989 (2) SA 22 (A).

S v Van Nell 1998 4 BCLR 605 (NC).

S v Woodrow 1999 (2) SACR 109 (E).

S v Zimmerie 1989 (3) SA 484 (C).

S v Zuma 1995 (1) SACR 568 (CC).

Schmerber v California 384 US 757 (1966).

Taylor v Illinois 484 US 400 (1988) 408.

Uncedo Taxi Services Association v Maninjwa 1998 (2) SACR 166 (ECD).

Williams v New York 337 US 241 (1949).

EXECUTIVE SUMMARY

1. During 1994 the Minister requested the Commission to give urgent attention to the problems arising from the application of the Bill of Rights to criminal procedure, criminal law, law of evidence and sentencing. A new investigation was consequently included in the Commission's programme (Project 101- The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing). The report focuses only on those

sections which are clearly unconstitutional and which need urgent consideration. The Commission concluded that neither the Commission nor the Project Committee dealing with the investigation should usurp the function of the Constitutional Court and decide on the constitutionality of those sections of the Criminal Procedure Act which are only arguably unconstitutional. In those instances the Constitutional Court should rather develop the case law step by step. While the report primarily focuses on provisions which are considered to be clearly unconstitutional, the constitutionality of some other provisions and whether or not they should be amended in the scope of the investigation, is also dealt with.

2. The report deals *inter alia* with provisions of the Criminal Procedure Act which are in conflict with -

- * the presumption of innocence, (for example, section 55 (failure of accused to appear on a summons); section 60 (failure of an accused on bail to appear in court); section 74 (failure of accused on warning to appear in court); sections 78(1A) and (1B) (mental defect and criminal responsibility); section 170 (failure of accused to appear after adjournment); section 174 (discharge of accused after case for the prosecution); section 212 (proof of certain facts by affidavit); section 217 (confessions); section 219A (admissions) section 37 (evidence on charge of bigamy); section 240 (evidence on charge of receiving stolen property); section 243 (evidence of receipt of money or property and general deficiency on charge of theft); section 245 (evidence on charge of which false representation is an element); and section 332 (prosecution of corporation and members of association);
- * the constitutional provisions of equality and access to courts, for example, section 7 (private prosecution on certification of *nolle prosequi*); section 29 (search to be conducted in orderly manner); section 190 (impeachment or support of credibility of witness); section 191 (payment of expenses of witness); and section 269 (sodomy);
- * the right to a fair trial which includes the right to appeal, for example, section 302 (sentences subject to review in the ordinary course and transmission of record);
- * the right to a public trial, for example, section 153 (circumstances in which

criminal proceedings shall not take place in open court); section and 154 (prohibition of publication of certain information relating to criminal proceedings);

- * the right to adduce and challenge evidence and adequate facilities to prepare defence, for example, section 166 (cross-examination); section 179 (process for securing attendance of witnesses); section 182 (witnesses from prison); and section 190 (impeachment or support of credibility of witness);
- * the right to freedom and security of person, for example, section 185 (detention of witness) and section 286 (declaration of certain persons as dangerous criminals) and section 286B (imprisonment for an indefinite period);
- * the right to be brought before a court after arrest, for example, section 50 (arrest);
- * the right to a fair trial (including the right to be informed in detail of charge), for example, section 95 (housebreaking with intent to commit an offence);
- * the right to a fair trial (unconstitutionally obtained evidence), for example, section 225 (evidence of prints or bodily appearance of accused); and section 252A (authority to make use of traps and undercover operations and admissibility of evidence so obtained); and
- * the right to a fair trial, for example, section 213 (proof of written statement by consent); sections 105, 119, 126 and 213 (the unrepresented accused).

CHAPTER 1

ORIGIN OF THE INVESTIGATION AND SOME INTRODUCTORY REMARKS

BACKGROUND

1.1 During his budget vote speech to the National Assembly and the Senate in 1994, the Minister of Justice touched on a number of issues that should be addressed. He stated, **inter alia**, that he believed that the judicial system is in need of fundamental changes in order to make it more accessible to the public. Legal procedures should be simplified, terminology should be less technical, the judicial system should serve the community and it should also reflect the schools of thought in the community. The Minister also expressed concern for the unprecedented crime wave in South Africa. In this regard he stated that we needed innovative thinking and a new approach to solve the problems. He therefore requested the Commission to give urgent attention to the problems arising from the application of the Bill of Rights to criminal law, criminal procedure and sentencing. A new investigation was consequently included in the Commission's programme (Project 101- The application of the Bill of Rights to the criminal law, criminal procedure and sentencing).

1.2 A Bill of Rights was included in the Interim Constitution which came into operation on 27 April 1994. An amended Bill of Rights forms part of the new Constitution which was approved by the Constitutional Assembly during May 1996 and the certification of the Constitution by the Constitutional Court was subsequently finalised.

1.3 In the light of the Minister's further requests, and because the new Constitution came into operation, the Commission had to redefine the content of its investigation. In order to proceed meaningfully with the investigation the project committee's first priority was to identify specific areas that are in need of reform and to proceed incrementally with investigations in that regard. A new project committee was appointed during September 1996 which was restructured during 1998 and 1999. At present the Committee consists of the following members:

Mr Justice LTC Harms (Judge of Appeal and Project leader)

Madam Justice Y Mokgoro (Judge of the Constitutional Court and Chairperson of the

Commission)

Mr Justice AEB Dhlodhlo (Judge of the High Court)

Mr PAJ Kotze (Retired Regional Court President)

Professor NC Steytler (Law Faculty, University of the Western Cape)

Professor B Majola (Director Legal Resources Centre)

1.4 In the first phase of the investigation the Committee invited all role players to submit proposals for amendment as well as relevant motivations to the Committee for consideration. In the second phase the Commission's researcher, Mr MHL Kganakga, with the assistance of Professor Steytler (committee member), worked through the Criminal Procedure Act with the aim to identify provisions which may be unconstitutional and to make recommendations for amendment. In the third phase the committee obtained the services of Professor PJ Schwikkard who drafted the discussion paper having due regard to the comments submitted to the Commission and the discussion document prepared by the Commission's researcher.

1.5 The Committee resolved that it should focus only on those sections which are clearly unconstitutional. It was argued that the Law Commission or the Project Committee should not usurp the function of the Constitutional Court and decide on the constitutionality of those sections of the Act which are only arguably unconstitutional. While the committee primarily focussed on provisions which it considers to be clearly unconstitutional, it considered the constitutionality of some other provisions and whether they should be amended in the scope of the investigation. In these instances the provisions and motivation for amendment were included in the discussion paper for purposes of inviting comment. The discussion paper was published in January 2000 for general information and comment. The closing date for comments was the 31 March 2000, but was extended until the 30 April 2000.

1.6 The Commission would like to express its appreciation to the GTZ and its project manager, Mr R Pfaff, for the technical and financial assistance rendered in this investigation.

CHAPTER 2

PROBLEMS ARISING FROM THE APPLICATION OF THE BILL OF RIGHTS TO

PROVISIONS OF THE CRIMINAL PROCEDURE ACT

INTRODUCTION

2.1 The Commission set out to identify those provisions in the Criminal Procedure Act that are *clearly* unconstitutional. Owing to the operation of the limitations clause, identifying what is unconstitutional is a hazardous task. The Commission consequently attempted to identify those sections of the Criminal Procedure Act which give rise to sustainable constitutional arguments. The degree to which these arguments establish an infringement of the Constitution varies. The difficulty in determining what weight should be attached to these arguments has been reflected in the sometimes contradictory comments received by the Commission.

THE PRESUMPTION OF INNOCENCE AND CLUSTER OF ASSOCIATED RIGHTS

Section 35(3) of the Constitution:

**Every accused person has a right to a fair trial, which includes the right-
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;**

2.2 The following is a summary of conditions that give rise to an infringement of the presumption of innocence with reference to South African and Canadian case law.

The scope of the presumption of innocence

2.3 It can be argued that the scope of the presumption of innocence as a constitutionally entrenched right in s 35(3)(h) of the Constitution, requiring the prosecution to prove guilt beyond a reasonable doubt at trial, is restricted to proof of those elements of the state's case that must be established in order to justify punishment. The relevance of evidence should also be proved beyond a reasonable doubt in order to ensure the consistent application of the reasonable doubt standard¹. The blameworthiness of the accused is the underlying justification for punishment. Consequently, facts necessary to establish legal guilt but not pertinent to blameworthiness need

¹ In *S v Zuma* 1995 (1) SACR 568 (CC) the Constitutional court, albeit in a qualified manner, extended the application of the presumption of innocence beyond the elements of the offence required to be proved by the prosecution. In *Zuma* the court considered the application of the presumption of innocence in allocating and determining the standard of proof with regard to the admissibility of confessions. See generally PJ Schwikkard *Presumption of Innocence* (1999).

not be established beyond reasonable doubt in terms of the presumption of innocence, which reflects society's tolerance of erroneous acquittals in an attempt to ensure that only the truly blameworthy are convicted. However, there may be circumstances where the value given to other rights demands that the reasonable doubt rule be applied independently of the presumption of innocence. The constitutional right to be presumed innocent is specified in relation to the right to a fair trial. It therefore does not apply to proceedings outside the definition of a criminal trial. However, when imprisonment is a possible result of 'other proceedings' the residual content of the s 12(1) right to freedom and security, requiring procedural fairness, may well require the application of the reasonable doubt standard.²

The scope of s 35(3)(h) of the Constitution received some clarification in *S v Dzukuda*; *S v Tshilo*³. The court held that while the accused's liberty and security interests were not extinguished during the sentencing phase of the trial, they were reduced in that the presumption of innocence was no longer applicable.⁴ However, Ackermann J held that the accused's right to remain silent and not to testify during proceedings were still applicable at the sentencing phase.⁵

Identifying infringements of the presumption of innocence

Canada

2.4 The decisions of the Canadian Supreme Court show that the presumption of innocence will be infringed in relation to "true crimes" wherever there is a possibility of conviction despite the existence of a reasonable doubt.⁶ This will occur whenever the accused is required to prove something relevant to the verdict on a balance of probabilities. The defence-offence dichotomy is irrelevant⁷ except in regard to whether a person holds a statutorily required licence.⁸ A

² See *Ferreira v Levin NO & Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC) at [79] but cf [185]. Cf *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC).

³ 2000 (2) SACR 443 (CC).

⁴ At [53].

⁵ At [40].

⁶ *R v Oakes* (1986) 50 CR (3d) 1 (SCC).

⁷ *R v Whyte* 1988 64 CR (3d) 123 (SCC); *R v Keegstra* 1990 3 SCR 697 (SCC); *R v Chaulk* 1990 3 SCR 1303 (SCC).

⁸ *R v Schwartz* 1989 66 CR (3d) 251 (SCC). In *R v Chaulk* supra, Wilson J distinguished *Schwartz* on the basis that it dealt with regulated rather than prohibited conduct. Consequently, it may be

mandatory evidential burden infringes the presumption of innocence if it relieves the prosecution of its burden of establishing a prima facie case before the accused needs to respond.⁹ A mandatory presumption will also breach the presumption of innocence where the basic fact does not lead inexorably to the presumed fact as such a presumption allows conviction despite the existence of reasonable doubt.¹⁰ Whilst a permissive evidential burden will generally not infringe the presumption of innocence, it will do so when a negative inference is required to be drawn from the accused's silence.¹¹ Where an offence is regulatory in nature, the requirement that an accused prove due diligence on a balance of probabilities will not infringe the presumption of innocence.¹²

South Africa

2.5 There is clear authority for the view that the presumption of innocence will be infringed whenever there is the possibility of a conviction despite the existence of a reasonable doubt.¹³ The offence-defence dichotomy is irrelevant.¹⁴ The Constitutional Court in *S v Coetzee*¹⁵ has by implication rejected the "greater includes the lesser test".¹⁶ Consequently, a reverse onus provision cannot be saved by the argument that the legislature, by creating a special defence in respect of which the accused bears the onus, has ameliorated the hardship the accused would otherwise have suffered if it had chosen to create an absolute liability offence.

argued that the *Schwartz* does not apply to truly criminal offences.

⁹ *R v Downey* 1992 13 CR (4th) 129 (SCC); *R v Du Bois* 1986 23 DLR (4th) 503 (SCC); *R v P(MB)* 1994 29 CR (4th) 209 (SCC).

¹⁰ *R v Downey* supra; *R v Audet* 1996 48 CR (4th) 1 (SCC).

¹¹ *R v Noble* 1997 1 SCR 874 (SCC).

¹² *R v Wholesale Travel Group* 1992 8 CR (4th) 145 (SCC).

¹³ *S v Zuma* 1995 1 SACR 568 (CC).

¹⁴ *S v Coetzee* 1997 3 SA 527 (CC).

¹⁵ Supra.

¹⁶ This American phraseology is used to reflect an argument that since the legislature in formulating an offence is not obliged to provide any defences, it is free to determine the rules of proof in relation to any defences it gratuitously creates ie the greater power of elimination of the defence is seen as including the lesser power of shifting the burden of proof. See D Dripps "the Constitutional Status of the Reasonable Doubt Rule" (1987) 75 *California Law Review* 1665 at 1678. See also *Ferry v Ramsey* 277 US 88 (1928); Cf *United States v Romano* 382 US 136 (1965); *Morrison v California* 291 US 82 (1934).

2.6 In *Scagell v Attorney-General of the Western Cape*¹⁷ the Constitutional Court, without distinguishing between permissive and mandatory presumptions, held that an evidential burden does not create the possibility of conviction despite the existence of a reasonable doubt. However, the question remains open as to whether an evidential burden will nevertheless infringe the presumption of innocence by relieving the prosecution of its duty to prove all the elements of the offence charged. It is submitted that the better view is that mandatory presumptions do infringe the presumption of innocence whether it be by permitting convictions despite the existence of a reasonable doubt or by relieving the prosecution of its full duty to prove all the elements of the crime.¹⁸ However, the distinction between a mandatory evidential burden and a reverse onus would be an important factor to be taken into consideration in determining whether a breach was justifiable, the former constituting a lesser infringement. In *S v Manamela*¹⁹ the Constitutional Court held that the imposition of an evidentiary burden on the accused infringed the right to remain silent; however, in the circumstances it was a justifiable limitation.²⁰

2.7 Whether the drawing of a negative inference from silence infringes the right to remain silent or the presumption of innocence also remains an open question. In so far as the presumption of innocence determines the incidence of the burden of proof, any shift of an evidential burden to the accused prior to the prosecution establishing a prima facie case will constitute an infringement of the presumption of innocence. Consequently, an inference drawn from silence before the prosecution has discharged its duty of establishing a prima facie case will infringe the presumption of innocence.

2.8 The application of the presumption of innocence to regulatory offences has yet to be

¹⁷ 1996 11 BCLR 1446 (CC). See also *S v Zondo* 1999 (1) SACR 54 (N).

¹⁸ See also K Dawkins "Statutory presumptions and reverse onus clauses in the Criminal Law: In search of rationality" 1987 (3) *Canterbury Law Review* 215 who outlines the infringement of the presumption of innocence by mandatory evidential burdens as follows:

"The trier of fact must find that the presumed fact has been established once P has proved the basic fact, even if not satisfied that P could prove the presumed fact if put to its usual burden of persuasion. D therefore loses the benefit of any residual doubt that would otherwise arise from P's case".

Cf A Skeen "A Bill of Rights and the presumption of innocence" 1993 9 *SAJHR* 525 at 535; U Raifeartaigh "Reversing the burden of proof in a criminal trial: Canadian and Irish Perspectives on the Presumption of Innocence" 1995 5 *Irish Criminal Law Journal* 135.

¹⁹ 2000 (1) SACR 414 (CC).

²⁰ Cf *Osman v Attorney-General, Transvaal* 1998 (2) SACR 493 (C).

properly considered by the courts. However, the Constitutional Court has indicated that the regulatory nature of an offence is better considered as a factor in establishing whether a provision constitutes a justifiable limitation of the right to be presumed innocent rather than in establishing breach. This approach is to be preferred in that it allows the court to concentrate on “ the values at stake in the particular context”²¹ rather than focussing on the unruly distinction between regulatory and criminal offences.

Measuring the cases against the limitations clause

2.9 The Constitutional Court has been remarkably consistent in refusing to find justification for the infringement of the presumption of innocence. It held that any justification for infringing the presumption of innocence would have to be clear, convincing and compelling.²² In respect of the proportionality inquiry required by the limitation clause, it is clear that the importance of the objective of the limitation, even if addressing a pressing and substantial concern, will seldom, if ever, on its own justify an infringement of the presumption of innocence.²³ However, if the objective is not sufficiently important it would appear that the constitutional challenge must fail irrespective of the means used to achieve the objective. It is inevitable that a reverse onus in the criminal context will have as its broad objective the effective prosecution of crime; however, to be sufficiently important it must be shown that there is a pressing social need for the effective prosecution of the category of offence to which the presumption applies.²⁴ The fact that a presumption is required to facilitate adequate sentencing discretion would not on its own be a sufficiently important objective.²⁵

2.10 Once it is established that the purpose of the limitation is not discordant with the values underlying an open and democratic society based on human dignity and equality, the validity of an infringement is dependent on a determination of whether the means used in attaining the objective are reasonable and justifiable. In determining the nature and extent of the limitation the

²¹ *S v Coetzee* supra [43].

²² See *S v Mbatha*; *S v Prinsloo* supra 1996 3 BCLR 293 (CC); *S v Ntsele* supra 1997 11 BCLR 1543 (CC) at [4]. See also *S v Mello* 1999 (2) SACR 255 (CC); *S v Manamela* 2000 (1) SACR 414 (CC).

²³ *S v Coetzee* supra.

²⁴ *Scagell v Attorney-General of the Western Cape* supra.

²⁵ *S v Bhulwana*; *S v Gwadiso* 1996 1 SA 388 (CC).

courts appear to be wary of presumptions that are overly broad in their application.²⁶ Overbreadth must be considered in relation to the range of offences brought within the framework of the presumption as well as the category of offenders. In the case of a reverse onus it would be logical to infer that the effect of the limitation will also be influenced by the accused's ease of access to the information required to discharge the burden. Cameron J, in *S v Meaker*²⁷, expressed the view that a presumption would constitute a lesser infringement of the presumption of innocence where it only came into effect once a person had already been shown to have committed an offence. However, this will clearly not be the case where the offence to which the presumption pertains attracts heavier penalties or greater disapproval than the offence proved.²⁸ The extent of the limitation will also be partially determined by the nature of the penalties and the stigma attached to the offence²⁹ However, trivial consequences of a conviction, on their own, will not constitute sufficient justification.³⁰ Whether the offence to which the presumption applies is truly criminal or regulatory will also be taken into account.³¹ Evidence that a reverse onus is applied with circumspection and is therefore unlikely to impact on the rights of innocent people will not be considered a justifying factor, it being unacceptable for the rights of innocent people to be dependent on the discretion of the police or attorney-general.³² The extent of the limitation will also be affected by the likelihood of the presumption operating in a manner that increases the possibility of innocent people being brought to trial,³³ for example, where the basic fact from which the inference to be drawn is in itself not suggestive of criminal behaviour.³⁴

2.11 The inquiry into the relationship between the limitation and its purpose requires a finding

²⁶ *S v Coetzee* supra.

²⁷ Supra.

²⁸ *S v Bhulwana*; *S v Gwadiso* supra.

²⁹ *S v Mbatha*; *S v Prinsloo* 1996 3 BCLR 293 (CC)..

³⁰ Cf *S v Meaker* 1998 (2) SACR 73 WLD where Cameron J rejected the contention that the trivial consequences of conviction were relevant to justification.

³¹ *S v Coetzee* supra.

³² *S v Mbatha*; *S v Prinsloo* supra at [23]; *Scagell v Attorney-General of the Western Cape* supra at [17]-[18]. In the light of such clear and substantial Constitutional Court authority it would appear Cameron J in *S v Meaker* supra at 91g was misguided in his conclusion that the Constitutional Court "did not intend to discountenance all consideration of benign administrative procedures in assessing the practical efficacy and equitable operation of a presumption".

³³ *S v Mbatha*; *S v Prinsloo* supra at [24];

³⁴ See *Scagell v Attorney-General of the Western Cape* supra.

of both external and internal rationality.³⁵ External rationality requires a rational connection between the presumption and the legislative purpose behind its enactment. Internal rationality requires a rational connection between the basic fact and the presumed fact. The content of the presumption of innocence compels the court to establish internal rationality at both the breach and limitations stages. The degree of internal rationality determines whether conviction is possible despite the existence of a reasonable doubt. At the limitations stage the court needs to assess the parameters of doubt arising in accordance with the level of internal rationality. In the absence of express articulation of this view by the Constitutional Court, the best example of the different application of the rational connection test is to be found in the Witwatersrand Local Division's decision in *S v Meaker*.³⁶ In *Meaker* the court applied section 36 of the 1996 Constitution in determining whether the presumption contained in section 130(1) of the Road Traffic Act³⁷ constituted a justifiable infringement of the presumption of innocence. This section provides that in any prosecution under the common law, or under the Act, relating to the driving of a motor vehicle, it will be presumed that the vehicle was driven by the owner. In finding that section 130 breached the presumption of innocence, the court found that it was reasonably possible that the owner would not be the driver of the vehicle. However, in applying section 36 the fact that it was not unlikely that the owner was the driver was sufficient to conclude that the provision was sufficiently rational for the purposes of the limitations clause. Whilst it is clear that insufficient rationality will be found to exist for the purposes of breach when the inference to be drawn from the basic fact does not exclude a reasonable doubt as to the existence of the presumed fact, it is less clear what will constitute sufficient rationality at the second stage of the inquiry. The finding of the court in *Meaker* would support the minority view of McLachlin J in *R v Downey*³⁸ "that at a minimum, proof of the substituted fact must make it *likely* that the presumed fact is true".³⁹

2.12 An inquiry as to whether less restrictive means could be used to achieve the limitations objective, includes the question whether the infringement is required at all.⁴⁰ Consequently, it

³⁵ *S v Bhulwana*; *S v Gwadiso* supra; *S v Julies* 1996 4 SA 313 (CC); *S v Van Nell* 1998 4 BCLR 605 (NC); *S v Mbatha*; *S v Prinsloo* supra; *S v Ntsele* supra.

³⁶ Supra.

³⁷ 29 of 1989.

³⁸ Supra.

³⁹ At [69].

⁴⁰ *S v Coetzee* supra.

is argued that section 36 does not exclude the necessity test but merely makes it applicable to all constitutionally guaranteed rights. In establishing the necessity of a reverse onus, the state would have to lead evidence that in practice it was impossible or unduly burdensome for the state to discharge its onus.⁴¹ A factor supporting such a contention would be that the presumed fact was peculiarly within the knowledge of the accused.⁴² But this on its own will not be sufficient evidence of an unduly burdensome onus.⁴³ Nor will the mere fact that a presumption makes proof of the offence easier, constitute sufficient justification.⁴⁴ Nor would it be sufficient to show that in certain circumstances the absence of the presumption would permit a guilty person to escape conviction, this being an inevitable consequence of the presumption of innocence.⁴⁵ The courts will also take into account the approach adopted in foreign jurisdictions regarding the necessity of a presumption in relation to the offence or category of offence under consideration.⁴⁶

⁴¹ *S v Mbatha*; *S v Prinsloo* supra; *Scagell v Attorney-General of the Western Cape* supra.

⁴² See *S v Zuma* supra. Glanville Williams "The Logic to Exceptions" (1988) 47 *Cambridge Law Journal* 261 at 268 makes the following observations regarding the "peculiar knowledge rule":

"A 'peculiar knowledge' rule would be reasonable if it referred only to the evidential burden; but why, because the matter was particularly within the knowledge of the defendant, should he be deprived of the benefit of the doubt? Indeed, to shift the burden of proof to the defendant not only deprives him of the benefit of a reasonable doubt; it convicts him when it is a toss-up whether he is guilty or not.

...The rule is inconsistent with *Woolmington* and the cases following it. The defendant to a criminal charge is in the best position to know whether he had the mental element required for the crime charged; yet *Woolmington* decided that the burden of proving the mental element rests on the prosecution."

And at 290:

"That it is easy for the defendant to give evidence on an issue, and relatively difficult for the prosecution, may be an excellent reason for placing an evidential burden upon the defendant. It is a very poor reason for telling the jury, at the end of the day, that the defendant is to be convicted if he has not established his version of the issue."

See also Glanville Williams *The Proof of Guilt* 3 ed (1963) 184-5.

⁴³ *S v Coetzee* supra. See D Dripps "The Constitutional Status of the Reasonable Doubt Rule" (1987) 75 *California Law Review* 1665 who argues at 1695 that the drastic consequences arising from conviction provide a strong motive to offer exculpatory testimony:

"Because of this incentive, the trier of fact is likely to discount any exculpatory testimony given by the accused. In a criminal case, the unilateral consequences of conviction therefore undercut the credibility of the defendant's testimony. The credibility problem explains why access to evidence cannot justify shifting the burden of proof to a criminal defendant."

⁴⁴ *S v Bhulwana*; *S v Gwadiso* supra at [11].

⁴⁵ *S v Mbatha*; *S v Prinsloo* supra [20].

⁴⁶ *S v Coetzee* supra; *S v Meaker* supra.

2.13 Once it is established that the objective of the provision could not be obtained by using policing or prosecutorial tactics⁴⁷ which do not conflict with the provisions of the constitution,⁴⁸ the question arises whether the objective could have been obtained by using less intrusive means, for example, by imposing an evidential burden rather than a legal burden.⁴⁹ This raises the difficulties experienced by the Canadian Courts in determining the parameters of the minimal impairment test.

2.14 Sachs J in *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer of Port Elizabeth Prison*⁵⁰ formulated the parameters of necessary review as follows:

“[T]he law would not be permitted to impose restrictions or burdens going beyond what would be strictly required to meet the legitimate interests of judgment creditors and society as a whole. This is not to say that an impossibly high threshold would have to be established which effectively ruled out genuine weighing by Parliament of reasonable alternatives within the broad bracket of what would not be unduly oppressive in the circumstances. The requirement of finding ‘the least onerous solution’ would not therefore have to be seen as imposing on the Court a duty to weigh each and every alternative with a view to determining precisely which imposed the least burden. What would matter is that the means adopted by Parliament fell within the category of options which were clearly not unduly burdensome, overbroad or excessive, considering all the reasonable alternatives.”⁵¹

2.15 This formulation tends towards a conclusion substantially similar to that reached by the majority in *R v Chaulk*,⁵² namely that the minimal impairment test does not require Parliament to have chosen the absolutely least intrusive means of meeting its objective.⁵³ However, in *Coetzee v Government of the Republic of South Africa* the state was not the sole antagonist as the individual rights of judgment debtors had to be weighed against the interests of judgment creditors and society as a whole. Where the state is the sole antagonist, which is invariably the

⁴⁷ *Scagell v Attorney-General of the Western Cape supra*; *S v Coetzee supra*.

⁴⁸ *S v Coetzee supra*.

⁴⁹ *S v Mbatha*; *S v Prinsloo supra* [26]. The fact that the legislature might have adopted a more drastic measure to achieve its objective, such as creating an absolute liability offence appears to be irrelevant. See *S v Coetzee supra*.

⁵⁰ 1995 (4) SA 631 (CC).

⁵¹ At [60].

⁵² *Supra*.

⁵³ At [68]-[69].

case when considering a limitation of the presumption of innocence, there is much to be said in favour of the stance adopted by the Canadian Supreme Court in its later decision in *R v Laba*.⁵⁴ In terms of this approach it is recognized that where the presumption of innocence is the subject of constitutional scrutiny, the state, acting on behalf of the *whole* community, is in effect a singular antagonist of the individual who seeks to assert a right fundamental. And in this context “the courts are in as good a position as the legislature to assess whether the least drastic means of achieving the governmental purpose have been chosen”.⁵⁵

2.16 *It should be noted that in accordance with its aim of identifying only those sections of the Criminal Procedure Act which are either clearly unconstitutional or attract sustainable constitutional arguments the Commission has not dealt with many of the provisions that cast an evidential burden on the accused due to the uncertainty regarding the constitutional implications of such a burden.*

SECTION 55(2) and (3)(A): FAILURE OF ACCUSED TO APPEAR ON SUMMONS (1.1)

2.17 Sections 55(2) and (3)(a) requires the accused to prove on a balance of probabilities that her failure to appear on summons was not due to any fault on her part. If the accused does not satisfy the court regarding absence of fault, the accused may be sentenced to a fine not exceeding R300 or to imprisonment for a period not exceeding three months. No doubt there are a number of persuasive arguments that might be made justifying this infringement of the presumption of innocence. On the other hand, it can be argued that it is relatively easy for the prosecution to establish a prima facie case without the assistance of the presumption.

PRELIMINARY RECOMMENDATION

2.18 In the discussion paper the Commission recommended that the provisions should not be amended as there are substantial arguments in favour of justification in terms of the limitations clause. The alternative would be that the presumption should either be removed or redrafted so as to impose no more than evidential burden on the accused. See also 1.11 in

⁵⁴ 1995 34 CR (4th) 360 (SCC).

⁵⁵ *R v Laba* supra [86].

which the summary nature of proceedings is discussed.

COMMENTS

2.19 The office of the legal component of the SA Police Service agrees with the recommendation that the provision should not be amended. It argues that the accused should discharge the reverse onus in rebutting his/her contributory fault upon a balance of probability especially where his/her own actions have prima facie led to the state of blameworthiness which this section inevitably seeks to address.

2.20 With regard to subsections 55 (2) and (3) (a) of the Criminal Procedure Act, which deal with the failure of an accused to appear on summons, the Superintendent General, Department of Education is of the view that the section should be redrafted to impose an evidential burden on an accused.

RECOMMENDATION

2.21 The comments received do not justify the Commission's departure from its initial recommendation that the provision should not be amended.

SUBSECTIONS 60(11)(A) AND (B): BAIL APPLICATION OF ACCUSED IN COURT (1.2)

PRELIMINARY RECOMMENDATION

2.22 In considering the constitutionality of subsections 60(11)(a) and (b), which the court found imposed a formal onus on the accused, Kriegler J in *S v Dlamini, S v Dladla, S v Joubert, S v Schieteka*⁵⁶ explicitly stated that the imposition of an onus on an applicant for bail was not constitutionally objectionable as the question of erroneous conviction did not arise.⁵⁷ Consequently, the Commission was of the view that there is no necessity to amend these sections.

⁵⁶ 1999 (2) SACR 51 (CC)

⁵⁷ At [78].

COMMENTS

2.23 The comments received by the Commission were in support of the retention of the status quo.

RECOMMENDATION

2.24 The Commission is of the view that there is no necessity to amend these subsections.

SUBSECTION 67(2)(a) : FAILURE OF ACCUSED ON BAIL TO APPEAR (1.3)

2.25 The reverse onus provision in this subsection requires the accused to satisfy the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part. If he fails to so satisfy the court, the provisional cancellation of bail and the provisional forfeiture of the bail money (in terms of subsection 67(1)) shall become final.

2.26 Unlike a bail application, this provision is concerned with the accused's blameworthiness and consequently *S v Dlamini*, *S v Dladla*, *S v Joubert*, *S v Scheitekat* cannot be said to be directly applicable. Nevertheless it is probable that if an infringement of the presumption of innocence is found to exist it will be viewed as justifiable given the close and rational connection between this provision and the efficient administration of the bail system. However, the state would also have to establish that the same objectives could not be reached by imposing an evidential burden on the accused.

PRELIMINARY RECOMMENDATION

2.27 Although it could be argued that it might be prudent to rephrase subsections 67(2)(a) and (b) so as to impose an evidential rather than a legal burden, the Commission was for the reasons set out in 1.1 not convinced that the provisions should be changed and invited comments on the proposal.

COMMENTS

2.28 The office of the legal component of the SA Police Service agrees with the

recommendation that this section should not be changed. It asserts that the failure to appear or remain in attendance can best be explained by the accused himself.

2.29 The Superintendent General, Department of Education is of the view that the onus imposed on an accused is justified in the circumstances for the reason that bail should never be granted lightly, especially in cases of serious offences.

RECOMMENDATION

2.30 There are no compelling arguments for changing the status quo, the Commission confirms its initial recommendation that the provision should not be amended.

SECTION 68: CANCELLATION OF BAIL (1.4)

PRELIMINARY RECOMMENDATION

2.31 Du Toit et al⁵⁸ submit that the onus is upon the State to satisfy the court on a balance of probabilities that there are sufficient grounds for cancellation of bail in terms of section 68. Consequently, the accused might have her bail cancelled despite the existence of a reasonable doubt. It is submitted that this section will also survive constitutional scrutiny. The standard is the same as that required at the bail application where the prosecution must establish on a balance of probabilities that it is in the interests of justice to refuse bail (see *S v Dlamini*, *S v Dladla*, *S v Joubert*, *S v Scheitekat* supra at 53).

COMMENTS

2.32 No comments were received in respect of section 68.

RECOMMENDATION

2.33 No amendment is recommended.

⁵⁸ At 9-48.

SUBSECTION 72(4): ACCUSED MAY BE RELEASED ON WARNING IN LIEU OF BAIL (1.5)

2.34 In terms of this subsection, unless the accused satisfies the court that his failure to comply with his warning in terms of subsection (1) was not due to his fault he will be guilty of an offence. And the court may sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

PRELIMINARY RECOMMENDATION

2.35 In light of the arguments justifying the imposition of an onus on the accused the Commission recommended the retention of the status quo.

COMMENTS

2.36 The office of the legal component of the SA Police Service agrees with the recommendation that this section should not be changed on the basis that the failure to appear or remain in attendance can best be explained by the accused himself.

2.37 In respect of the provisions of subsection 72(4) dealing with the release of an accused on warning in lieu of bail, the Superintendent General, Department of Education is of the view that only an evidential burden should be placed on the accused.

RECOMMENDATION

2.38 In the absence of compelling arguments in support of an evidentiary burden, the Commission confirms its initial recommendation that the status quo be retained.

SUBSECTION 74(7): PARENT OR GUARDIAN UNDER EIGHTEEN YEARS TO ATTEND PROCEEDINGS (1.6)

2.39 In terms of this subsection, unless a parent or guardian satisfies the court that his failure to attend proceedings after he has been duly warned was not due to fault on his part, he will be liable to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

PRELIMINARY RECOMMENDATION

2.40 In the discussion paper the Commission recommended that the subsection 74(7) should not be amended as there are substantial justifications in terms for limiting the right to be presumed innocent. The alternative being that the reverse onus provision should either be removed or redrafted so as to impose no more than an evidential burden on the accused.

COMMENTS

2.41 The office of the legal component of the SA Police Services agrees with the recommendation that the provision should not be amended.

2.42 Judge Van den Heever, retired Judge of the Supreme Court of Appeal, does not agree that subsection 74(7) of the Act should remain unaltered. In many decades on the Bench dealing with reviews of matters from the magistrate's court, she came across only one record reflecting that a parent or guardian took any part at all in the proceedings. In that case it was a "guardian" of doubtful standing, who perpetrated an irregularity gravely prejudicial to the minor. Her impression is that the presence of an adult is generally sought to be achieved as a matter of form, not substance. When an adult is in court who is not a parent, his qualification to "act" as guardian is seldom if ever investigated. Whether parent or guardian, the adult usually loses income by staying away from work, and risks losing his job if he stays away too often, and matters are postponed time and time again, so that he sees no benefit to the minor resulting from his sacrifice. To punish someone for not persisting in what must appear to him to be an exercise in futility, she argues, is in itself unfair, and to expect the adult to discharge an onus even more so. She has never come across a case in which a parent or guardian has been advised, after that first appearance, that he may apply for exemption from further attendance by virtue of subsection (3). She is of the view that the whole scheme of section 74 needs to be reconsidered. She accepts that the motivation behind the section is an assumption that a minor would get some moral or emotional support from the presence in court of a (trusted) adult. Consequently, the first enquiry should be directed at establishing this.

RECOMMENDATION

2.43 The disadvantages arising out of the requirement that a child's parent or guardian be warned to attend relevant proceedings are outweighed by public policy which demands that

parents and guardians be informed of any state action in respect of their children and requires parents and guardians to exercise and not abdicate their parental duties.

2.44 However, some of the concerns raised by Judge Van den Heever could be met by amending subsection 74(2) to impose a duty on the relevant officials to advise parents and guardians of their right to apply for exemption from attending proceedings in terms of subsection 74(3).

2.45 The Commission recommends that subsection 74(2) be amended by the insertion of subsection 74(2)(c) as provided for in the draft Bill in Annexure A.

SECTION 78(1A) AND 78(1B): MENTAL ILLNESS OR MENTAL DEFECT AND CRIMINAL RESPONSIBILITY (1.7)

(after amendment by section 5(b) of the Criminal Matters Amendment Act 68 of 1998)

2.46 *This amendment has not yet been put into operation. It reads as follows:*

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

78(1B) Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.

2.47 Professor JR Milton⁵⁹ has made the following observations regarding these amendments:

The position in South African law is now as follows: the presumption of sanity is codified in s 78(1A) of the Criminal Procedure Act 1977; the burden of proving insanity rests on the party raising the issue; the burden may be discharged on the balance of probabilities. ... [T]he accused who raises the defence of insanity is now in more or less the same position as before the passing of the Criminal Matters Amendment Act 1998: he or she must adduce evidence that establishes, on the balance of probabilities, a state of insanity at the time of the offence.

What is puzzling about all this is why Parliament declined the constitutionally correct opportunity to assert the presumption of innocence and prefer the more dubious option of perpetuating the anomalous reverse onus arising from the presumption of sanity? It

⁵⁹

"Law reform: The Criminal Matters Amendment Act 1998" 1999 (12) SACJ 41 at 47- 81.

might be that Parliament (in the form of the Portfolio Committee) was persuaded by the reasoning of the Canadian Supreme Court in *R v Chaulk* (supra) which found that 'the nearly impossible task of disproving insanity' placed an insupportable burden of proof on the prosecution. The Court thus found the reverse onus justifiable.

If this was indeed the motivation of the Portfolio Committee it is, with respect, neither persuasive nor principled.

Whatever may be the position in Canada, the task of disproving insanity in South African law is not so arduous as may appear. Section 79 of the Criminal Procedure Act 1977 requires that an accused person thought to be mentally ill must be referred to a psychiatric institution for examination by a panel of psychiatric practitioners. The panel is required to prepare a report which must, among other things, include a finding as to whether, at the relevant time, the accused's capacity to distinguish right from wrong was affected by mental illness. Should the panel report that the accused was not insane at the time, it is surely disingenuous to suggest that it is 'virtually impossible' for the state, in these circumstances, to disprove sanity?

2.48 Professor Milton's argument is persuasive and it was submitted that it is highly probable that these subsections will be found to be unconstitutional.⁶⁰

PRELIMINARY RECOMMENDATION

2.49 Section 78(1B) is a departure from the common law. At common law the only exception to the presumption of innocence was the defence of insanity. Presumably once section 78(1B) comes into force all defences pertaining to criminal responsibility would have to be proved by the accused on a balance of probabilities. (For example, the defence of non-pathological incapacity). In order to justify this infringement of the presumption of innocence the state would have to establish that convictions could not be obtained using ordinary police and prosecutorial tactics. Presumably this would be very difficult to establish as the prosecution has managed without this presumption in the past. It is also likely that section 78(1B) will be found to be unconstitutional.

2.50 In the discussion paper it was submitted that these sections should be revised so as to impose no more than a duty to introduce a defence on the accused. However, at this stage the Commission felt that it could not recommend an amendment in this regard and invited comments on the proposal.

⁶⁰ See also the dissenting judgment of Wilson J in *R v Chaulk* 1990 3 SCR 1303 (SCC); D Stuart *Charter Justice in Canadian Criminal Law* 2 ed (1996) 15; 'Will section 1 now save any Charter violation? The Chaulk Effectiveness Test is improper' (1991) 2 CR (4th) 107; P Healy "R v Chaulk: Some answers and some questions on insanity" (1991) 2 CR (4th) 95.

COMMENTS

2.51 The office of the legal component of the SA Police Service agrees that an amendment to these sections is not needed at this stage, especially in view thereof that the provisions of the Criminal Matters Amendment Act, 68 of 1998 have not yet been put into operation. However, they note that: (a) Criminal capacity is an indispensable requirement for criminal liability and one which the State must prove beyond reasonable doubt; (b) the proposed section 78(1B) goes beyond the grounds of mental illness or defect by stating that whenever criminal responsibility (criminal capacity) is in issue the burden of proof shall be upon the party raising the issue of criminal capacity (on whatever ground); and (c) as a rule criminal capacity in cases outside pathological mental illness needs to be proved by the State in accordance with the rules of criminal liability. Therefore, they conclude, it is difficult to see how the burden of proof in this regard should be placed upon the accused so as to prove an element of the crime against him/herself. This section would then unreasonably violate the accused's right to be presumed innocent until proven guilty.

2.52 Judge Van den Heever is of the view that section 78(1B) is not a model of clarity, and wonders why it was thought necessary to "codify" via sections (1A) and (1B) what is both common law and common sense. She notes that: people are generally accepted as being sane; section (1B) is not limited to pathological causes which would excuse an accused; and further that, the special defence of non-pathological non-accountability has become quite popular since the judgment of Burger J in the Cape, in which he acquitted a jealous older husband for stabbing his younger wife who taunted him. It would be fair, in her view, whenever a special defence is to be advanced, not only this one [i.e. something which in the ordinary course the accused would have knowledge of *but* the State, not], that such defence *should be disclosed at the stage of pleading*. She agrees that at this stage it would be as well to leave the sections as they are, and let the Constitutional Court decide whether it conflicts with the accused's "Basic Rights" to burden the accused with an onus to show what went on in his mind at the relevant time, or to counter the logical inference that he was not mad.

2.53 In respect of the sections 78(1A) and 78(1B), the Superintendent General, Department of Education is of the view that in the past the prosecution never had a problem of dealing with the question of insanity and non-pathological incapacity, and there is no need to place an onus on the accused but only to place a burden on him/her to adduce evidence to that effect.

2.54 With regard to the recommendation in par 2.32 of the Discussion Paper, The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope agrees that the proposed amendment should be deleted in the event that it is found to be unconstitutional.

2.55 The Natal Law Society agrees with Professor Milton's observation that Parliament in making the amendment should have seized the opportunity to re-emphasize the presumption of innocence and remove the reverse onus. They note that in such circumstances one is dealing with an accused whose sanity or mental state is in question and this raises the question as to how such a person can be expected to prove his sanity when he/she is questionably of unsound mind.

2.56 The Natal Law Society submits that this is a section that should be amended by removing the presumption operating against the accused and the court should, where a person appears or is thought to be mentally ill, refer him/her to a psychiatric institution for examination for a report by a panel of experts.

RECOMMENDATION

2.57 Judge Van den Heever's concerns regarding disclosure at the plea stage are addressed by the Commission in a separate investigation.

2.58 In 1995 the South African Law Commission in its report on *The Declaration and Detention of Persons as State Patients under the Criminal Procedure Act 1977 and the Discharge of Such Persons under the Mental Health Act 1973, including the Burden of Proof with Regard to the Mental State of an Accused or Convicted Person*⁶¹ concluded that the presumption of sanity would not withstand constitutional scrutiny and 'that the onus should be regulated in section 78 of the Criminal Procedure Act always to rest on the State when the accountability of an accused regarding the perpetration of an act which constitutes an offence is in issue.'⁶²

2.59 In the absence of substantial arguments justifying the imposition of a reverse onus in the circumstances set out in sections 78(1A) and 78(1B) it is recommended that subsection 5(b)

⁶¹ Project 89 (1995) para 8.30-8.

⁶² See also Burchell & Milton *Principles of Criminal Law* 2 ed (1997) 95.

of the Criminal Matters Amendment Act 68 of 1998 be deleted.⁶³ The courts may then develop and interpret the common law in a manner that promotes the spirit, purport and objects of the Bill of Rights.

SECTION 90: CHARGE NEED NOT SPECIFY OR NEGATIVE EXCEPTION, EXEMPTION, PROVISIO, EXCUSE OR QUALIFICATION (1.8)

2.60 Section 90 clearly infringes the presumption of innocence as it permits conviction despite the existence of a reasonable doubt by requiring the accused to prove “any exception, exemption, proviso, excuse or qualification”. This defence-offence dichotomy was rejected by the Constitutional Court in *S v Coetzee*⁶⁴. Although section 90 is prima facie unconstitutional, difficulties arise with regard to the limitations clause. Section 90 could apply to any number of statutory offences and it can be argued that whether it constitutes a justifiable limitation may depend on different considerations depending on the nature of the particular offence. On the other hand it could be found to be unconstitutional because of its over-breadth – i.e. its indiscriminate application to statutory offences. Given the Constitutional Court’s record in striking down reverse onuses which pertain to blameworthiness – very few, if any, applications of section 90 are likely to pass constitutional muster.⁶⁵

PRELIMINARY RECOMMENDATION

2.61 In the discussion paper it was argued that in the interests of certainty and consistency this provision should be deleted. An infringement of the presumption of innocence requires rigorous justification and it therefore makes sense to require the legislature to make considered choices in imposing reverse onuses. The Commission’s provisional view was that it was not convinced that the section should be amended because of its over-breadth and invited comments on the proposal for amendment.

COMMENTS

⁶³ There would appear to be no barrier to the repeal of signed legislation that has not been put into force.

⁶⁴ Supra.

⁶⁵ See A Paizes ‘A closer look at the presumption of innocence in our Constitution: what is an accused presumed to be innocence of’ 1998 (11) SACJ 409.

2.62 The office of the legal component of the SA Police Service is of the opinion that this provision should not be amended. It argues that the State would face insurmountable problems in proving all the exceptions or excuses and that there remains a duty on the State to prove the essential elements of the offence.

2.63 It is the view of the Superintendent General, Department of Education that s 90 should be amended so as to remove the reverse onus provision.

2.64 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope agrees and supports the amendments proposed to section 90.

RECOMMENDATION

2.65 Despite the existence of substantial arguments in support of the view that section 90 is unconstitutional, the Commission remains unconvinced that the section is clearly unconstitutional and does not recommend that the section be amended.

SUBSECTION 319(3) OF ACT 56 OF 1955 (1.9)

2.66 Subsection 319(3) of Act 56 of 1955 reads as follows:

If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such first mentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made such statement he believed it to be true.

2.67 Section 319(3) has no equivalent in the 1977 CP Act, but was not repealed so it remains in force.

2.68 Du Toit et al⁶⁶ make the following observations about subsection 319(3):

In contrast to the case of common-law perjury, the State need not for the purposes of statutory perjury prove which one of the two statements is false; all that need be proved, is that the accused on two different occasions made sworn statements and that they differ. This discrepancy must appear clearly in the charge in the sense that the words, in their context and taking into account surrounding circumstances must not be reconcilable. Moreover the alleged conflict must be specifically indicated so that the accused is put in a position to prepare his defence. Where the conflict is obvious a specific indication of the differences is actually superfluous as the possibility of prejudice falls away.

The onus then falls upon the accused to prove on a balance of probability that he believed in the truth of each statement at the time when he made it.

PRELIMINARY RECOMMENDATION

2.69 In the discussion paper the Commission noted that this subsection, by requiring the accused to establish that he believed the statements to be true when he made them, clearly infringes the presumption of innocence. Whether this would constitute a justifiable limitation is a slightly more open question. Nevertheless it was likely that the objectives of subsection 319(3) could be met by imposing an evidential burden. It was suggested that the section be amended so as to create no more than an evidential burden. However, the Commission did not recommend an amendment and invited comments on the proposal.

COMMENTS

2.70 The office of the legal component of the SA Police Service is of the opinion that the present section may be unconstitutional and that the best way to settle this is to amend this section so as to create an evidential burden. It argues as follows: the mere existence of two conflicting statements is prima facie proof of perjury. The only person who has knowledge about what "he believed" is the accused. In the face of the rights of the accused to remain silent and be presumed innocent, the State would not be able to read the mind of the accused or examine the cause behind the accused's conduct. It would at times be extremely difficult for the prosecution to have even the slightest or most remote idea as to which of the accused's

⁶⁶ *Commentary on the Criminal Procedure Act (1987, as revised bi-annually) 14-43.*

conflicting statements is in reality false, especially where one cannot establish the origin in time and fact of the irreconcilable and conflicting written falsehood. The accused would be able to use the shield of innocence to hide and protect such knowledge.

2.71 With regard to subsection 319(3) of Act 56 of 1955, the Superintendent General, Department of Education recommends placing merely an evidential burden on the accused.

RECOMMENDATION

2.72 All comments received support an amendment to subsection 319(3) replacing the full onus resting on an accused with an evidential one. The Commission recommends that the subsection be amended as per the draft Bill in Annexure A.

SECTION 151: ACCUSED MAY ADDRESS COURT AND ADDUCE EVIDENCE (1.10)

2.73 In *Brooks v Tennessee*⁶⁷ the Supreme Court was required to consider a Tennessee statute that rendered an accused an incompetent witness if he did not testify before any other defence testimony was heard by the court. The majority held that this infringed the privilege against self-incrimination and the right to remain silent as it penalised the accused for remaining silent at the close of the state case.

Subsection 151(1)(b) can be distinguished on the basis that the accused is not rendered incompetent, he merely runs the risk of a negative inference being drawn. The fact that the inference is permissive and not mandatory also serves to support the constitutionality of the section. The purpose of the section is to prevent the accused from tailoring his/her evidence and it is likely that should the existence of a constitutional infringement be established it will be found to be a justifiable limitation. It could also be cogently argued that subsection 151(1)(b) does not impinge on any constitutional rights as it merely requires the accused to make a choice and does not compel the accused to do anything.⁶⁸ It is submitted that *Brooks v Tennessee* does not provide grounds for redrafting subsection 151(1)(b).

PRELIMINARY RECOMMENDATION

⁶⁷ 406 US (1972) 605.

⁶⁸ See *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1997 (7) BCLR 771 (CC).

2.74 In the discussion document the Commission noted that it was clear from the case law⁶⁹ that it is essential that the unrepresented accused be fully advised of his rights at the close of the state's case. The instructions should pertain not only to the consequences of not testifying before other defence witnesses, but also to the consequences of not testifying at all. Van der Merwe⁷⁰ suggests that 'the undefended accused should be warned that he has the constitutional right to testify or to refuse testify, but that if he remains silent that the court will have to decide the case on the uncontroverted prima facie evidence furnished by the state'. Consequently, the question arose as to whether it would be prudent to include an express instruction to this effect in s 151. The Commission concluded that an affirmative answer would require the Act to perform the function of a bench manual and not simply a statute. The Commission therefore recommended that no amendment to the Act was necessary since the matter was in any event governed by the relevant constitutional provisions and no purpose would be served by repeating the constitutional provisions.

COMMENTS

2.75 The office of the legal component of the SA Police Service is of the opinion that there is no need to amend this section so as to include an express instruction in line with the one submitted by Van der Merwe. It submits that the accused is covered by the express provisions of s 35 of the Constitution.

2.76 The Superintendent General, Department of Education supports the proposal put forward by the Commission.

RECOMMENDATION

2.77 The Commission recommends that no amendment be made to section 151.

SECTION 170: FAILURE OF ACCUSED TO APPEAR AFTER ADJOURNMENT (1.11)

2.78 The constitutional issue raised by subsection 170(2) is whether summary proceedings in this context infringe the right to a fair trial? In particular the right to be informed of the charge with

⁶⁹ See Du Toit 22-3 and cases cited therein.

⁷⁰ 1994 *Obiter* 1 at 21.

sufficient detail to answer it (section 35(3)(a)) and the right to be presumed innocent and to remain silent (section 35(3)(h)). Section 170 proceedings are analogous to contempt of court proceedings. The constitutionality of summary contempt of proceedings have been considered in a number of provincial division cases.⁷¹

2.79 The conclusion to be drawn from these cases is that summary proceedings for contempt do not infringe the right to a fair trial (and if they do, the infringement would be justifiable). Pickering J in *Uncedo*⁷² held that it was irrelevant whether contempt of court proceedings were instituted by means of civil or criminal proceedings; in either instance proof beyond reasonable doubt was necessary as it would be “clearly unconstitutional to deprive a person of his liberty upon proof merely on a balance of probabilities”. However, Pickering J also approved the holding of Claasen J in *Lavhengwa*⁷³ that the requirement that the offender in contempt proceedings was required ‘to show cause why he should not be committed for contempt’ did not infringe the presumption of innocence as it merely created an evidential burden. In both cases the court referred to *R v Cohn*,⁷⁴ in which the Ontario Court of Appeal held: “Summary proceedings for contempt in the face of the court do not infringe the right to be presumed innocent. The burden on the accused is an evidential one only and if at the end of the proceedings there exists a reasonable doubt as to guilt, he is entitled to be acquitted.”⁷⁵

2.80 Section 170(2) needs to be distinguished from the common law of contempt in that it contains an express reverse onus which places a burden on the accused to prove on a balance of probabilities that his absence was not due to his fault.⁷⁶

PRELIMINARY RECOMMENDATION

2.81 In the discussion paper it was argued that there is a strong possibility that this reverse

⁷¹ See for example, *S v Lavhengwa* 1996 (2) SACR 453 (W) and *Uncedo Taxi Services Association v Maninjwa* 1998 (2) SACR 166 (ECD) (The former dealing with contempt *in facie curiae* and the latter with contempt *ex facie curiae*).

⁷² Supra 174g.

⁷³ Supra.

⁷⁴ (1985) 10 CRR 142.

⁷⁵ At 158. However, it is clear from the *Cohn* judgment that the evidential burden in question was constitutional because of its permissive nature.

⁷⁶ See *S v Du Plessis* 1970 (2) SA 562 (E) and *S v Bkenlele* 1983 (1) SA 515 (O).

onus which infringes the presumption of innocence will fail the limitations test primarily under the inquiry as to whether less restrictive means could be used to achieve the limitations objective. Again the possibility of imposing an evidential burden should be considered. The Commission's view was that the that the section should be retained unchanged. See also sections 184, 188 where section 170(2) is made applicable.

COMMENTS

2.82 The office of the legal component of the SA Police Service is of the opinion that this section should not be changed or amended. It argues that the State should not, by such a proposal, be placed in such a position so as to assist the accused in providing a defence to his/her own act or failure by watering down the reverse onus to a mere evidentiary burden. It would be more prudent to leave the section as it is and await a Constitutional Court ruling upon this point.

2.83 The Superintendent General, Department of Education is of the view that section 170 should not be amended as one should view this section as entrenching the respect and dignity of the courts.

2.84 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope agrees and supports the amendments proposed to section 170.

RECOMMENDATION

2.85 Subsequent to the discussion paper the Constitutional Court has had an opportunity to consider section 170(2) of the Criminal Procedure Act albeit indirectly in *S v Baloyi*⁷⁷. The Transvaal High Court declared section 3(5) of the Prevention of Family Violence Act 133 of 1993 unconstitutional on the basis that it incorporated the reverse onus contained in section 170(2) of the Criminal Procedure Act. It referred its declaration to the Constitutional Court for confirmation. The Constitutional Court held that section 3(5) of Act 133 of 1993 was saved from constitutional invalidity because the reverse onus provision contained in section 170(2) was **not** incorporated by section 3(5).

2.86 *Baloyi* highlights the unconstitutionality of section 170(2) and it is recommended that the

⁷⁷ 2000 (1) SACR 81 (CC).

section be amended to impose an evidentiary burden on the accused as per the draft Bill in Annexure A.

SECTION 174: ACCUSED MAY BE DISCHARGED AT CLOSE OF CASE FOR PROSECUTION (1.12)

2.87 It was argued in the discussion paper that section 174 constitutes an unjustifiable infringement of the presumption of innocence in that it gives the court a discretion to refuse discharge in the absence of a prima facie case. The argument is set out below.

2.88 The discretion conferred by the word “may” has enabled the courts to invoke the following test in applying section 174:

At the close of the State case, when discharge is considered, the first question is:

(i) is there evidence on which a reasonable man might convict; if not

(ii) is there a reasonable possibility that the defence evidence might supplement the State case?

If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence.⁷⁸

2.89 In *R v Kritzinger*⁷⁹ the court held that it had an absolute discretion to refuse discharge even where there was no evidence against the accused.⁸⁰ This approach, which allows the court to refuse discharge if there is a reasonable possibility that the accused might supplement the state’s case, has been criticized in numerous divisions of the Supreme Court.⁸¹ These decisions were rendered prior to the new constitutional dispensation, *S v Mathebula*⁸² being the first case to consider section 174 in light of the interim Constitution. In this case Claasen J noted that sections 11(1), 25(3)(c) and (d) of the interim Constitution curtailed the discretion conferred by section 174 “possibly even to the extent of it being non-existent”.⁸³ He reasoned as follows:

⁷⁸ *S v Shuping* 1983 (2) SA 119 (BSC) at 120. See also *S v Zimmerie* 1989 (3) SA 484 (C); *S v Campbell* 1991 (1) SACR 435 (Nm); *S v Rittmann* 1992 (2) SACR 110 (Nm).

⁷⁹ 1952 (2) SA 402 (W) at 402.

⁸⁰ See also *R v Heholdt*(3) 1956 (2) SA 722 (W); *S v Ostilly* 1977 (2) SA 104 (D); *S v Mpetha* 1983 (4) SA 262 (C).

⁸¹ See *S v Phuravhatha* 1992 (2) SACR 544 (V) at 551-2; *S v Qozo* 1994 (1) BCLR 10 (Ck); *S v Beckett* 1987 (4) SA 8 (C); *S v Amerika* 1990 (2) SACR 480 (C); *S v Heller*(2) 1964 (1) SA 524 (W). In a number of earlier cases the court held that a presiding officer has a duty to acquit the accused where there is no evidence that he committed the offence. See *R v Louw* 1918 AD 344; *R v Thielke* 1918 AD 373; *R v Machinini*(2) 1944 WLD 91.

⁸² 1997 (1) BCLR 123 (W). See also *S v Ndlangamandla* 1999 (1) SACR 391 (W).

⁸³ At 146j.

The duty to prove an accused's guilt rests fairly and squarely on the shoulders of the State. As I said previously the accused need not assist the State in any way in discharging this onus. If the State cannot prove any evidence against the accused at the end of the state's case, why should the accused be detained any longer and not be afforded his constitutional rights of being regarded innocent and thus be acquitted and accorded his freedom? Can it be said that he was given a fair trial if, at the close of the State's case wherein no evidence was tendered to implicate him in the alleged crimes, the trial is then continued due to the exercise of a discretion in the hope that some evidence implicating him might be forthcoming from the accused himself or his co-accused? To my mind such a discretionary power to continue the trial would fly in the face of the accused's right to freedom, his right to be presumed innocent and remain silent, not to testify and not to be a compellable witness. To my mind it would constitute a gross unfairness to take into consideration possible future evidence which may or may not be tendered against the accused either by himself or his co-accused or by other co-accused and for that reason decide not to set him free after the State had failed to prove any evidence against him.⁸⁴

2.90 However, Claasen J attached the caveat that his judgment only pertained to cases where there was no evidence tendered against the accused and did not lay down a general rule "when there is scant evidence against the accused".⁸⁵ He concluded that where there was no evidence against the accused it would render the trial unfair not to grant discharge, and a discretion to refuse discharge could not be said to constitute a justifiable limitation on the basis that it would "be grossly unreasonable that an accused, vested with all the higher order rights, should be put on his defence when no incriminating evidence came from the mouth of the State".⁸⁶ Further, it would negate the accused's rights to freedom, to be presumed innocent and not to be a compellable witness.⁸⁷

2.91 In support of his conclusion he drew on the reasoning of the Canadian Supreme Court in *Du Bois v R*.⁸⁸ In this case, Lamer J held that the standard required to avoid discharge, ie the "case to meet" was an essential component of the presumption of innocence. He stated that the presumption of innocence required the prosecution to prove "the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or by calling other evidence".⁸⁹ He referred with approval to the

⁸⁴ At 146I-147D.

⁸⁵ At 147D.

⁸⁶ At 147I.

⁸⁷ At 148C. See also *S v Jama* 1998 (2) SACR 237 (N), in which Nicholson J, Niles-Duner J concurring, approved and applied the approach taken by Claasen J in *S v Mathebula* supra.

⁸⁸ (1986) 23 DLR (4th) 503.

⁸⁹ At 521-522.

following observation by Ratushny:

The accused need only respond once. The Crown must present its evidence at an open trial. The accused is entitled to test and to attack it. If it does not reach a certain standard, the accused is entitled to an acquittal. If it does reach that standard, then and only then is the accused required to respond or to stand convicted.⁹⁰

2.92 However, this component of the presumption of innocence appears to have carried little weight in *S v Makofane*.⁹¹ Mynhardt J was prepared to follow *Mathebula*,⁹² only in so far as it applied to a single accused against whom no evidence had been adduced. To not discharge an accused in such circumstances, he held, would be unfair as any subsequent conviction would inevitably be a consequence of self-incrimination. However, he found that the court retained a discretion to refuse discharge where some evidence had been adduced against the single accused although not sufficient to constitute a prima facie case. And where there were more than one accused, even if no evidence had been adduced against one or more of them, the court could exercise its discretion to refuse discharge if there was a reasonable possibility that such an accused would be implicated by his co-accused.

2.93 Mynhardt J (Swart J concurring) rejected the reasoning of Claasen J on the basis that the only change brought about by the interim Constitution in relation to section 174 is that the court must now, in exercising its discretion, ask whether the accused has been accorded a fair trial. Referring to *Key v Attorney General, Cape Provincial Division*⁹³ and *Khan v S*⁹⁴ as authority for the proposition that the decision as to what constitutes a fair trial is discretionary, Mynhardt J appears to take the approach that the specific rights guaranteed in relation to the right to a fair trial are also subject to the court's discretion and does not deal with the contention that the broad discretion exercised under section 174 infringes the right to remain silent and the right to be presumed innocent. The arguments against the approach of Mynhardt J are the following. The passages referred to in *Key* and *Khan* clearly apply to the discretion to exclude or include

⁹⁰ E Ratushny *Self-incrimination in the Canadian Criminal Process* (1979) 180. See also E Ratushny (WS Tarnopolsky & GA Beaudoin eds) "The Role of the Accused in the Criminal Process" in *The Canadian Charter of Rights and Freedoms* (1982) 335, 359.

⁹¹ 1998 (1) SACR 603 (T). See also *S v Shongwe* 1998 (2) SACR 321 (T); *S v Hudson* 1998 (2) SACR 345 (W).

⁹² *Supra*

⁹³ 1996 (4) SA 187 (CC).

⁹⁴ [1997] 4 All SA 435 (A).

unconstitutionally obtained evidence in accordance with the right to a fair trial. Both cases were decided in terms of the interim Constitution which, unlike the 1996 Constitution, had no explicit provision regarding the admissibility of unconstitutionally obtained evidence. Whilst both cases are consistent with the finding of the court in *S v Zuma*⁹⁵ that the right to a fair trial is broader than the specific rights guaranteed in section 25(3) of the interim Constitution, they cannot be read as conferring a discretion on the court to disregard those rights in determining whether the requirements for the right to a fair trial have been met.

2.95 It is clear from *R v P (MB)*⁹⁶ and *R v Noble*⁹⁷ that in the Canadian context, the prosecution must establish a prima facie case in order to avoid discharge. A prima facie case is “one in which the prosecution case is complete on all inculpatory elements of the offence and sufficient in the sense that a reasonable trier of fact could find that the evidence comes up to proof beyond reasonable doubt”.⁹⁸ McLachlin J⁹⁹ explained the distinction between the application of the presumption of innocence at the close of the state case and at the end of the trial, as follows: At the close of the state case the question to be asked, is whether the evidence, *if believed*, establishes proof beyond a reasonable doubt.¹⁰⁰ At the end of the trial the presiding officer must then consider whether he believes the prosecution evidence. This approach, it was submitted, would be consistent with the presumption of innocence as a constitutional right determining the allocation and standard of proof; a logical consequence of which is that an evidential burden cannot shift to the accused until the prosecution has established a prima facie case.¹⁰¹

⁹⁵ 1995 (1) SACR 568 (CC).

⁹⁶ [1994] SCR 555

⁹⁷ [1997] 1 SCR 874 at [29], [118]-[120].

⁹⁸ P Healy ‘Risk, obligation and the consequences of silence at trial (1997) 2 Canadian Criminal Law Review 385 at 398.

⁹⁹ In *R v Noble* supra at [119].

¹⁰⁰ This accords with Lord Devlin’s statement referring to the evidence required to avoid discharge in *Jayasena v The Queen* [1970] AC 618 at 624: “How much evidence has to be adduced depends upon the nature of the requirement. It may be such evidence, as if believed and if left uncontradicted and unexplained, could be accepted by the jury as proof.” In *Haw Tua Tua v Public Prosecutor* [1981] 3 All ER 14 the Privy Council held that proof beyond reasonable doubt is the test to be applied on a no case submission. See also H Glass “The Insufficiency of Evidence to Raise a Case to Answer” (1981) 55 *Australian Law Journal* 842 at 847 who notes: “No reason appears why the test of sufficiency on a no case submission should be different from the test appropriate when the evidence is concluded. Considerations of principle seem to dictate an identical criterion.”

¹⁰¹ It also accords with test set out in *S v Qozo* supra at 137J, namely: “Is there evidence upon which a reasonable man could convict the accused or is there evidence upon which a reasonable man,

2.95 Skeen¹⁰² points out that the Canadian Supreme Court in *R v Oakes*¹⁰³ held that “the presumption of innocence has at least three components: (i) an accused must be proved guilty beyond a reasonable doubt, (ii) the prosecution must bear the onus of proof and (iii) criminal prosecutions must be carried out in accordance with lawful procedures and principles of fairness”.¹⁰⁴ He states that the discretion to refuse discharge on the basis that the defence evidence might supplement the state’s case “offends against the notion of fairness”.¹⁰⁵ On this basis he asserts that the presumption of innocence is infringed.¹⁰⁶ Whilst agreeing with Skeen that such an approach infringes the right to a fair trial and the presumption of innocence, it is submitted that the presumption of innocence is infringed because to refuse discharge in the absence of a prima facie case absolves the prosecution from overcoming the first hurdle in proving guilt beyond a reasonable doubt. The premature shifting of the evidential burden infringes that part of the presumption of innocence that places the incidence of the burden of proof on the state.

PRELIMINARY RECOMMENDATION

2.96 In the discussion paper it was suggested that the unconstitutionality of section 174 can be cured by redrafting the section so as to require the court to grant discharge in the absence of a prima facie case. However, the Commission’s view was that the case law on the application of section 174 is well developed and in accordance with the constitutional provisions. There are complicating factors which should also be considered such as the cases where two or more accused persons are on trial. Although the constitutional principles will have to be followed, the Commission was not convinced that merely changing the “may” to “must” will necessarily remove the problem. The Commission was of the view that the provisions of section 174 should not be amended and invited comments on the proposal for amendment.

COMMENTS

if he believed it, might convict or evidence upon which a reasonable man acting carefully might convict?”

¹⁰² A Skeen “A Bill of Rights and the Presumption of Innocence” (1993) 9 *SAJHR* 525, 535.

¹⁰³ (1986) 26 DLR (4th) 200 (SCC) at 214.

¹⁰⁴ Skeen op cit 535.

¹⁰⁵ Op cit 535. See also E Du Toit, FJ de Jager, A Paizes, A St Q Skeen, SE van der Merwe *Commentary of the Criminal Procedure Act* (1987, as revised) 22-32F.

¹⁰⁶ Op cit 534.

2.97 The office of the legal component of the SA Police Service agrees that this section should not be amended at this stage owing to it being founded upon well-established judicial precedent which is compatible with the current constitutional provisions.

2.98 The Superintendent General, Department of Education submits that at a stage where the prosecution has presented its case, it is the right of the accused to be found guilty or not guilty on the basis of the evidence before the Court. This view, the Superintendent states, also takes into account the fact that the State must prove its case beyond reasonable doubt without help from an accused. The Superintendent General therefore proposes that section 174 be amended by the substitution of the word "may" in the last sentence, with the word "must".

2.99 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope suggests that the section should read: "If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it shall [may] return a verdict of not guilty."

2.100 Judge Van den Heever is of the view that the approach of Mynhardt J in *Mafokane's*¹⁰⁷ case appears to be commonsensical. She comments as follows:

It prevents the accused from playing the pea-and-thimble game, whereby the moment accused no.1 leaves the dock, his accomplices in their defence testimony pile all the blame on him. When a number of accused are joined in a charge, one should also give the police and prosecution the benefit of a 'presumption of innocence'. They have information on the strength of which they believe the accused to be guilty, and are not abusing court procedure to indulge in a fishing expedition. Often their information is pretty reliable - one or all of the accused told what sounded like the truth when arrested, but that tale cannot be presented to the court as admissible evidence. It was in my experience when still at the Bar customary for the trial judge to refuse discharge of one out of a group of accused. The man seeking discharge is protected by the commonsensical rule about the wariness with which the court assesses the evidence of accomplices.

2.101 The Natal Law Society, taking into account the relevant case law and (1) the accused's right to remain silent, (2) the presumption of innocence, (3) the right against self-incrimination, and (4) the onus of proof being on the state, submitted that:

(a) where there is one accused and at the end of the state case there is no evidence upon

¹⁰⁷

1998 (1) SACR 303 (T).

which the court might make a finding of proof beyond reasonable doubt, the court must acquit the accused on application for such acquittal;

(b) where there are a number of accused and application for discharge is not made in respect of some of them, or is made but is not successful or not likely to be successful, then the application may be refused only if there is a reasonable prospect of one or more of the other accused implicating the accused applying for discharge.

RECOMMENDATION

2.102 The conflicting comments received by the Commission confirm its view that section 174 is not clearly unconstitutional. The Commission recommends that section 174 should not be amended.

SECTION 212: PROOF OF CERTAIN FACTS BY AFFIDAVIT OR CERTIFICATE (1.13)

2.103 Section 212 contains a host of provisions that effectively impose an evidential burden on the accused. Because these are evidential burdens, it is unlikely that they will be found to infringe the presumption of innocence. And any infringement of the right to remain silent will in all likelihood meet the requirements of the limitations clause. However, subsection (10)(a) contains a presumption that imposes a legal burden on the accused: “the measuring instrument in question shall, for the purpose of proving the fact which it purports to prove, be accepted at criminal proceedings as proving the fact recorded by it, *unless the contrary is proved.*”

PRELIMINARY RECOMMENDATION

2.104 In the discussion document the commission recommended that the section be remedied by rewording the presumption so as merely to impose a evidential burden. For example: ‘the measuring instrumentshall ... be accepted at criminal proceedings as prima facie proof of the fact recorded by it.’

COMMENTS

2.105 The office of the legal component of the SA Police Service agrees that subsection 212(10)(a) be rephrased so as to impose an evidential burden upon the accused and that the

current legal burden and the legal presumption upon which it is based be removed.

2.106 The Superintendent General, Department of Education and the Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope support the recommendations by the Commission in respect of section 212.

RECOMMENDATION

2.107 The Commission recommends that section 212(10)(a) be amended so as to impose an evidentiary burden as per the Draft Bill in Annexure A.

SECTION 217: ADMISSIBILITY OF CONFESSION BY ACCUSED (1.14)

2.108 The Constitutional Court in *S v Zuma* 1995 (4) BCLR 401 (CC) held the provisions contained in section 217(1)(b)(ii) to be unconstitutional. (The reverse onus provisions infringing the presumption of innocence).

PRELIMINARY RECOMMENDATION

2.109 The Commission in its discussion document recommended that sections 217(1)(b) and (2) be deleted.

COMMENTS

2.110 The office of the legal component of the SA Police Service, the Superintendent General, Department of Education and the Criminal Law and the Procedure Committee of the Law Society of the Cape of Good Hope support the recommendation that sections 217(1)(b) and (2) be deleted from the text of the Criminal Procedure Act.

2.111 Judge Van den Heever suggests (particularly in the light of the comments by Kentridge J in par 37 and 41 of his judgment in the *Zuma*¹⁰⁸ case), that section 217 be amended, instead of (1)(b) and (2) being deleted. The idea of the proviso, as she understands it, is to make it

¹⁰⁸ 1995 (4) BCLR 401 (CC).

unnecessary for overworked magistrates, “who should surely be trusted not to take a confession from someone who appears unwilling (or bruised), to have to waste time in the witness box instead of on the bench. The magistrate is surely supposed to inquire from the accused why he is making a confession and whether he is happy about doing so, to be able to insert in his record something which indicates that it was indeed made *freely and voluntarily*, as required by (1)(b)(ii).” She proposes replacing the words "be presumed, unless the contrary is proved to have been " in the latter, with "constitute *prima facie* proof until rebutted, that it was". She also proposes that admissions should be included in this section on the same basis and that section 219A should be scrapped.

RECOMMENDATION

2.112 The concerns raised by Judge Van den Heever are considered in the Commission’s investigation into the feasibility of introducing inquisitorial elements into South African criminal procedure. The recommendations arising from that investigation are compatible with the deletion of subsections 217(1)(b) and (2). The Commission confirms its preliminary recommendation that subsections 217(1)(b) and (2) be deleted.

SECTION 219A: ADMISSIBILITY OF ADMISSION BY ACCUSED (1.15)

2.113 The proviso to section 219A mirrors that in subsection 217(1)(b)(ii), it has essentially the same reverse onus infringing the presumption of innocence.

PRELIMINARY RECOMMENDATION

2.114 In the discussion document the Commission recommended that the proviso to subsections (1)(a)(b) and (2) should be deleted.

COMMENTS

2.115 The office of the legal component of the SA Police Services, the Superintendent General of the Department of Education and the Criminal Law and procedure Committee of the Law Society of the Cape of Good Hope agree and support the amendments proposed to section 219A

RECOMMENDATION

2.116 The Commission recommends that the proviso to subsections (1)(a)(b) and (2) should be deleted.

GENERAL COMMENT REGARDING ADMISSIONS AND CONFESSIONS (1.16)

2.117 An argument can be made that if the constitutional privilege against self-incrimination is to be upheld, a distinction should not be drawn between the requirements of admissibility for confessions and admissions, and that both admissions and confessions should be required to be made freely and voluntarily in sound and sober senses and without undue influence.¹⁰⁹ The courts have taken an overly technical approach in distinguishing between admissions and confessions and the reluctance to classify statements as confessions appears to have its origins in judicial disapproval of the requirement that a confession made to a peace officer be reduced to writing.¹¹⁰ This requirement, prior to *Zuma*, was coupled with the proviso that once a confession was reduced to writing in the presence of a magistrate and certain requirements were met it would be presumed to have been made freely and voluntarily, in sound and sober senses and without undue influence. This proviso has been found to be unconstitutional and has been held to be an infringement of the presumption of innocence. The requirement of writing and confirmation in the case of certain peace officers has not provided the intended protection to accused persons as it “has the effect of dropping a veil between the treatment of the accused by his custodians and his resulting confession”.¹¹¹ There would therefore appear to be little reason to retain it. The scrapping of this requirement (subsection 217(1)(a)) should also reduce resistance to the notion of making both admissions and confessions subject to the same requirements of admissibility. Once the distinction between confessions and admissions is removed the necessity of retaining the restrictive and technical common-law interpretation of voluntariness is removed, there being little sense in retaining it when it can be subsumed under the broader umbrella of undue influence. **This issue, however, is addressed by the Commission in its separate investigation into the feasibility of introducing inquisitorial elements into South African criminal procedure.**

¹⁰⁹ See Schwikkard et al *Principles of Evidence* (1997) 195- 199.

¹¹⁰ Ibid 203-227

¹¹¹ See AV Lansdown & J Campbell *South African Criminal Law and Procedure* vol V *Criminal Procedure and Evidence* (1982) 874.

SECTION 237: EVIDENCE ON CHARGE OF BIGAMY (1.17)

2.118 Subsections (1) and (2) contain reverse onus provisions imposing a legal burden on the accused to disprove the fact presumed on a balance of probabilities. (They consequently infringe the presumption of innocence.) Subsection (3) contains an evidential burden.

PRELIMINARY RECOMMENDATION

2.119 In the discussion paper the Commission recommended that the objectives of subsections 237(1) and (2) could be attained by imposing an evidential burden on the accused.

COMMENTS

2.120 The office of the legal component of the SA Police Service, the Superintendent General of the Department of Education and the Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope support the suggestion that the reverse onus provisions in subsections (1) and (2) be rephrased so as to impose an evidentiary burden upon the accused.

RECOMMENDATION

2.121 The Commission recommends that subsections 237(1) and (2) be amended so as to impose an evidential burden only as provided in the draft Bill contained in Annexure A.

SECTION 238: EVIDENCE OF A RELATIONSHIP ON CHARGE OF INCEST (1.18)

2.122 The justification for the reverse onus contained in subsection (1)(b) is presumably that this is something peculiarly within the knowledge of the accused. The Constitutional Court has held that this on its own is not sufficient justification for imposing a reverse onus. It also does not appear that it would be impossible to obtain a conviction in the absence of such presumption.

PRELIMINARY RECOMMENDATION

2.123 In the discussion document the Commission recommended that subsection (1)(b) be deleted or alternatively rephrased so as to impose an evidential burden.

COMMENTS

2.124 The office of the legal component of the SA Police Service, the Superintendent General of Department of Education and the Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope support the recommendation that subsection 1(b) be rephrased so as to impose an evidential burden upon the accused.

RECOMMENDATION

2.125 The Commission recommends that section 238 be amended so as to impose an evidential burden as provided in the draft Bill in Annexure A.

SECTION 240: EVIDENCE ON A CHARGE OF RECEIVING STOLEN PROPERTY (1.19)

2.126 Again the primary justification for the reverse onus in section 240 would be that the fact to be proved is something peculiarly within the knowledge of the accused. And again, the Constitutional Court's approach to the reverse onus does not augur well for this provision. (See also Du Toit 24-116 where it is noted '[w]hether this presumption will survive constitutional attack must be open to serious doubt'.)

It could also be argued that the imposing of an evidential burden could also fulfil the purpose (overcoming the difficulties of proving the offence of receiving stolen property) sought to be achieved by this provision. For example, subsection (3) could be replaced by the following:

Where an accused is proved to have received the property which is the subject of the charge, from a person under the age of eighteen years, at a time when the accused was over the age of twenty-one, this will constitute prima facie proof that the accused knew at the time when he received such property that it was stolen property.

PRELIMINARY RECOMMENDATION

2.127 In the discussion paper the Commission recommended that subsection (3) be deleted.

COMMENTS

2.128 The office of the legal component of the SA Police Service is of the view that an evidential burden can fulfil the purpose sought to be achieved by section 240.

2.129 The Superintendent General, Department of Education supports the recommendations by the Commission in respect of section 240.

2.130 Judge Van den Heever is of the view that subsections 240(l) and (2) are unnecessary and that common-sense evidentiary rules provide that in certain circumstances it is permissible to lead evidence of similar facts. She is of the view that subsection (3) is nonsensical, being based on nothing that she can think of but pure formalism.

RECOMMENDATION

2.131 The Commission recommends that subsection (3) be deleted.

SECTION 243: EVIDENCE OF RECEIPT OF MONEY OR PROPERTY AND GENERAL DEFICIENCY ON CHARGE OF THEFT (1.20)

2.132 Du Toit et al note:

The effect of subsection (1) and in particular the meaning of the words 'shall be proof' is not entirely clear. It could be argued that the entry in the book of account merely constitutes prima facie proof of receipt or that the subsection creates a presumption of receipt which casts on to the accused the onus of proving the contrary on preponderance of probability. Hiemstra submits (at 511) that the latter interpretation was intended.¹¹²

2.133 It can be argued that to ensure constitutional consistency the interpretation that imposes an evidential burden should be favoured. Alternatively the ambiguity can be cleared up by inserting the words 'prima facie' before 'proof', i.e. the section would then read 'shall be prima facie proof'.

PRELIMINARY RECOMMENDATION

¹¹² At 24-119.

2.134 In the discussion paper the Commission was of the view that in light of the different interpretations of the section it should not be amended at this stage. The Commission invited comments on the proposal.

COMMENTS

2.135 The office of the legal component of the SA Police Service is of the opinion that the interpretation of Hiemstra (which is in line with the legal presumption that vague, unclear or ambiguous legislation is to be interpreted in favour of the accused) is more suitable to this situation. The very fact that the phrase *prima facie* proof does not exist within the written text supports the rule that one should not read into a statute a meaning beyond the statute's contextual purpose. In the event of an evidentiary burden being favoured, the text would have to be rephrased so as to include the exact phrase "*prima facie proof*". The SA Police Services submits that the section should be amended to refer to "*prima facie*" proof.

2.136 The Superintendent General, Department of Education proposes that section 243 be amended to reflect an evidential burden.

2.137 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope suggests that subsection (1) should read *an entry in any book of account kept by the accused shall be prima facie proof that such money or such property was received by the accused*. The Committee believes that it is likely to be difficult to keep track of bookkeeping where it is done by more than one person and that, for this reason, bookkeeping records can only be treated as *prima facie* proof.

RECOMMENDATION

2.138 In order to avoid ambiguity and uncertainty the Commission recommends that the section be amended so as to provide for an evidentiary burden as provided for in the draft Bill in Annexure A.

SECTION 245: EVIDENCE ON CHARGE OF WHICH FALSE REPRESENTATION IS ELEMENT (1.21)

2.139 This section was declared unconstitutional in *S v Coetzee* 1997 (4) BCLR 437 (CC).

RECOMMENDATION

2.140 The Commission's preliminary recommendation that the section be deleted was supported by all comments received, and the Commission confirms its recommendation that the section be deleted.

SECTION 249: PRESUMPTION OF FAILURE TO PAY TAX OR TO FURNISH INFORMATION RELATING TO TAX (1.22)

2.141 Section 249 contains another reverse onus which the state would have to justify. It is argued that it would probably be prudent to rephrase the section so as to create an evidential burden.

PRELIMINARY RECOMMENDATION

2.142 In its discussion paper the Commission recommended that the section should not be amended at this stage and invited comments on the proposal.

COMMENTS

2.143 The office of the legal component of the SA Police Service and the Criminal Law and Procedure Committee of the Cape of Good Hope are of the opinion that this section should be rephrased so as to create an evidential burden.

RECOMMENDATION

2.144 In light of the comments received the Commission recommends that this section be amended so as to create an evidential burden.

SECTION 250: PRESUMPTION OF LACK OF AUTHORITY (1.23)

2.145 The reverse onus provision contained in this subsection pertains to offences which fall to be classified as 'regulatory'. The regulatory nature of an offence will be a factor taken into

account in determining whether a reverse onus constitutes a justifiable limitation. The Canadian courts have been reluctant to strike down reverse onus clauses pertaining to regulatory offences. Consequently, it must be concluded that the unconstitutionality of this provision is far from clear. In *S v Fransman*¹¹³ the court held that section 250(1) did not offend the accused's constitutional rights or the presumption of innocence.

PRELIMINARY RECOMMENDATION

2.146 In the discussion paper the Commission concluded that no amendment was necessary.

COMMENTS

2.147 The office of the legal component of the SA Police Service supports the recommendation not to amend this section.

2.148 With regard to subsection 250(1), the Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope suggests that the subsection should read:

“if a person would commit an offence without being the holder of a licence, permit, permission or other authority or qualification, *it shall be prima facie proof* that, at criminal proceedings upon a charge that he committed such an offence, an accused has not been the holder of the necessary authority, unless the contrary is proved”, rather than “an accused *shall be deemed not to have been the holder of the necessary authority*, unless the contrary is proved.”

RECOMMENDATION

2.149 The Commission is not persuaded that the unconstitutionality of the section is sufficiently obvious to require amendment.

SECTION 274: EVIDENCE ON SENTENCE (1.24)

2.150 The ultimate decision as to what constitutes an appropriate sentence is discretionary and not subject to a specified standard of proof. Prior to the amendment of section 277 of the

¹¹³ 1999 (9) BCLR 981 (W).

Criminal Procedure Act,¹⁰¹ there was no onus on either party at the sentencing phase, with the exception of the onus on the accused to prove extenuating circumstances following a murder conviction.¹⁰² Following the amendment of section 277 the Appellate Division held in *S v Nkwanyana*¹⁰³ that when the sentence of death was a competent verdict, section 277(2) required the state to prove extenuating factors and negative the existence of mitigating factors beyond a reasonable doubt. Section 277 has subsequently been struck down on the basis that the death penalty is unconstitutional.¹⁰⁴ In *Du Toit et al* it is argued that there is no reason why the standard of proof stipulated in *Nkwanyana* should not be applied at the sentencing phase in respect of other offences.¹⁰⁵

2.151 There are two possible constitutional grounds that can be used in support of the Du Toit argument: the right to be presumed innocent and the right to freedom and security of person. Lamer CJC, in *R v Pearson*,¹⁰⁶ noted obiter that the presumption of innocence as a rule requiring proof of guilt beyond a reasonable doubt did not apply at the sentencing phase; however, it did apply as a component of fundamental justice. Logically the presumption of innocence cannot be applied as a rule requiring proof of guilt beyond reasonable doubt at the sentencing phase as guilt has already been proved. It is equally difficult to see how the presumption of innocence can be applied as a principle of fundamental justice as there is no justification for continuing to assume innocence. In *S v Dzukuda; S v Tshilo*¹⁰⁷ the Constitutional Court held that while the accused's liberty and security interests were not extinguished during the sentencing phase of the trial, they were reduced in that the presumption of innocence was no longer applicable.¹⁰⁸ However, Ackermann J held that the accused's rights to remain silent and not to testify during proceedings were still applicable at the sentencing stage.¹⁰⁹

¹⁰¹ See s 4 of the Criminal Law Amendment Act 107 of 1990, subsequently repealed by s 35 of Act 105 of 1997).

¹⁰² *Du Toit* 28-4. See also *S v Siebert* 1998 (1) SACR 554 (A).

¹⁰³ 1990 (4) SA 735 (A). See also *S v Khumalo* 1991 (4) 310 (A).

¹⁰⁴ *S v Makwanyane* 1995 (2) SACR 1 (CC).

¹⁰⁵ *Du Toit et al* 28-4A; see also *S v Shepard* 1967 (4) 170 (W).

¹⁰⁶ (1992) 3 SCR 665 (SCC) at [36]-[37].

¹⁰⁷ 2000 (2) SACR 443 (CC).

¹⁰⁸ At [53].

¹⁰⁹ At [40].

2.152 As Schwartz¹¹⁰ notes, there is a distinction between procedures applied in proving criminal liability and the less formal procedures in determining sentence. This, he says, is because “conviction is the basic determination that the defendant has forfeited his freedom and subjected himself to dispositions society makes for its own protection. Sentencing is an altogether different matter”.¹¹¹

2.153 However, whilst the presumption of innocence may not apply at the sentencing phase, this does not mean that other societal interests do not require the prosecution to prove disputed facts beyond a reasonable doubt. Colman J in *S v Shepard*,¹¹² referring to the application of the reasonable doubt rule at the sentencing phase, stated:

To an accused person the sentence is at least as important as the conviction, and it might seem, in a sense, anomalous to give him the benefit of all reasonable doubts before finding him guilty, and then, when dealing with a question which may make a vast difference to his sentence, to place an onus on him so that the Court, if it finds the probabilities equally balanced in relation to some mitigating factor, will punish him as if that fact did not exist.¹¹³

2.154 The Canadian Supreme Court in *R v Gardiner*,¹¹⁴ in holding that disputed facts relevant to sentencing should be proved beyond a reasonable doubt by the prosecution, quoted the

¹¹⁰ Schwartz ‘Innocence - a Dialogue with Professor Sundby’ (1989) 41 *Hastings Law Journal* 153 at 159.

¹¹¹ At 159. Cf Sundby op cit who argues that the presumption of innocence does apply at the sentencing stage. However, his argument is based on those exceptions in American criminal law which permit the onus to be placed on the accused in respect of certain defences or exceptions. In contrast D Dripps “The Constitutional Status of the Reasonable Doubt Rule” (1987) 75 *California Law Review* 1665 at 1703 notes that the decisions of the United States Supreme Court, whilst inconsistent, reflect a less rigorous application of due process safeguards at the sentencing phase (see, for example, *Williams v New York* 337 US 241 (1949)) and argues that consistency would be best achieved by requiring all issues of fact at the sentencing stage to be proved beyond a reasonable doubt.

¹¹² Supra .

¹¹³ At 180G. However, the following comments of Colman J in *S v Shepard* supra at 180H also deserve noting: “But on the other hand, it could hardly be sound policy, or conducive to the proper administration of justice, to place an onus on the state to negative, beyond all reasonable doubt, all mitigating circumstances. A prosecutor is not always able to foresee all the mitigating factors which might be urged in favour of an accused person; and when such a factor is put forward, either in argument or in evidence given by or on behalf of the accused, he is not always equipped to test its factual validity, or to counter the assertion if it is false. And that may be true of matters closely related to the gravity of the offence, as well as matters personal to the accused. See also S Sundby “The Virtues of a Procedural View of Innocence - a Response to Professor Schwartz” (1989) 41 *Hastings Law Journal* 171.

¹¹⁴ [1982] 2 SCR 368 (SCC) at 415.

following passage with approval:

[B]ecause the sentencing process poses the ultimate jeopardy to an individual ... in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process.¹¹⁵

2.155 Consequently, it is possible to argue that the right to freedom and security of person requires that that an onus be placed on the state at the sentencing phase at least in respect of establishing the presence of aggravating factors and the absence of mitigating factors. Another approach may be to consider the sentencing stage a stage of the trial where the ordinary rules of evidence and argument do not necessarily apply. The function of the judicial officer would then be to conduct an investigation into the matter in which case it will no longer be-party driven.

PRELIMINARY RECOMMENDATION

2.156 In the discussion paper the Commission was of the view that this section could not be classified as clearly unconstitutional. However, any potential conflict with the constitution could easily be reduced by amending section 274(2) to make provision for the prosecution to address the court first on the matter of sentence. The Commission recommended that the provision should be retained as it is.

COMMENTS

2.157 The office of the legal component of the SA Police Service agrees that this section should be retained as it is.

2.158 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope supports the proposal that an onus be placed on the state at the sentencing stage as per *R v Gardiner*.

RECOMMENDATION

¹¹⁵ From JA Olah "Sentencing: The Last Frontier of the Criminal Law" (1980) 16 CR (3d) 97 at 121.

2.159 In light of the holding of the Constitutional Court in *S v Dzukuda; S v Tshilo*¹¹⁶ that the accused retains his right to remain silent at the sentencing phase the Commission recommends that the section be amended to make provision for the prosecution to address the court first on the matter of sentence.

SECTION 332: PROSECUTION OF CORPORATION AND MEMBERS OF ASSOCIATION (1.25)

2.160 Subsection 332(5) was declared invalid by the constitutional court in *S v Coetzee*¹¹⁷ as an unjustifiable infringement of the presumption of innocence. A number of other subsections in section 332 need to be reconsidered in the light of *S v Coetzee* and the Constitution.

PRELIMINARY RECOMMENDATION

2.161 In its discussion paper the Commission recommended that subsection 2(d) should be deleted unless (5) was redrafted so as to pass constitutional muster.

2.162 The Commission noted that in terms of the reverse onus contained in subsection (4) 'any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his custody or under his control, shall be presumed to have been made or kept or to have been in his custody or under his control within the scope of his activities as such director, servant or agent, unless the contrary is proved'; and that this reverse onus only operates for the purposes of subsection (3) which provides that such a record will be admissible in evidence against the accused in criminal proceeding against a corporate body.

2.163 The Commission noted further that the constitutionality of this presumption will come into question when proof of custody or the control of a document is relevant to a conviction. For when it is so relevant placing the onus on the accused to disprove that the record was kept, made or kept in custody or under control within the scope of his activities as director, servant or agent will permit conviction despite the existence of a reasonable doubt. It was submitted that the state may have difficulty establishing that the convictions would be thwarted without this presumption. The Commission recommended that the presumption should either be deleted or rephrased so

¹¹⁶ Supra.

¹¹⁷ 1997 1 SACR 379 (CC).

as to impose no more than an evidential burden.

2.164 The Commission found that subsection 6(b) constitutes an exception to the hearsay rule and would appear to impose a legal burden on the accused to prove on a balance of probabilities that he had no knowledge of the said document, memorandum, book or record and was in no way party to the drawing up of such document or memorandum or the making of any relevant entries in such book or record. It noted that the subsection appears unduly broad and to lack internal rationality. Furthermore, it is likely that its purpose could be achieved by applying the ordinary rules applicable to documentary hearsay.

It recommended that this subsection should be deleted.

2.165 The Commission noted that subsection (7) has essential the same format as subsection (5) and that consequently it must be concluded that this section would also be declared invalid if it were to come before the Constitutional Court.

2.166 The Commission was of the view that subsection (8) was not unconstitutional, but that subsection (7) would have to be redrafted so as to comply with the Constitution if subsections 8 and 9 were to make any sense.

2.167 The Commission found that subsection (9) was subject to the same criticism as subsection (4).

COMMENTS

2.168 The office of the legal component of the SA Police Service is of the opinion that subsection 2(d) should be retained and that subsection (5) should be redrafted.

2.169 The office of the legal component of the SA Police Service agrees with the suggested amendment to subsection (4) which makes provision for an evidential burden.

2.170 The office of the legal component of the SA Police Services is of the view that subsection 6(b), should not be deleted. It asserts that there is value in the argument that the accused within the ambit of this provision has knowledge peculiar to himself as regards these documents, records etc.

2.171 The office of the legal component of the SA Police Service recognises that subsection (7) creates an presumption of guilt and places a reverse onus on any member of such an association or corporate body, and proposes that both subsections (5) and (7) be redrafted.

2.172 The Superintendent General, Department of Education and the Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope support the recommendations made in the discussion paper.

2.173 Judge Van den Heever proposes that in subsection 332(2)(d) one should merely replace the last words of this, namely "in terms of subsection (5)", with "also in his personal capacity either jointly with or separately from the corporation" and then delete subsection (5).

2.174 As regards subsection (4), Judge Van den Heever is of the view that the matter involved is peculiarly within the knowledge of the accused and she would be inclined to leave it as it is, unless perhaps the accused is compelled to state at the plea stage already what his claim to absolution is based on. Judge Van den Heever states that the same applies even more so to (6). As she reads this, the reverse onus relates to admissibility, and seems to reflect no more than a common sense inference. She notes that two kinds of documents are listed: those kept (by others, that is) in the ordinary course of the business of the company, and those in the custody and control of the accused himself in his official capacity. And she expresses the view that it should not be difficult for the accused who knows how the company was run, to establish that relevant documents of the first kind were never drawn to his attention. It would be almost impossible, she says, for the prosecution - particularly if caught by surprise at the trial - to show that they were.

In regard to the second type of document, she notes that logic enables one of two inferences to be drawn as to his alleged ignorance: that he is not telling the truth and was aware of matters he would be aware of if he were doing his job properly; or that he was not doing the job for which he was getting paid. It would be unfair if he could rely on a reasonable possibility that he was incompetent, to have the documentation ruled inadmissible against him. He should give credible details of wherein his failing consisted. She has no problem with the "reverse onus" here, or in subsection (9). She agrees that subsection (7) must suffer the same fate as subsection (5). She proposes that perhaps the present subsection (7) and (8) could be combined to state that just as in the case of the fictional entity of a corporation, the individuals through whom an association of persons conducts its business are liable for offences committed in trying to further

its aims, and that they are subject to the same rules relating to the admissibility of documents as apply in the case of corporations.

RECOMMENDATION

2.175 The Commission is in a agreement with Judge Van den Heever that subsection 2(d) can be amended by deleting the words 'in terms of subsection (5)' and replacing them with the words 'also in his personal capacity either jointly with or separately from the corporation'. It is recommended that subsection 2(d) be amended as provided in the draft Bill in Annexure A.

2.176 In light of the comments received the Commission recommends that subsection (4) be amended so as to impose an evidential burden as provided in the draft Bill in Annexure A.

2.177 Owing to the multiplicity of grounds on which subsection (5) was found to be unconstitutional in *S v Coetzee* 1997 (3) SA 527 (CC), the Commission is of the view that subsection (5) cannot be rescued by amendment and must be deleted.

2.178 In light of the comments received the Commission recommends that subsection 6(b) be amended so as to impose an evidential burden as provided in the draft Bill in Annexure A.

2.179 For the same reasons provided in respect of subsection (5), subsection (7) must be deleted.

2.180 The Commission recommends that subsection (8) be amended so as to provide for the admission or records without reference to subsection (7). See the draft Bill in Annexure A.

2.181 In light of the comments received the Commission recommends that subsection (9) be amended so at to impose an evidential burden as provided in the draft Bill in Annexure A.

SECTION 337: ESTIMATING AGE OR PERSON (1.26)

2.182 This section may not be used where age is an essential element of the offence charged; if it were it would clearly be an infringement of the presumption of innocence. At the sentencing stage its constitutionality is less clear. At the sentencing stage, once the presiding officer has made an estimation of age, the accused must prove on a balance of probabilities that the

estimated age is incorrect. Although section 35(3) does not apply at the sentencing phase (see discussion under section 274 above at 1.24), it may be argued that the right to freedom and security of person requires that such an essential fact be proved beyond reasonable doubt.

PRELIMINARY RECOMMENDATION

2.183 The Commission recommended that the section be rephrased so that it only imposed an evidential burden.

COMMENTS

2.184 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope, the office of the legal component of the SA Police Services and the Superintendent General of the Department of Education support the amendments proposed to section 337 in the discussion paper.

2.185 Judge Van den Heever is of the view that section 337 is confusing and the draft at page 95 of the discussion paper is more so. She asks when and how will "the correct age" be proved, and by whom. She states that there are many people in South Africa whose births have not been registered, whose parents are illiterate, etc. She explains that the purpose behind the present section is to provide that judicial opinion based on personal observation may be the "best evidence" available when all else fails. She cannot envisage a prosecution being instituted for "something like having intercourse with a girl under the age of consent or under 16, without the prosecutor being in possession of adequate evidence to establish what is an indispensable component of the offence charged". She cannot think, off-hand, of matters in which the age of an accused is relevant to his conviction, except for deciding whether he is *doli incapax*, or under 14 and so presumptively incapable of intercourse. "An accused may perhaps give his age as younger than it is, to get the benefit of being treated as a juvenile; or as older than he really is, to keep his macho pals company whatever their destination may be." She is of the view that the section does not necessarily burden the accused with a "reverse onus" - it does not say who may "prove" the judicial estimate to have been wrong. She feels that the section should spell out what it envisages: for example, what "person" it has in mind, and for what purposes an estimate will do. She accordingly recommends that the section be amended, but to obtain clarity, not because of any conflict with the Constitution.

RECOMMENDATION

2.186 The Commission agrees that the amendment proposed in the discussion paper lacks clarity. Although Judge Van den Heever is correct that the presumption will not always operate against the accused, the fact remains that it may. The Commission is of the view that clarity can be achieved through redrafting as provided in the draft Bill in Annexure A.

SECTION 338 (1.27)

2.187 The reverse onus provision in this section requires the accused to establish on a balance of probabilities that the failure to produce a specified document was not due to her fault. If the accused fails to establish this on a balance of probabilities he or she will be guilty of an offence and be fined (up to R300) or imprisoned (up to 3 months).

2.188 It is argued that this reverse onus is unconstitutional for the same reasons set out under the discussion of section 170.

PRELIMINARY RECOMMENDATION

2.189 In the discussion paper the Commission rejected the suggestion that an evidential burden replace the reverse onus provision and recommended that an amendment was not necessary.

COMMENTS

2.190 The office of the legal component of the SA Police Service agrees that the provision should not be amended at this stage.

RECOMMENDATION

2.191 It is unclear what amendment is supported by the Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope. However, in the absence of substantial proposals to the contrary the Commission affirms its preliminary recommendation that section

338 does not require amendment.

CHAPTER 3

EQUALITY AND ACCESS TO COURTS

EQUALITY

9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection(3).

National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

3.1 The Constitutional Court in *Harksen v Lane NO*¹¹⁸ set out the stages of an enquiry into a violation of the equality clause as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1) [now s 9(1)]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to 'discrimination'. This requires a two stage analysis: (b)(i) Firstly, does the differentiation amount to 'discrimination'. If it is on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human being or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2) [now s 9(3) and (4)].

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

3.2 As noted by De Waal et al¹¹⁹ '[a] purposive approach to constitutional interpretation means that section 9 must be read as grounded on a substantive conception of equality'. In *President of the Republic of South Africa v Hugo*¹²⁰ the court held:

We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

ACCESS TO COURTS

34 Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or where appropriate, another

¹¹⁸ 1998 (1) SA 300 (CC) at [53].

¹¹⁹ J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* 4 ed (2001) 200.

¹²⁰ 1997 (4) SA 1 (CC) at [41].

independent and impartial tribunal or forum.

SECTION 7: PRIVATE PROSECUTION ON CERTIFICATE NOLLE PROSEQUI & SECTION 9: SECURITY BY PRIVATE PROSECUTOR (2.1)

3.3 One of the comments received by the Commission, prior to the publication of the discussion document, raised the possible difficulties that may arise by requiring a private prosecutor to provide security for costs. In principle there can be no objection to this requirement as it protects against abuse of process and protects the accused from the whims of a vexatious litigant. Also it is not clearly discriminatory as it treats all potential private prosecutors the same. However, its effect is to deny the indigent complainant access to court where the state declines to prosecute and in this way deprives the complainant of equal benefit to the law.

PRELIMINARY RECOMMENDATION

3.4 In the discussion paper the Commission recommended that section 9 be amended so to allow waiver or reduction of security in the case of the indigent complainant. It also noted that subsection 7(1)(b) &(c) require amendment in that they contain different *locus standi* provisions for men and women and consequently discriminate on the basis of gender. It suggested that subsection (1)(b) be amended so as to confer equal standing to spouses. In the event of such an amendment it would be unnecessary to refer to 'the wife' in subsection (1)(c).

COMMENTS

3.5 The office of the legal component of the SA Police Service agrees with the amendments proposed by the Commission.

3.6 Judge L Van den Heever, does not think that sections 7 and 9 are unconstitutional. She argues that if an indigent person is regarded as "deprived" of equal access to the courts because he cannot put up security for a private prosecution, there never can be equal access to our courts. The example she gives in support of this contention is as follows: one accused is dependant on the junior counsel provided by Legal Aid, or has to look after himself to avoid prejudicing the material interests of the family he supports, another can afford a silk-plus junior to defend him. She notes that a certificate of *nolle prosequi* almost invariably means that the State has

insufficient evidence to found a successful prosecution. She can think of no reason why a private individual should be absolved from security in a matter such as a private prosecution, unless the person to be charged himself gets decent legal aid to defend him against a suspect charge.

3.7 She does not understand subsection 7(l)(b) or (c) to discriminate on the grounds of gender. In her view the section seems to envisage alternative prosecutors, not to suggest that [only] a husband may prosecute for an injury to his wife (and a wife falls under the classification in (1)(a)). She states that the section does not aim at damages, but at retribution, as indicated in subsection (c).

RECOMMENDATION

3.8 In the absence of substantive objections to the redrafting of section 7 the Commission confirms its preliminary recommendation as provided for in the draft Bill in Annexure A.

3.9 Although Judge Van den Heever is unfortunately correct in stating that there can “never ever ... be equal access to our courts”, she is of course referring to the limits imposed by the reality of budgetary constraints on the substantive right to state resources on the part of indigent persons. However, this does not mean that the criminal justice system should not strive to facilitate equal access within those limits. The Commission recommends that section 9 be amended as suggested in the discussion document and as provided for in the draft Bill in Annexure A.

SECTION 29: SEARCH TO BE CONDUCTED IN DECENT AND ORDERLY MANNER (2.2)

3.10 A comment submitted prior to the drafting of the discussion paper pointed to difficulties with the implementation of section 29. The section makes provision for women to be searched by women but is silent as regards men. It is submitted that there can be little disadvantage in requiring men to be searched by men. This may well be necessary to ensure that this provision complies with the equality and dignity provisions. It may also assist in establishing that a search is a justifiable infringement of the right to privacy.

PRELIMINARY RECOMMENDATION

3.11 The Commission recommended that the section be amended so as to protect the dignity of both men and women.

COMMENTS

3.12 The office of the legal component of the SA Police Service is of the opinion that an amendment to this section is necessary.

3.13 Judge Van den Heever does not recommend any amendments to section 29.

3.14 Mr D Lambrechts, a legal tutor, is of the view that the application of section 29 is unclear. It is unclear whether a male person shall be searched by a male person only. It is also not clear who may accompany a person conducting a search.

RECOMMENDATION

3.15 The Commission recommends that section 29 be amended as suggested in the discussion document and as provided for in the draft Bill in Annexure A.

SECTION 190: IMPEACHMENT OR SUPPORT OF CREDIBILITY OF WITNESS (2.3)

3.16 The difficulty with this section lies in the contents of some aspects of English law (as understood and applied in South African on the 30 May 1961) made applicable by subsection (1). (Subsection (2) is a departure from English law.)

3.17 We have inherited from English law the contentious sexual offence exception to the rule that previous consistent statements are irrelevant. In terms of this exception evidence that the complainant in a sexual offence case made a complaint soon after the alleged offence is admissible. It has been argued that the admission of such evidence favours the complainant unfairly in that the accused is prohibited from leading similar evidence. Conversely it is criticised on the basis that it enables the defence to exploit the complainant's failure to complain timeously in order to cast doubt upon her credibility. The negative inference that may be drawn from the complainant's failure to complain timeously reflects attitudes formulated in a time when there was little understanding of the psychology of the rape survivor.

There are many psychological and social factors which may inhibit a rape survivor from making a complaint, consequently the absence of a complaint can never be a reliable criteria in assessing credibility.¹²¹ Two recent High Court cases illustrate the contradictions and inequality in treatment arising from his exception. In *S v M*¹²² Donen AJ did not draw a negative inference from the complainant's failure to report the rape at the first available opportunity on the basis that the failure to report was consistent with the trauma experienced by a person who had been raped. On the other hand Cillie J in *S v De Villiers*¹²³ found that the failure to report the rape at the first reasonable opportunity was a factor undermining the complainant's credibility.

3.18 It was submitted that this exception has no rational basis and results in a category of complainants not being afforded equal protection and benefit of the law. As the exception has no rational basis it cannot meet the requirements of the limitations clause. It was submitted that a further subsection be added to section 190 prohibiting the use of previous consistent statements by complainants in sexual offence cases except where it is suggested that a witness's story is a recent fabrication.

PRELIMINARY RECOMMENDATION

3.19 In its discussion paper the Commission was of the view that no amendment was necessary.

COMMENTS

3.20 The office of the legal component of the SA Police Service supports the recommendation to retain section 190 of the Criminal Procedure Act without an amendment.

RECOMMENDATION

3.21 The Commission recommends that no amendment be made.

SECTION 191: PAYMENT OF EXPENSES OF WITNESS (2.4)

¹²¹ See generally Schwikkard in Jagwanth et al *Women and the Law* (1994) 198 -202.

¹²² 1999 (1) SACR 664 (C) at 669f-l.

¹²³ 1999 (1) SACR 297 (O) at 306a-c.

(See also discussion of section 179 at 5.1 below.)

3.22 Steytler¹²⁴ asserts that this section is discriminatory. “While a state witness is entitled to witness fees (over and above travelling and transport costs) unless the court directs otherwise, a witness for the defence will receive travelling and transport expenses only if the court makes such an order.”

3.23 Steytler¹²⁵ also notes:

Where an indigent accused who is not in custody, is arraigned at a place far from home, it may be difficult for him or her to be and remain present due to the attendant travel and subsistence costs. At present there is no statutory duty on the state to provide for such cost; the duty applicable to state and defence witnesses excludes an accused. In *S v Maki(2)*¹²⁶ the Court found that this was grossly unfair for an accused on bail and recommended that the matter should receive legislative attention. It may also be argued that the effective exercise of the right to be present at trial imposes a positive constitutional duty on the state in these circumstances to provide such accused with an adequate subsistence and travel allowance.

PRELIMINARY RECOMMENDATION

3.24 In the discussion paper the Commission was of the view that the discriminatory effects of s 191 could be removed by deleting subsection (2) and inserting the following words in subsection (1) “Any person who attends criminal proceedings as a witness for the State or defence shall be entitled...”

3.25 The Commission felt that the proviso to subsection (1) is sufficient to prevent abuse of this procedure.

COMMENTS

3.26 The office of the legal component of the SA Police Service agrees with the suggested amendment in the Draft Bill, but is concerned as to the extent of the financial implications that may result as a consequence of such an amendment.

¹²⁴ N Steytler *Constitutional Criminal Procedure* (1998) at 355 fn96.

¹²⁵ Op cit 297.

¹²⁶ 1994 2 SACR 643 (E) 645.

3.27 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope agrees and supports the amendments proposed to section 190.

3.28 Judge Van den Heever, recommends that “and/or the accused himself if he has been released on bail” be added to section 191(3).

RECOMMENDATION

3.29 The Commission recommends that the section be amended as provided in the discussion document taking into account Judge Van den Heever’s recommendation in 3.28.

SECTION 269: SODOMY (2.5)

3.30 This section needs to be deleted in light of the constitutional invalidation of the crime of sodomy in *National Coalition for Gay & Lesbian Equality v Minister of Justice*.¹²⁷

3.31 In *National Coalition for Gay & Lesbian Equality v Minister of Justice*¹²⁸ the court held that because of the conclusion that criminalizing sodomy is unconstitutional it necessarily follows the inclusion of sodomy in the Schedule is inconsistent with the Constitution.

PRELIMINARY RECOMMENDATION

3.32 The Commission recommended that the section be deleted.

COMMENTS

3.33 All comments received supported the Commission’s recommendation that the section be deleted.

RECOMMENDATION

¹²⁷ 1998 (2) SACR 102 (W).

¹²⁸ Supra.

3.34 The Commission confirms its preliminary recommendation.

CHAPTER 4

THE RIGHT TO A FAIR TRIAL

35(3) Every accused has a right to a fair trial, which includes the right

...

(o) of appeal to, or review by, a higher court.

4.1 The purpose and content of this right is set out by Steytler¹²⁹ as follows:

'To err is human; thus protection against error is necessary.' Judicial officers are fallible with regard to the finding of fact or law. Moreover, they may reasonably differ in their conclusions. A court once removed from the heat of a trial may also be better able to judge the rationality of factual conclusions, the correct finding of the law and the fairness of the proceedings. Through appeal and review proceeding consistency and uniformity in the application of the law may be achieved in furtherance of equality before the law. The right to appeal or review, although seldom protected in constitutions, recognises these realities and values. It is an essential component of a deliberate and rational decision-making process, a core characteristic of a judicial system which gives expression to the foundational value of the rule of law.

...

The content of the right of appeal to or review by a higher court is not immediately apparent. 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 could be extracted and accorded constitutional status. Those include (a) reconsideration of a court decision (or a review of proceeding) by a higher court, (b) a reconsideration of the merits of decisions on law or fact (or fairness of the proceedings) on the basis of the full record of the proceedings (and such additional information as need be), (c) the hearing of the appeal or review only after the completion of the case, and (d) the exercise of the right within reasonable time limits. In addition, the constitutional right should be limited to a one-level appeal or review process and an undefended accused should be duly informed about the right.

4.2 There can be little doubt that informing an unrepresented accused, who is frequently indigent and ignorant of the law (and who may also have been refused legal aid) is going to do little to further the substantive right of appeal or review. To date the existence of procedures for

¹²⁹ Op cit 393-4.

automatic review have significantly contributed to creating a substantive right to review.

SECTION 302: SENTENCES SUBJECT TO REVIEW IN THE ORDINARY COURSE AND SECTION 303: TRANSMISSION OF THE RECORD (3.1)

4.3 These two sections would appear to be constitutionally consistent but unfortunately they are likely to be repealed by virtue of section 2 Criminal Procedure Amendment Bill B7-99.

4.4 This Amendment Bill does away with automatic review “where an unrepresented accused person is sentenced by a magistrate with less than seven years experience, to a fine exceeding R2 500 or to imprisonment exceeding three months and by a magistrate with more than seven year’s experience, to a fine exceeding R5 000 or to imprisonment exceeding six months”.

4.5 The effect of this is to deny many indigent accused the right to review and thus denying such accused the equal benefit of the law. The abolition of automatic review will also undermine the normative effects of section 302 on magistrates’ conduct. See *S v Lukhandile*¹³⁰ in which the court emphasised the merits of automatic review.

COMMENTS

4.6 The office of the legal component of the SA Police Service is not in support of the proposed amendments as indicated in clause 2 of the Amendment Bill. They argue that denial of the right to review is unconstitutional.

4.7 Judge Van den Heever is not in favour of the abolition of automatic review.

4.8 The Natal Law Society proposes that the right to automatic review should not be done away with.

RECOMMENDATION

¹³⁰ 1999 (1) SACR 568 (C).

4.9 There is clear support for the view that the right to automatic review should be retained.

CHAPTER 5

THE RIGHT TO A PUBLIC TRIAL

35(3)(c) Every accused person has the right to a fair trial, which includes the right to a public trial before an ordinary court;

5.1 Steytler¹³¹ 251 describes the content of the right to a public trial as follows:

A trial is public when members of the public, including the media, have access to the courtroom and may report on the proceedings. A prerequisite for a public hearing is that the public knows when the proceedings are scheduled...

SECTION 153: CIRCUMSTANCES IN WHICH CRIMINAL PROCEEDINGS SHALL NOT TAKE PLACE IN OPEN COURT (4.1)

5.2 Section 153 constitutes a prima facie infringement of subsection 35(3)(c) of the Constitution – the right to a public trial before an ordinary court. However, the grounds enumerated in section 153 for holding criminal proceedings in camera coincide with interests internationally recognised as overriding the right to a public trial.¹³² Consequently, it is likely that subsections 153(1) and(2) will pass constitutional muster. However, subsection 153(3) may be considered over-broad. It would appear to be directed at protecting the privacy of victims. The offences of indecency and extortion (and related statutory offences) may arise out of facts which do not always demand that the privacy of the victim and/or witnesses trump the right to a public trial. Section 153(3) confers a discretion on judicial officers whether to order that the hearing be heard in camera. However, the scope of the discretion is defined by the nature of the offence alone. It is suggested that the potential over-breadth of subsection 153(3) could be remedied by specifying criteria to be considered in the exercise of the courts discretion.

¹³¹ Op cit 251.

¹³² Generally see Steytler op cit 247-249.

PRELIMINARY RECOMMENDATION

5.3 In its discussion paper the Commission recommended that the provision should be retained unchanged.

COMMENTS

5.4 The office of the legal component of the SA Police Service does not agree that this section should be retained unchanged. They assert that subsection (3) is too vague and the nature of the offence should not be the only guideline in deciding whether to hold the trial in camera.

5.5 Judge Van den Heever does not recommend that criteria should be stipulated in section 153(3). She argues that “once one starts spelling out detail, one starts an avalanche”.

RECOMMENDATION

5.6 In light of the conflicting comments received the Commission confirms its initial recommendation that it is not necessary to amend section 153.

SECTION 154: PROHIBITION OF PUBLICATION OF CERTAIN INFORMATION RELATING TO CRIMINAL PROCEEDINGS (4.2)

5.7 Section 154 is in potential conflict with section 16(1)(a) of the Constitution which guarantees the freedom of the press and other media, as well as the right to a public trial (subsection 35(3)(c)), in so far as media access constitutes a component of a public trial. However, the same considerations which apply to section 153 will no doubt assist section 154 in passing constitutional muster (but subject to the same doubts expressed in relation to subsection 153(3)). The proviso in subsection 154(1) permitting publication of the name of the accused, the charge, plea, verdict and sentence together with the provisos contained in subsections 154(2)(a) and (3) conferring a discretion on judicial officers to allow publication where it would be just and equitable, lend weight to the view that section 154 constitutes a reasonable limitation of the abovementioned rights. However, subsection 154(2)(b) has no such proviso and would consequently be more vulnerable under a proportionality inquiry.

5.8 Steytler¹³³ makes the following comments in relation to subsection 154(2)(b):

This blanket prohibition is constitutionally questionable. While the objective of protecting the victim is legitimate, the sweep of the prohibition is over broad. The offences subject to the prohibition cover a wide array of conduct and not all of which may need to be shielded from the public view. It is not apparent why the ban must apply up to the pleading stage (which could take a considerable time after the first court appearance). It is also unclear why all information should be banned. While the identity of the victim should be protected the public may have a legitimate interest in knowing about the incident and the identity of the accused. Finally, the broad sweep of the prohibition is compounded by the fact that the court has no discretion to decide on the publicity of the proceedings until the accused pleads to the charge.

5.9 It is submitted that purpose of the provision is to prevent publication prior to a court ruling in terms of section 153(3) and presumably the reason for extending the blanket prohibition to the plea stage is to protect the accused from the stigmatization that might arise from a spurious complaint and to give the court an opportunity to make a ruling in terms of subsection (3). After the plea the public will have full access if there is no subsection (3) ruling, and where there is a subsection (3) ruling the court has a discretion in terms of section 154 (2)(a) to authorize the publication of such information which he/she considers just and equitable. If it is accepted that the interests protected by section 154(2)(b) are legitimate it is likely that this section will meet the requirements of the limitations clause.

PRELIMINARY RECOMMENDATION

5.10 In the discussion paper the Commission expressed the view that there is no immediate necessity to consider redrafting section 154. (See also section 335A)

COMMENTS

5.10 The office of the legal component of the SA Police Service agrees that no amendment of this section is currently necessary.

RECOMMENDATION

¹³³ Op cit 255.

5.11 The Commission recommends that the provision should be retained unchanged.

THE RIGHT TO ADDUCE AND CHALLENGE EVIDENCE AND ADEQUATE FACILITIES TO PREPARE A DEFENCE

Section 35(3) Every accused person has the right to a fair trial which includes the right-

(b) to have adequate time and facilities to prepare a defence;

...

(i) to adduce and challenge evidence

6.1 Steytler¹³⁴ describes the content and purpose of the right to have adequate facilities to prepare a defence as follows:

Equality of arms, as one of the underlying principles of the fair trial, becomes illusory where there is a vast disparity of resources between the prosecution and an accused. The former has all the state's resources of investigation at its disposal, while the latter has only that which he or she can afford. The disparity in arms is most acute where the accused is indigent and in custody. The contest between the state and an accused becomes more even when evidence in the possession of the prosecution, which may assist the accused in the preparation of a defence, is placed at the latter's disposal. Similarly access to other state facilities may, ameliorate the position of the indigent accused.

...

The words 'facilities' means, the Namibian High Court noted in *S v Nassar*¹³⁵ 'facilitating or making easier the performance of an action'. The right to 'have ... facilities' implies a claim against someone or somebody to facilitate or make easier the preparation of a defence. In the context of the Bill of Rights the claims are certainly against the state, imposing a positive a duty on it to assist. As the word 'facilities' is not self-limiting, it holds the potential of being expansively interpreted to place an accused in a position similar to that of the prosecution, with state-appointed investigators, access to laboratory expertise, expert witnesses, etc. The state's obligations are, however limited in three ways.

First, as the right arises only when an accused does not have access to a particular facility, an accused must show a particular need. This requirement will be met most readily by indigent and imprisoned accused who cannot afford a particular facility. Second, the need must relate to the preparation of a defence. The onus will be on the accused to show why a particular facility is required. Third, the state's obligation is confined to the provision of facilities that are 'adequate'. The adequacy of the offered facility falls to be determined by the court and is not dictated by the accused.

6.2 Steytler¹³⁶ sets out the contents of the right to adduce and challenge evidence:

¹³⁴ Op cit 235-6.

¹³⁵ 1995 1 SACR 212 (Nm) 239b.

¹³⁶ Op cit 346-347, 354.

The right to adduce and challenge evidence lies at the heart of the criminal trial, namely establishing the truth about the guilt or innocence of an accused. The right also applies to all aspects of court proceedings where the court makes a factual finding. In view of the importance of the right, few limitations are readily accepted. This right is reinforced by the right to have access to statements of state witnesses in order for an accused to exercise the right to adduce and challenge evidence in an effective way.

The right to challenge and adduce evidence is a composite right which is given content in a number of rules. Cross-examination, for example, entails both eliciting favourable evidence from witnesses (adducing evidence) and undermining the value or incriminating evidence (challenging evidence). By the same token, calling a defence witness both challenges the state evidence and adduces evidence in reply. The right is discussed in terms of these two active defence rights.

...

The primary interest of the confrontation clause in the Sixth Amendment, the US Supreme Court held in *Douglas v Alabama*¹³⁷ is the right of cross-examination. The same is true in South Africa; the right to challenge evidence includes the right to cross-examine. A prerequisite for cross-examination is that all evidence is produced in court and witnesses testify *viva voce*. Where an accused has been deprived of the opportunity to cross-examine a witness due, for example, to the latter's death, the use of such untested evidence will result in the infringement of this constitutional right.

An accused has the right to cross-examine state witnesses and any witness called by a co-accused or the court. Presiding officers must inform undefended accused about the right and how to exercise it. The right should be conveyed to accused persons before the first state witness testifies to allow them to listen to the evidence with cross-examination in mind. The information given must appear from the record to enable a court on review to assess its correctness and adequacy.

Both at common and statutory law, an accused does not have an absolutely free hand to cross-examine at will. Under the Bill of Rights these restrictions are either inherent to the right itself or require justification in terms of the limitation clause.

...

The right to call witnesses is one of the core principles of a fair trial. In the words of Justice Stevens in the decision of *Taylor v Illinois*¹³⁸:

'Few rights are more fundamental than that of an accused to present witnesses in his own defense. Indeed, this right is an essential attribute of the adversary system itself.'

This right, codified in the CPA, provides that an accused may testify and/or call any witness for the defence, and when undefended, must be informed by the court of this right. The court must also afford an accused the opportunity to exercise this right. An accused is also a witness at his or her own calling he or she should also be informed of this right. Where undefended accused have made a plea explanation in terms of section 115 CPA, the court must inform them, in order to ensure an intelligent exercise of the right to adduce evidence, that such a statement did not constitute evidence, and if they want to testify, they must do so under oath.

In *S v Gwala*¹³⁹ Didcott J held that the 'accused had an absolute right to call the witness', a right which was not dependent on permission from the magistrate 'nor qualified in any other way'. Whether or not this dictum accurately reflects the common law, the question

¹³⁷ 380 US 415 1965.

¹³⁸ 484 US 400 (1988) 408.

¹³⁹ 1989 4 SA 937 (N) 938G.

must nevertheless be asked whether there are inherent qualification of the constitutional right to call a witness.

SECTION 166: CROSS-EXAMINATION AND RE-EXAMINATION OF WITNESSES (5.1)

6.3 If section 166(3)(a) infringes the right to challenge evidence, it is clearly a justifiable limitation.¹⁴⁰

6.4 However, it was submitted to the Commission that it may be worth considering including an instruction to presiding officers regarding advice to the unrepresented accused. The Appellate Division held in *S v Tyebela*¹⁴¹ that the accused's rights of cross-examination should be explained to them and some indication given as to how cross-examination should be conducted.¹⁴²

PRELIMINARY RECOMMENDATION

6.5 In its discussion paper the Commission recommended that the provision should be retained unchanged and invited comments on the proposal.

COMMENTS

6.6 The office of the legal component of the SA Police Service agrees that this section be retained unchanged.

RECOMMENDATION

6.7 The Commission recommends that the provision should be retained without amendment.

SECTION 179: PROCESS FOR SECURING ATTENDANCE OF WITNESS (5.2)

¹⁴⁰ See van der Merwe 1997 *Stellenbosch Law Review* 348.

¹⁴¹ 1989 (2) SA 22 (A).

¹⁴² See Du Toit 22-21; Steytler 347 and cases cite therein.

6.8 Steytler¹⁴³ comments as follows with regard to s 179:

The right to a fair trial may also have horizontal application; information in the possession of third parties could be necessary for the adequate preparation of a defence. While the state has the power to search for and seize any documentary evidence wherever located, an accused is limited to the subpoenaing of witnesses to give evidence or 'to produce any book, paper or document' at the trial. Documents in possession of a reluctant witness are thus produced only during the trial, rather than before trial in preparation of a defence. The principle of equality of arms should also apply during preparation for trial, and should entail the compulsory process of obtaining documentary evidence from third parties. However, an accused's claim to a fair trial will conflict with a third party's right to privacy. The manner in which the Supreme Court of Canada has sought to balance these rights,¹⁴⁴ is instructive and not inconsistent with the general principles of South African law. First, applying the rules pertaining to the granting of a *subpoena duces tecum* an accused must approach the trial court to obtain a court order by convincing the court that (a) there are reasonable grounds to believe that a specified document is in the possession of a third party, and (b) that it is 'likely to be relevant' for the preparation of the defence. The latter tests holds that the court must be satisfied that 'there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify'.¹⁴⁵ An issue at trial refers to the content of the evidence as well as the credibility of a witness and the reliability of other evidence. Second, on the order being granted, the evidence is produced to the court and examined by the presiding officer to determine whether, and to what extent, it should be disclosed to the accused. The court's discretion should be guided by weighing 'the salutary and deleterious effects of a production order' in determining whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence.

And at 355,

An accused's right to call witnesses would be of limited value if it were confined to those who would attend court voluntarily. The right to compel witness for the defence is thus widely regarded as an integral part of the right to adduce evidence. The ICCPR and the ECHR add the important rider that an accused's right to compulsory process should be under the same conditions that apply to state witnesses.

The right to compel the attendance of witnesses, as provided for in the CPA¹⁴⁶ now has constitutional status. However, the rules giving effect to the accused's right to subpoena a witness are inferior to those applicable to the state. First, where an accused is unable to pay the necessary costs and fees of a subpoena, the court may subpoena a witness whom it deems 'necessary and material'.¹⁴⁷ The requirement of 'material' is not only higher than the usual threshold for the right to call a witness, but no such condition applies to state witnesses. Second, there is as yet no clear requirement that the court must

¹⁴³ Op cit 243.

¹⁴⁴ See *R v O'Connor* (1995) 103 CCC (3d) 1 (SCC).

¹⁴⁵ *O'Connor* supra at [22].

¹⁴⁶ Section 179(1).

¹⁴⁷ Section 179(3).

inform undefended accused of the right to compulsory process. In *S v Hlongwane*¹⁴⁸ the Court held that where the presiding officer is aware that an accused encounters difficulties in getting a witness to court, the accused should be informed of the compulsory process and the court must, if necessary assist in securing the attendance of the witness in view of the constitutional nature of this right, undefended accused should be informed about it as a matter of course.

6.9 It is argued that the deletion of the word material from subsection 179(3)(a)(ii) may solve Steytler's problem as the threshold for requirements for state and defence will be on a par.

PRELIMINARY RECOMMENDATION

6.10 The Commission recommended the amendment of the section as set out in the draft Bill in Annexure A.

COMMENTS

6.11 The office of the legal component of the SA Police Service and the Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope agree that this section should be amended in accordance with the sections set out in the Draft Bill.

6.12 Judge Van den Heever, points out that in her experience, section 179 has almost invariably been abused in favour of the accused.

RECOMMENDATION

6.13 The Commission recommends that the section be amended as set out in the draft Bill in Annexure A.

SECTION 182: WITNESS FROM PRISON (5.3)

6.14 See comments made under section 179 above.

6.15 Steytler¹⁴⁹ notes:

Section 182 CPA falls foul of this principle. Where an accused subpoenas a prisoner as a defence witness, prior authority of the trial court is required; this is granted only if the court is satisfied that the evidence of such witness is 'necessary and material for the defence' and that the 'public safety or order will not be endangered by the calling of the witness.' A suggested ratio for this section is that it 'prevents possible abuse of court process by awaiting trial prisoners calling co-accused merely to afford such persons time away from the place of detention'. More compelling arguments would have to be advanced to justify the high standard for relevancy (the evidence must be both 'necessary and material') and the additional requirement of public safety order.

6.11 It is submitted that a rational justification can conceivably be raised in respect of the requirement of public safety and order. However, the requirement of materiality should be deleted in order that the provision be constitutionally consistent.

PRELIMINARY RECOMMENDATION

6.12 The Commission recommended that section 182 be amended as reflected in the draft Bill in Annexure A.

COMMENTS

6.13 The office of the legal component of the SA Police Service and the Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope agree that this section be amended as reflected in the Draft Bill.

6.14 Judge Van den Heever, points out that in her experience, section 182 has almost invariably been abused in favour of the accused.

RECOMMENDATION

6.15 The Commission recommends that section 182 be amended as reflected in the draft Bill in Annexure A.

SECTION 190: IMPEACHMENT OR SUPPORT OF CREDIBILITY OF WITNESS (5.4)

¹⁴⁹ Op cit 355.

6.16 The difficulty with this section lies in the contents of some aspects of English law (as understood and applied in South Africa on the 30 May 1961) made applicable by subsection (1). (Subsection (2) is a departure from English law.)

6.17 A party who calls a witness who then gives evidence which is unfavourable to her may not cross-examine that witness unless the witness has been declared hostile.

6.18 Van der Merwe¹⁵⁰ argues that this rule constitutes an infringement of the right to challenge evidence and argues that in applying this rule “the constitutional right to a fair trial should be the ultimate test and not the question of whether the accused has proved the defence witness ‘hostile’ in the technical sense of the word”.

The US Supreme Court in *Chambers v Mississippi*¹⁵¹ considered the constitutionality of the rule prohibiting a party from impeaching her own witness and declined to declare the rule itself unconstitutional but found that the manner in which it had been applied to the facts of the case violated the constitutional rights of the accused. This would indicate that this particular rule does not constitute a sufficiently clear infringement of the right to challenge evidence to justify amending section 190 in this respect.

PRELIMINARY RECOMMENDATION

6.19 In the discussion paper the Commission expressed the view that no amendment was necessary.

COMMENTS

6.20 The office of the legal component of the SA Police Service agrees that no amendment to this section is needed.

RECOMMENDATION

6.21 The commission recommends that no amendment be made.

¹⁵⁰ In Schwikkard et al *Principles of Evidence* at 315-6.

¹⁵¹ 410 US 284 (1973).

CHAPTER 7

THE RIGHT TO FREEDOM AND SECURITY OF PERSON

Section 12 (1) Everybody has the right to freedom and security of the person which includes the right -

(a) not to be deprived for freedom arbitrarily or without just cause;

(b) not to be detained without trial;

...

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful be released;

(e) not to be treated or punished in a cruel, inhuman or degrading way.

section 35(2) Everyone who is detained, including every sentenced prisoner, has the right -

...

(b) to choose, and to consult with , a legal practitioner, and to be informed of this right promptly;

...

(f) to communicate with, and be visited by, that person's -

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner.

SECTION 185: DETENTION OF WITNESS (6.1)

7.1 Section 185 is a prima facie infringement of the right to be detained without trial and its over-breadth makes it highly unlikely that it will meet the requirements of the limitations clause.

7.2 Steytler¹⁵² notes:

The arrest and detention of material witnesses whose presence cannot be secured by a subpoena are for a "just cause", as they further the truth finding function of trial courts. There can thus be no constitutional objection to section 184(1) CPA which provides that a judicial officer, before whom a not too serious charge is pending, may issue a warrant for the arrest of a material witness where such a person is about to abscond or is evading the service of a subpoena. Once arrested the court may release the witness on warning with suitable conditions.

The same cannot be said of section 185 CPA ...

Apart from the constitutional shortcoming with regard to procedural aspects of section 185, the justness of detention under this provision is also open to doubt. First, persons subjected to this power need not be *material* witnesses. Second, after discounting the legitimate concerns of a threat to personal safety to the 'witness', or that he or she may abscond, be tampered with or intimidated, it is difficult to conceive what possible

legitimate content can be given to the sweeping phrase that detention 'would be in the interests of the person concerned or of the administration of justice'. With no identifiable content, the justness of the cause cannot properly be assessed. Third, the power to detain a person until the completion of the proceedings may result in the detention of a person after his or her testimony has been given, thus serving no legitimate purpose.

7.3 The procedural shortcomings of the section include the following:

C Subsection 185(1)(b) allows the Attorney-General (DPP) to detain a potential witness for up to 72 hours before obtaining a court order for the detention (if the delay in obtaining the order would defeat the purpose of obtaining the order). The 72 hour period seems unduly long, given that persons arrested for allegedly committing an offence must be brought before a court no later than 48 hours after the arrest.

C Subsection 185(2)(b) provides that a judge's order for the issue of a warrant of detention is final. This is capable of an interpretation that denies the detainee access to appeal. It consequently infringes the right of access to court (section 34) and the right to challenge the lawfulness of a detention before a court and, if the detention is unlawful, to be released (section 35(2)(d)).

7.4 Subsection 185(5) infringes the accused's rights conferred by sections 35(2)(b) and (e). It is difficult to ascertain the justification for denying such a detainee access to a lawyer or caregivers specified in subsection 35(2)(e).¹⁵³

PRELIMINARY RECOMMENDATION

7.5 In the discussion document the Commission recommended that the following amendments be effected to remedy the constitutional short falls in section 185:

Deletion of sections (1)(a)(ii) and 2(a)(ii).

Deletion of 'seventy-two hours' in subsection (1)(b) - to be replaced with 48 hours.

Insertion of the following words in subsection (2)(b) The decision of a judge to refuse an

¹⁵³ See Steytler op cit 163 & 201; *S v Mhlongo* unreported decision DCLD of Didcott J, case no CC176/88, quoted in (1989) 2 SACJ 402-404.

application under paragraph (a) shall be final.

Deletion of subsection (5)

COMMENTS

7.6 The office of the legal component of the SA Police Service is of the opinion that section 185 need not be amended.

7.7 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope agrees and supports the amendments proposed to section 185.

7.8 Judge Van den Heever, is not sure that the seventy-two hours in section 185(1)(b) could not be justified. She argues that we are not dealing with an accused whom the police have been investigating and have arrested so that he may be charged, but with someone like a potential witness whom the police are told has been, or may be threatened - an allegation understaffed police with transport problems may not be able to try to verify at very short notice.

7.9 Mr Lambrechts proposes that the matter should be dealt with under the Witness Protection Act and not in the Criminal Procedure Act.

RECOMMENDATION

7.10 Taking into account the fundamental right to freedom and security of person it is clear that compelling arguments need to be present to justify the 72 hour period. In the absence of such arguments the Commission confirms its initial recommendation as provided for in the draft Bill in Annexure A.

CRUEL, INHUMAN OR DEGRADING PUNISHMENT: SECTIONS 286A DECLARATION OF CERTAIN PERSONS AS DANGEROUS CRIMINALS AND SECTION 286B IMPRISONMENT FOR INDEFINITE PERIOD (6.2)

7.11 Steytler at 422 makes the following observations in respect of sections 286A and 286B:

In view of its severity this sentencing option is constitutionally suspect on a number of fronts.

First, the sentence of indefinite imprisonment could easily be grossly disproportionate to the offence for which an accused has been convicted as there is no statutory requirement that the offence must be of any particular nature or severity. The offence before the court should at least by itself necessitate the enquiry about an accused's dangerousness.

Second, the definition of dangerousness may not meet the constitutional standard of legality. An offence must pose a danger to "the physical or emotional well-being of other persons" and, in addition, "the community should be protected against" the offender. The term "well-being" when qualified by "emotional", is vague in the extreme. If a threat of violence is not required, what other type of conduct is feared and when does a danger to the emotional well-being of persons also pose a danger to the community? Is the emotional well-being of the community also to be protected? Vague criteria which are offensive to the principle of legality, could easily result in grossly disproportionate punishment.

The effectiveness of the procedural safeguards attached to the inquiry into dangerousness is also undercut by the very vagueness of this concept. Before deciding on the dangerousness of an offender, the court must direct that an inquiry be conducted at a psychiatric hospital. The offender must be appraised of the inquiry and has the right to contest any of its findings. These procedural safeguards, however important, are of limited value if there is no adequate standard in terms of which the inquiry is conducted or against which an offender can contest the finding.

Third the release procedures may not adequately safeguard against a grossly disproportionate punishment in individual cases. The court, when imposing the sentence of indefinite imprisonment, must reconsider the sentence after a period fixed by it. This period may not exceed the court's jurisdiction which in the case of a regional court is 10 years and for a High Court wholly within its discretion. Unless the fixed period bears a relationship to the offence committed the sentence may ab initio be grossly disproportionate.

7.12 It is to be noted that the Act refers to 'mental' and not 'emotional' well-being. Nevertheless, Steytler's point that the vagueness as to what constitutes a 'dangerous criminal' compromises the constitutionality of the provision is valid and the section needs to be reconsidered and a more precise definition of dangerous criminal inserted. His other points do not indicate that the section is per se unconstitutional - but that its application may become unconstitutional depending of the particular circumstances of the case.

PRELIMINARY RECOMMENDATION

7.13 The Commission recommended that the provision should be retained as it is and invited comments on the proposal.

COMMENTS

7.14 The office of the legal component of the SA Police Service agrees that no amendment to this section is needed and that this section be retained unchanged.

7.15 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope supports Steytler's view that the vagueness as to what constitutes a 'dangerous criminal' compromises the constitutionality of the provision and that the section needs to be reconsidered and a more precise definition of dangerous criminal inserted.

7.16 Judge Van den Heever comments as follows: "I agree that it may perhaps be that in individual matters they may be applied in inappropriate circumstances, or rather, to an inappropriate accused. That, after all, is what the section are about: not the punishment of the offender, but at safeguarding society against his potential conduct; (where that no longer is ensured by the death penalty). The actual offence of which he is convicted may be in itself fairly harmless in that no-one is seriously damaged thereby; but, could nevertheless justify the inference that he is incorrigible and dangerous. As a random example, perhaps: a self-centred man with a short fuse has a record of serious assaults, rapes, robberies and a murder or two, usually committed after having had a few drinks. Sober, he not only gives his neighbour a pair of black eyes and other bruises for having one way or another incurred his displeasure, but also threatens to cut the throats of the neighbour's children when the opportunity presents itself. One can think of many examples, but this is not the time or place for writing novellettes. I find no flaw in the description of a "dangerous criminal": the statute says society needs to be protected against him. No judge or magistrate is going to label a shoplifter with a record from Cape Town to Cairo and back for snatching here some pencils, there a piece of cheese, then again a panty and so on - total value over a couple of decades amounting to say R2 500-00, the sort of person against whom society needs to be protected. Steytler's comments as quoted show little faith in the common sense of the judiciary!"

RECOMMENDATION

7.17 The constitutionality of section 286 came before the Constitutional Court in *S v Niemand* on the 22 February 2001, judgment is still to be handed down. The matter has also been considered in the Commission's investigation into Sentencing where the Commission recommended that some changes be effected to the provision. In view of the above the Commission recommends no amendments and proposes that the judgement of the Constitutional Court be delivered before making any further recommendations.

CHAPTER 8

THE RIGHT TO BE BROUGHT BEFORE A COURT AFTER ARREST

Section 35(1) Everyone who is arrested for allegedly committing an offence has the right-

(d) to be brought before a court as soon as reasonably possible but not later than-

(i) 48 hours after arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day.

8.1 Steytler at 126 notes:

The right of an arrested accused to be placed promptly under the authority of a court, with 48 hours being the outer limit, determines the lawful duration of detention in the hands of the police. After the expiry of this period the detention becomes unconstitutional. A positive obligation is thus imposed on the detaining authority to bring an arrestee before a court within that period. The right to be brought to court is circumscribed, first, by a general standard that it must be done 'as soon as reasonably possible' and, second, by an outer limit of 48 hours.

...

The right need not be realised immediately on arrest, but within a reasonable period thereafter, with 48 hours being the outer limit. To put it differently; before the expiry of the 48 hours a detention may become unconstitutional if it was reasonably possible for the police to have brought an accused to court but failed to do so.

What is reasonably possible must relate both to the legitimate concerns and capacities of the police as well as the interests of an accused. Where the police have not completed identification procedures or collected evidence for the bail inquiry, it would be unreasonable to require that an accused be taken to court. At the same time it is clearly in the interests of an accused to be brought before a court as soon as possible in order to determine the necessity of his or her detention. Reasonableness will depend on the circumstances of each case giving due consideration to the interests of both parties.

SECTION 50: ARREST (7.1)

8.2 Subsection 50(6)(b) reads: "An arrested person contemplated in paragraph (a)(i) is not entitled to be brought to court outside ordinary hours."

8.3 Subsections 50(1)(c) and (d)(i) contain essentially the same provisions as subsection 35(1)(d). Prior to the insertion of subsection 50(6)(b) it was recognised that accused persons were entitled to bring bail applications outside of court hours and before the expiration of the 48 hours period.¹⁵⁴

8.4 The constitutional right to be brought before a court as soon as reasonably possible - means precisely that - the 48 hour (during court days) limitation simply reinforces the right to freedom and security of person. And even if it is not reasonably possible to bring the accused before the court within 48 hours the accused must be released on the expiration of the 48 hour period. Consequently, it can be argued that the meaning of 'reasonably possible' will depend on the circumstances of each case. For example, when an arrested person is found to suffer from

¹⁵⁴ See *Twayie v Minister van Justisie* 1986 (2) SA 101 (O); *Garces v Fouche* 1998 (2) SACR 451 NmHC.

some chronic medical ailment - it is reasonable to demand that public officials make a greater effort to bring that person to the court before the expiration of the 48 hour period - than would be the case with accused unencumbered by 'peculiar personal' circumstances.¹⁵⁵

8.5 It was argued that the blanket prohibition on bail outside of court hours contravenes both section 12 and subsection 35(1)(d) and should either be deleted or qualified so as to permit bail outside of normal working hours where grounds for urgency exist.

PRELIMINARY RECOMMENDATION

8.6 In the discussion paper the Commission recommended that the provision should be retained unchanged in view of the fact subsection 35(1)(d) presupposes that the time limits are to be calculated with reference to 'ordinary court hours' and invited comments on the proposal.

COMMENTS

8.7 The office of the legal component of the SA Police Service supports the recommendation that the prohibition on the right to apply for bail outside ordinary court hours should be retained. It points out that: it often happens that criminals are arrested on the scene of the crime and their personal particulars must be verified during the initial 48 hour period. This means that frequently the police would not be in a position to oppose bail if bail was granted immediately after arrest.

8.8 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope has expressed reservations in previous comments about this provision and recommends that subsection 50(6)(b) should read: Subject to grounds of urgency an arrested person contemplated in paragraph (a)(i) is not entitled to be brought to court outside ordinary court hours". Referring to paragraph 8.5 on page 62 of the discussion paper- it was argued that the blanket prohibition on bail outside of court hours contravenes both sections 12 and 35(1)(d) and should either be deleted or qualified so as to permit bail outside of normal working hours where grounds for urgency exist.

¹⁵⁵ Hannah J in *Garces supra* at 457e noted: 'to my mind justice dictates that in the appropriate case a person should have a right to apply for bail outside normal hours.' However, at 457j he stated: "I must emphasise, however, that real grounds for urgency must exist before a court will hear a bail application outside normal hours. This is a matter which must be decided by magistrates on a case by case basis."

The committee re-iterates that the removal of access to justice after court hours is motivated by financial and practical implications for members of the Department of Justice and does not take account of the constitutional rights of the accused.

RECOMMENDATIONS

8.9 Taking into account the comments received and the constitutional requirement that the accused be brought to court as soon as reasonably possibly (see para 8.4 above) the Commission confirms its recommendation in the discussion paper. When the Constitution protects the right of access to court, it does not insist that provision be made beyond the ordinary, particularly if such provision will create practical difficulties for a system which already functions under extreme strain. The proposal of the Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope is not feasible and impractical. As soon as possible should mean as soon as is ordinarily possible. The Commission recommends that section 50(6)(b) be retained unchanged.

CHAPTER 9

THE RIGHT TO A FAIR TRIAL - INCLUDING THE RIGHT TO BE INFORMED OF DETAIL OF CHARGE

**Section 35(3) Every accused person has a right to a fair trial, which includes the right -
(a) to be informed of the charge with sufficient detail to answer it;**

9.1 Steytler¹⁵⁶ notes;

¹⁵⁶ Op cit 226-7.

The right to adequate notification of the charge, recognised in foreign constitutions and South African law, is an essential component of the right to a fair trial for it allows for the effective preparation of a defence. It enables an accused, first, to consider whether to contest the charge, and second, if a plea of not guilty is entered, what evidence to gather and how to challenge the incriminating evidence and prepare a line of defence. Once furnished, the prosecution cannot deviate from the charge during the trial for it sets the framework of the trial. This distinguishes the right to adequate notification from the right of access to information held by the prosecution. While such information may be useful for the preparation of a defence, a detailed charge binds the prosecution to a specified offence and particularised factual allegation. The information to be obtained is thus of a more limited nature and does not include the disclosure of evidence.

In *S v Lavhengwa*¹⁵⁷ the Court extended the application of the right to the definition of the offence itself: 'The charge itself must be clear and unambiguous.' In *casu* the Court asked whether the 'nature' of the statutory offence of contempt *in facie curiae*, was sufficiently clear and unambiguous to comply with the constitutional right to be sufficiently informed of the charge? The prohibition against a vaguely formulated offence is certainly an integral part of the foundational value of the rule of law and can be brought home under a number of rights including the right to freedom and the right against retrospective offences. With the emphasis on 'sufficient details', suggesting factual *allegations*, section 35(3)(a) is not the best suited provision for this purpose.

9.2 And he further notes:¹⁵⁸

A vaguely-defined offence raises the same concerns that underlie the prohibition against retroactive offences. If the definition of an offence is so vague that it cannot give sufficient notification to citizens of the proscribed field of activity, it not only permits the unfair prosecution of an unwitting person, but also allows the state a wide spread prosecuting discretion which it may abuse.

The doctrine of vagueness may be invoked under a number of provisions in the Bill of Rights. The doctrine has been included under the *nullum crimen sine lege principle* of article 7 of the European convention. In *S v Lavhengwa* the Court examined whether the nature of the statutory offence of contempt of court was sufficiently clear and unambiguous to comply with the constitutional right to be informed with sufficient particularity of the charge. The dicta in *S v Coetzee*¹⁵⁹ which suggest that an offence could be reviewed for 'overbreadth' in terms of the right to freedom, applies *a fortiori* to vagueness. Vagueness is also pertinent to the limitations clause; a law of general application must meet the criterion of foreseeability. While the doctrine on vagueness is connected to a number of specific provisions in the Bill of Rights it flows directly from the overarching value of the rule of law. Whatever its source provision, its rationale is the same: fair notification to those subjected to the law and adequate guidance for law enforcement agencies.

SECTIONS 95(12) AND 262: HOUSEBREAKING WITH INTENT TO COMMIT AN OFFENCE

(8.1)

¹⁵⁷ 1996 2 SACR 453 (W) 482-484.

¹⁵⁸ Op cit 374.

¹⁵⁹ Supra.

9.3 Burchell & Milton¹⁶⁰ note: “By statute the State may charge that X had the intent to commit ‘an offence to the prosecutor unknown’. At common law such a charge was not permitted, but the Criminal Procedure Act sanctions it.” In *S v Woodrow*¹⁶¹ the court noted that the validity of a charge of housebreaking with intent to commit a crime to the prosecutor unknown “has long been the subject of criticism by our courts and academic writers”.¹⁶²

9.4 Such a charge may not contain sufficient detail to enable the accused to properly prepare a defence. The accused for example, will not know, whether he is being charged with housebreaking with the intention of rape, murder or trespass. It was submitted that the sections should be amended so as to reflect the common law position.¹⁶³

PRELIMINARY RECOMMENDATION

9.5 The Commission recommended that the provision be retained since it relates to problems peculiar to the definition of the crime and invited comment on the proposal.

COMMENTS

9.6 The office of the legal component of the SA Police Service agrees that the provision be retained unchanged.

9.7 Section 95(12) provides that a charge relating to housebreaking or the entering of any house or premises with intent to commit an offence, whether the charge is brought under the common law or any statute, may state either that the accused intended to commit a specified offence or that the accused intended to commit an offence to the prosecutor unknown. The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope believes that an accused is entitled to know the charge against him/her. The Committee suggests that it would be preferable to formulate a charge for trespassing than to formulate a vague charge along

¹⁶⁰ *Principles of Criminal Law* (1997) at 605.

¹⁶¹ 1999 (2) SACR 109 (E) 111.

¹⁶² See De Wet and Swanepoel *Strafreg* 4th ed 369.

¹⁶³ The *Lavhengwa* approach is preferred because of the particular content of the offence under consideration. The primary component of the offence is clear and consequently the proscribed field of activity is clear. However the accused will clearly be hampered in his defence if he is unaware of the second component of the charge.

the lines of an offence to the prosecutor unknown. The Committee supports the comment in paragraph 9.3 on page 62 of the Discussion Paper and suggests that, if the State cannot formulate the charge, it will probably have difficulty proving it.

9.8 Dr SV Hoor, of the University of Port Elizabeth, is of the view that the very nature of liability for the offence of housebreaking is controversial. It is required that there be an intentional unlawful breaking and entry into premises, coupled with a further intention to commit a crime within the premises. He notes that some writers have categorised the crime as a sort of inchoate crime, allowing for the intervention of criminal liability at the earliest possible opportunity and that various solutions have been employed to enable the prosecuting authorities in the common law jurisdictions to more readily prove intent. These include allowing an inference or even a presumption of intent to commit theft, and using the statutory offence of possession of housebreaking implements as an alternative basis for liability after the fact of the commission of the crime.

9.9 Dr Hoor raises the question whether it can be said that the statutory offence of housebreaking with the intent to commit a crime to the prosecutor unknown infringes upon the constitutionally protected rights to be presumed innocent and to be informed of a charge with sufficient details to answer it.

9.10 Dr Hoor submits that it does not. In respect of the presumption of innocence, the crucial consideration is whether the provision in question creates a reverse onus in order to facilitate proof of a crime. Du Plessis and Corder (*Understanding South Africa's transitional Bill of Rights*(1994) 176-7) note that the constitutionality of such an evidentiary mechanism will undoubtedly come under fire. There is no such reverse onus in the present case, however; instead the intent is required to be proved in the same way as any given particular intent, by means of a process of inferential proof.

9.11 As regards the right to be informed of a charge with sufficient details to answer it, Dr Hoor explains that it seems that this right, read in association with the right of access to information held by the state (section 32), will enable an accused to discover police dockets and witness statements, although it is unlikely that the unlimited exercise of this right will be sanctioned (Du Plessis and Corder 176). Dr Hoor submits that the right of the accused to have access to such documents, namely to all the evidence relating to the trial, along with a charge sheet which includes all the elements of the offence, will encompass the protection available to the accused

in terms of subsection 35(3)(a). Dr Hoctor further submits that the State will not infringe upon this right provided that the accused is informed of the "nature and cause of the accusation...", but that this does not necessarily entail that the charge should specify the particular crime intended within the premises.

9.12 Dr Hoctor argues that even if it is held that the statutory provisions underlying the crime of housebreaking are unconstitutional, it is feasible that the provisions might well be saved by the limitation of rights clause (section 36). The limitation might be considered reasonable and justifiable in the context of the pervasive social problem presented by the housebreaking crime: a housebreaking is committed every minute and 53 seconds in South Africa (*Sunday Times* 6 November 1994), and in the period 1/7/93-30/6/94 there were 41 631 prosecutions for "burglaries and related matters", which resulted in 32 453 convictions.

9.13 Dr Hoctor states that if we accept the above analysis, the only question outstanding remains how precisely to deal with the problem of proof? The approach adopted in other jurisdictions to deal with this problem varies. Thus the ulterior intent may either be presumed to be present (as in subsections 348(2) and 349(2) of the Canadian Criminal Code), or it is simply required to be proved on the basis of inferential reasoning from the circumstances of the case.

9.14 Dr Hoctor submits that in practice these approaches dovetail with the procedure in South African law. On the one hand, the "ulterior intent" need not be pleaded with the same particularity in prosecuting the housebreaking crime as in a prosecution for the crime itself, or an attempt to commit that crime (*Model Penal Code and Commentaries* Article 221.1 (Burglary) (1980) 76). On the other hand, proof of a subjective intention is in its very nature a difficult process. Occasionally there may be direct proof, from what the accused said contemporaneously with the criminal act, or by the accused's admission before or after the act (LRC Canada *Criminal Intrusion* 21). However, in most cases there is no such overt evidence, and thus no direct access to the accused's mind. It is then incumbent on the court to infer the intent from the circumstances of the case.

9.15 Dr Hoctor further submits that the only alternative to gauging the accused's state of mind from his outward acts and from all the circumstances, is to require that the accused explain his conduct, that is to place an onus on the accused to explain his presence on the premises (LRC Canada). The Canadian Commissioners note that there may be some merit in this option, as judging the state of mind of the accused on the basis of outward acts, and in the circumstances,

may be problematic, particularly where the accused is apprehended before he proceeds far enough to manifest his intent (LRC Canada).

9.16 However, Dr Hoctor questions whether this option is desirable, or even necessary. Putting a statutory onus on the accused to give a satisfactory explanation for his conduct appears, he submits, to codifying the usual rules relating to proof. This, he says, is evident from the leading English case of *R v Wood* (1911) 7 CrAppR 56 where, on a charge of breaking and entering with the intent to commit a felony, it was held that an inference of felonious intent may arise if an accused has broken into premises and fails to give a satisfactory explanation for being there. He notes that the Canadian Commissioners, following the approach adopted in *Wood*, concluded that a statutory onus to adduce evidence simply compels the accused to do that which is the practice at common law, and that the existing presumption of intent in subsection 348(2) of the Canadian Criminal Code was superfluous (LRC Canada 22). Hoctor therefore concludes that the circumstances of an entry will normally lead the trier of fact to the proper inference as to the intent of the intruder (*Model Penal Code and Commentaries* 76), and that such intent should therefore be assessed in this way.

9.17 Referring to the South African law, Hoctor states that it is clear that a court dealing with a charge of housebreaking with intent may regard the acts of breaking and entering as objective evidence from which the intent to commit a crime on the premises may be inferred. In the absence of any evidence which is indicative of the crime which is intended however, the question arises whether it is appropriate to allow a verdict of "housebreaking with the intent to commit a crime to the prosecutor unknown" to prevail. He submits that in the light of the cogent criticisms levelled at this provision by the South African writers, that it is not, and that in those rare cases where there is no conclusive evidence whatsoever that the accused intended to commit a specific crime within the premises, the accused should be convicted of trespass (in terms of section 1 of Act 6 of 1959), or malicious injury to property.

9.18 Dr Hoctor submits that the verdict enabled by subsection 262(2) of the Criminal Procedure Act (Act 51 of 1977), of housebreaking with the intent to commit a crime to the prosecutor unknown, should no longer be possible. This could be accomplished by the courts adopting an approach of "looking for the crime", that is ensuring that a conviction is always on the basis of an intent to commit a particular crime (Snyman *Strafreg* 3ed (1992) 555). Alternatively, if the statutory crime is to be scrapped, a possible solution would be to charge the accused with the intention to commit on the premises any one of a number of crimes, and to convict him on the basis of that

intention which is properly established in court (as is customary, by means of a process of inferential reasoning). This would undoubtedly result in more clumsy charge-sheets, but this concern would be ameliorated by the fact that justice could be seen to be done and that this need would only arise in those cases where it is, at least initially, impossible to ascertain a definitive intent on the part of the accused. Dr Hoctor concludes that where an intent to commit a particular crime does not emerge by the conclusion of the trial process, the court will be obliged to acquit the accused of housebreaking with the intent to commit a crime.

RECOMMENDATION

9.19 Taking the comments received into account the Commission retains its view that sections 95(12) and 262 are not clearly unconstitutional and recommends that no amendment be made.

CHAPTER 10

UNCONSTITUTIONALLY OBTAINED EVIDENCE

Section 35(5): Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice

10.1 In *Principles of Evidence*¹⁶⁴ the following observations are made in respect of section 35(5):

Section 35(3) lists certain basic requirements for the existence of a fair trial. If s 35(5) is read together with s 35(3), it is certainly open to the interpretation that if any of the rights falling under the umbrella of s 35(3) are violated, the evidence must be excluded, that is, the courts do not have a discretion to include it. However, it must be borne in mind that the limitations clause must be applied before the constitutional exclusionary rule comes into play. Consequently, a person arguing for the exclusion of evidence, on the basis that it was obtained in contravention of the accused's right to a fair trial, would not succeed if

the prosecution persuaded the court that the violation was reasonable and justifiable in terms of the limitations clause.

It is also clear that once it is established that the admission of evidence would “be detrimental to the administration of justice” the courts do not have a discretion to admit it. What remains to be determined is the test to be applied in establishing when the admission of evidence would be detrimental to the administration of justice.

SECTION 225: EVIDENCE OF PRINTS OR BODILY APPEARANCE OF ACCUSED (9.1)

10.2 Section 225(2) reads:

Such evidence shall not be inadmissible by reason only thereof that the finger-print, palm-print, or foot-print in question was not taken or that the mark, characteristic, feature condition or appearance in question was not ascertained in accordance with the provisions of section 37, or that it was taken or ascertained against the wish or the will of the accused.

10.3 In *S v Huma(2)*¹⁶⁵ the court found that taking the accused's fingerprints against the accused's will did not infringe the accused's constitutional right to dignity or the privilege against self incrimination. Claassen J held that the taking of fingerprints did not constitute testimonial evidence by the accused and was therefore not in conflict with the privilege against self-incrimination. The court found the majority decision in *Schmerber v California*¹⁶⁶ clearly persuasive. We must therefore conclude that in this respect there is no clear constitutional breach. However, more contentious is the directive that “evidence shall not be inadmissible by reason only thereof that the finger-print,... was not ascertained in accordance with the provisions of s 37”. On the face of it this would allow improperly obtained evidence to be admitted into evidence - however the words “by reason only thereof” make it clear that evidence can be excluded on grounds other than non-compliance with section 37, consequently, section 35(5) of the Constitution will apply in cases where evidence is obtained in breach of the Bill of Rights. Therefore it would appear that no amendment is required.¹⁶⁷

PRELIMINARY RECOMMENDATION

¹⁶⁵ 1995 (2) SACR 411 (W).

¹⁶⁶ 384 US 757 (1966).

¹⁶⁷ Cf Schwikkard et al *Principles of Evidence* at 118.

10.4 The Commission recommended in the discussion paper that no amendment was necessary. The only comment received in respect of this provision was from the office of the legal component of the SA Police Service which supported the Commission's recommendation.

RECOMMENDATION

10.5 The Commission recommends that no amendment is necessary.

SECTION 252A: AUTHORITY TO MAKE USE OF TRAPS AND UNDERCOVER OPERATIONS AND ADMISSIBILITY OF EVIDENCE SO OBTAINED (9.2)

10.5 In *Du Toit et al*¹⁶⁸ the following constitutional objections are made:

Subsection (1) provides that evidence obtained as a result of a trap 'shall be admissible' (emphasis added) if the conduct of the trap 'does not go beyond providing an opportunity to commit an offence'. Whatever the last phrase may mean... it is not difficult to envisage the existence of traps of this kind which do, nevertheless, entail the violation of one or other constitutional right to a greater or lesser extent - say, for example, the right to dignity or privacy. In such a case [the] provisions of s 35(5) of the Constitution come into play. This subsection provides that '[e]vidence obtained in a manner that violates any right in the Bill of Rights *must be excluded* if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice' (emphasis added). Thus subsection (1), in so far as it provides for the mandatory admission of a class of evidence which ... [may fall into] ... a class for which the Constitution provides for mandatory exclusion in certain circumstances - circumstances which s 252A(1) does not even allow a court to consider - would seem to be clearly unconstitutional.

A similar objection arises in respect of subsection (3)(a), which provides that where the conduct of the trap does go beyond providing an opportunity to commit an offence, the court 'may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and [sic] that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice'. Where the procurement of such evidence violates a constitutional right, however, (and it seems that this would arise more often than not), s 35(5) of the Constitution again becomes applicable. And, as has been pointed out, this section provides that such evidence 'must' be excluded if the condition set out in it - conditions which are the same as those in s 252A(3)(a) - are met. To the extent that subsection (3)(a) gives a court a discretionary power to determine whether those conditions are met, it is clearly unobjectionable. But to the extent that it gives a court a discretionary power to exclude *or not to exclude* such evidence once it has found those conditions to have been met, it is clearly in conflict with s 35(5) of the Constitution.

10.6 It was argued that a possible solution would be to substitute the word 'shall' in subsection

¹⁶⁸

Op cit 24-133.

(1) with 'may'. And substitute the word 'may' in (3)(a) with 'must'.

PRELIMINARY RECOMMENDATION

10.7 In its discussion paper the Commission did not agree with the proposal and recommended that the provision should be retained unchanged and invited comments on the proposal.

COMMENTS

10.8 The office of the legal component of the SA Police Service is in favour of the suggestion that these provisions should be retained without amendment.

10.9 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope is of the opinion that the drafting of this section may lead to confusion. The Committee suggests that the drafting be clarified, abbreviated and put in simple language.

10.10 Mr Lambrechts is of the view that the provisions of section 252A is superfluous in the light of the Constitution.

RECOMMENDATION

10.11 In the absence of substantial arguments to the contrary the Commission confirms its recommendation that section 252A does not require amendment.

CHAPTER 11

THE RIGHT TO A FAIR TRIAL

SECTION 213: PROOF OF WRITTEN STATEMENT BY CONSENT (10.1)

11.1 This is another exception to the rule that evidence should be given viva voce. The fact that such a statement can only be admitted by consent should in principle save it from constitutional challenge. It is argued that this section may severely compromise the unrepresented accused's right to a fair trial. If no objection is received at least two days before commencement of proceedings, ((2)(c) and (e)), the written statement may be admitted into evidence. An unrepresented accused may not be literate and may not understand the import of not objecting consequently the failure to object may not be a true reflection of consent.

11.2 It was submitted that this section should either be made to apply only to those who have legal representation or include a proviso imposing a duty on presiding officers to ascertain from the accused at proceedings whether he understands the import and consequences of consenting to the admission of such statements and whether the failure to object is indeed consent.

PRELIMINARY RECOMMENDATION

11.3 In the discussion paper the Commission recommended that the provision should be retained unchanged and invited comments on the proposal.

COMMENTS

11.4 The office of the legal component of the SA Police Service agrees that this provision should be retained unchanged.

11.5 The Criminal Law and Procedure Committee of the Law Society of the Cape of Good Hope agrees and supports the amendments proposed in para 11.2 above.

RECOMMENDATION

11.6 The Commission confirms its recommendation that no amendment is necessary.

THE UNREPRESENTED ACCUSED (10.2)

11.7 Clearly the unrepresented accused must be advised fully of his rights and how to best exercise those rights at each step in the criminal process. The question arises whether it is in the interests of the unrepresented accused to instruct presiding officers when and how they should do this by codifying these instructions in the Criminal Procedure Act. In the short term codification has its advantages in that the instructions are more likely to be noticed by presiding officers. The disadvantage is the rigidity of codification and the risk of attention being paid to form rather than substance. If codification is preferred a full investigation should be made as to the contents of the instructions to be given at each stage in the criminal process. (See also the provisions of sections 105, 119, 126 and 213).

PRELIMINARY RECOMMENDATION

11.8 The Commission was of the view that codification of an explanation of rights to undefended accused persons should not be recommended and invited comments on the proposal.

COMMENTS

11.9 The office of the legal component of the SA Police Service is of the view that the codification of the explanation of rights to an undefended accused should not be recommended.

RECOMMENDATION

11.10 The Commission confirms its view that no codification is necessary.

REPUBLIC OF SOUTH AFRICA

CRIMINAL PROCEDURE ACT AMENDMENT BILL

(As introduced)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B –2000]

REPUBLIEK VAN SUID-AFRIKA

STRAFPROSESWYSIGINGS- WETSONTWERP

(Soos ingedien)

(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W –2000]

GENERAL EXPLANATORY NOTE:

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

_____ Words underlined with a solid line indicate insertions in existing enactments.

AMENDMENT BILL

To amend the Criminal Procedure Act, 1956, Criminal Procedure Act, 1977 and the Criminal Matters Amendment Act 1998 so as to bring the provisions of the Act into line with the Constitution; and to provide for matters connected therewith.

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

1. **Section 7 of the Criminal Procedure Act, 1977 (hereinafter referred to as the Principal Act) is hereby amended by the substitution for the section of the following section:**

7 Private prosecution on certificate nolle prosequi

- (1) In any case in which a **[n attorney-general]** Director of Public Prosecutions declines to prosecute for an alleged offence-
- (a) any private person who proves some substantial and peculiar interest in the issue of the trial **[arising out of some injury which he as an individual suffered]** in consequence of the commission of the said offence[;
 - (b) a husband, if the said offence was committed in respect of his wife;
 - (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or
 - (d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward],

may, subject to the provisions of section 9, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

2. Section 9 of the Principal Act is hereby amended by the substitution for the section of the following section:

9 Security by private prosecutor

(1) No private prosecutor referred to in section 7 shall take out or issue any process commencing the private prosecution unless he or she deposits with the magistrate's court in whose area of jurisdiction the offence was committed-

[(a) the amount the Minister may from time to time determine by notice in the Gazette as security that he will prosecute the charge against the accused to a conclusion without undue delay; and]

(b) the amount, if any, such court, after having heard the accused, may determine as security for the costs which may be incurred in respect of the accused's defence to the charge.

(2) The accused may, at any time thereafter **[when he is called upon to plead to the charge]**, apply to the court hearing the charge to review the amount determined under subsection (1) (b), whereupon the court may, before the prosecution proceeds **[accused pleads]** -

(a) require the private prosecutor to deposit such additional amount as the court may determine with the magistrate's court in which the said amount was deposited; or

(b) direct that the private prosecutor enter into a recognizance, with or without sureties, in such additional amount as the court may determine.

(3) **[Where a private prosecutor fails to prosecute a charge against an accused to a conclusion without undue delay or where a charge is dismissed under section 11, the amount referred to in subsection (1) (a) shall be forfeited to the State.]**

3. Section 15 of the Principal Act is hereby amended by the substitution for the section of the following section:

15 Costs of private prosecution

(1) The costs and expenses of a private prosecutor shall, subject to the provisions of subsection (2), be paid by the private prosecutor.

(2) **[The court may order a person convicted upon a private prosecution to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence: Provided that the provisions of this subsection shall not apply with reference to any prosecution instituted and conducted under section 8: Provided further**

~~that]~~ **W**here a private prosecution is instituted after the grant of a certificate by a **[n attorney-general]** Director of Public Prosecutions that he or she declines to prosecute and the accused is convicted, the court may order the costs and expenses of the private prosecution, including the costs of an appeal arising from such prosecution, to be paid by the State.

4. **Section 29 of the Principal Act is hereby amended by the substitution for subsection (1) of the following subsection:**

29 Search to be conducted in decent and orderly manner

- (1) A search of any person or premises shall be conducted with strict regard to the protection and respect of dignity and to decency and order and **[a]** the person of [woman] someone shall be searched by **[a woman]** a person of the same sex only, and if no **[female]** such police official is available, the search shall be made by **[any woman]** someone designated for the purpose by a police official.

5. **Section 36 of the Principal Act is hereby amended by the substitution for subsection (1) of the following subsection:**

36 Disposal of article concerned in an offence committed outside Republic

- (1) Where an article is seized in connection with which-
- (a) an offence was committed or is on reasonable grounds suspected to have been committed in a country outside the Republic;
 - (b) there are reasonable grounds for believing that it will afford evidence as to the commission in a country outside the Republic of any offence or that it was used for the purpose of or in connection with such commission of any offence,

the magistrate within whose area of jurisdiction the article was seized may, on application and if satisfied that such offence is punishable in such country **[by death or]** by imprisonment for a period of twelve months or more or by a fine of five hundred rand or more, order such article to be delivered to a member of a police force established in such country who may thereupon remove it from the Republic.

6. **Section 37 (1) (c) of the Principal Act is hereby amended by the substitution for the paragraph (c) of the following subparagraph:**

37 Powers in respect of prints and bodily appearance of accused

- (1) Any police official may-
- (c) take such steps as he or she may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance; Provided that no police official shall take any blood sample

of the person concerned nor shall a police official who is not of the same sex as the person concerned make any examination of the body of the person concerned **[where that person is a female and the police official concerned is not a female]**.

7. **Section 39 of the Principal Act is hereby amended by the substitution for subsection (2) of the following subsection:**

39 Manner and effect of arrest

- (2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest and [or], in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.

8. **Section 47 of the Principal Act is hereby amended by the substitution for subsection (1) of the following subsection:**

47 Private persons to assist in arrest when called upon

- (1) Every **[male]** inhabitant of the Republic of an age not below sixteen and not exceeding sixty years shall, when called upon by any police official to do so, assist such police official-
- (a) in arresting any person;
- (b) in detaining any person so arrested.

9. **Section 74 of the Criminal Procedure Act 51 of 1977 is hereby amended by the insertion of the following paragraph:**

(c) The peace officer or police official referred to in subsection 2(a) or the person serving a summons under section 54 or a written notice under section 56 referred to in subsection 2(b), shall advise a parent or guardian of his or her right to apply for exemption from the obligation to attend proceedings under subsection (3).

10. **Section 5(b) of the Criminal Matters Amendment Act 68 of 1998 is hereby repealed.**

11. **Section 85 of the Principal Act is hereby amended by the substitution for paragraph (d) of subsection (1) of the following paragraph:**

85 Objection to charge

- (1) An accused may, before pleading to the charge under section 106, object to the charge on the ground-
- (d) that the charge does not contain sufficient particulars of any matter alleged in the charge[: **Provided that such an objection may not be raised to**

a charge when he is required in terms of section 119 or 122A to plead thereto in the magistrate's court];

12. Section 148 of the Principal Act is hereby repealed.
13. Section 170 of the Criminal Procedure Act 51 of 1977 is amended by the substitution of subsection (2) by the following subsection:

170 Failure of accused to appear after adjournment or to remain in attendance

- (2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his or her arrest and, when he or she is brought before the court, in a summary manner enquire into his or her failure so to appear or so to remain in attendance and, unless the accused **[satisfies the court] raises a reasonable doubt** that his or her failure was not due to fault on his or her part, convict him or her of the offence referred to in subsection (1) and sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months."

14. Section 179 of the Principal Act is hereby amended by the substitution for subsections (2) and (3) of the following subsections:

179 Process for securing attendance of witness

- (2) Where an accused desires to have any witness subpoenaed, a sum of money sufficient to cover the costs of serving the subpoena shall be deposited with the prescribed officer of the court and such officer shall subpoena such witness.
- (3) (a) Where an accused desires to have any witness subpoenaed and he or she satisfies the prescribed officer of the court-
- (i) that he or she is unable to pay the necessary costs and fees; and
- (ii) that the evidence of such witness is reasonably necessary and material for his or her defence,
- such officer shall subpoena such witness at the cost of the State.
- (b) In any case where the prescribed officer of the court is not so satisfied, he shall, upon the request of the accused, refer the relevant application to the judge or judicial officer presiding over the court, who may grant or refuse the application or defer his or her decision until he or she has heard other evidence in the case."

15. Section 182 of the Criminal Procedure Act is hereby amended by the substitution for the section of the following section:

182 Witness from prison

A prisoner who is in a prison shall be subpoenaed as a witness on behalf of the defence or a private prosecutor only if the court before which the prisoner is to appear as a witness authorizes that the prisoner be subpoenaed as a witness, and the court shall give such authority only if it is satisfied that the evidence in question is reasonably necessary and material for the defence or the private prosecutor, as the case may be [, **and that the public safety or order will not be endangered by the calling of the witness**].

16. **Section 185 of the Principal Act is hereby amended by the substitution for sections of the following section:**

185 Detention of witness

(1) (a) Whenever any person is with reference to any offence referred to in Part III of Schedule 2 in the opinion of the **[attorney-general]** Director of Public Prosecutions likely to give evidence on behalf of the State at criminal proceedings in any court, and the **[attorney-general]** Director of Public Prosecutions, from information placed before him or her[-

(i)] is of the opinion that the personal safety of such person is in danger or that he or she may abscond or that he or she may be tampered with or that he or she may be intimidated;[**or**

(ii) **deems it to be in the interests of such person or of the administration of justice that he be detained in custody,]**

[the attorney-general] he or she may by way of affidavit place such information before a judge in chambers and apply to such judge for an order that the person concerned be detained pending the relevant proceedings.

(b) The **[Attorney-general]** Director of Public Prosecutions may in any case in which he or she is of the opinion that the object of obtaining an order under paragraph (a) may be defeated if the person concerned is not detained without delay, order that such person be detained forthwith but such order shall not endure for longer than **[seventy-two] forty-eight** hours unless the **[attorney-general]** Director of Public Prosecutions within that time by way of affidavit places before a judge in chambers the information on which he or she ordered the detention of the person concerned and such further information as might become available to him or her, and applies to such judge for an order that the person concerned be detained pending the relevant proceedings.

(c) The **[attorney-general]** Director of Public Prosecutions shall, as soon as he or she applies to a judge under paragraph (b) for an order of detention, in writing advise the person in charge of the place where the person concerned is being detained, that he or she has so applied for an order, and shall, where a judge under subsection (2) (a) refuses to issue a warrant for the detention of the person concerned, forthwith advise the person so in charge of such refusal, whereupon the person so in charge shall without delay release the person detained.

- (2) (a) The judge hearing the application under subsection (1) may, if it appears to him from the information placed before him or her by the **[attorney-general] Director of Public Prosecutions** [-
- (i)] that there is a danger that the personal safety of the person concerned may be threatened or that he or she may abscond or that he or she may be tampered with or that he or she may be intimidated, [; or
- (ii) **that it would be in the interests of the person concerned or of the administration of justice that he be detained in custody,]**
- issue a warrant for the detention of such person.
- (b) The decision of a judge to refuse an application under paragraph (a) shall be final: Provided that where a judge refuses an application and further information becomes available to the **[attorney-general] Director of Public Prosecutions** concerning the person in respect of whom the application was refused, the **[attorney-general] Director of Public Prosecutions** may again apply under subsection (1) (a) for the detention of that person.
- (3) A person in respect of whom a warrant is issued under subsection (2), shall be taken to the place mentioned in the warrant and, in accordance with regulations which the Minister is hereby authorized to make, be detained there or at any other place determined by any judge from time to time, or, where the person concerned is detained in terms of an order by the **[attorney-general] Director of Public Prosecutions** under subsection (1) (b), such person shall, pending the decision of the judge under subsection (2) (a), be taken to a place determined by the **[attorney-general] Director of Public Prosecutions** and detained there in accordance with the said regulations.
- (4) Any person detained under a warrant in terms of subsection (2) shall be detained for the period terminating on the day on which the criminal proceedings concerned are concluded, unless-
- (a) the **[attorney-general] Director of Public Prosecutions** orders that he or she be released earlier; or
- (b) such proceedings have not commenced within six months from the date on which he or she is so detained, in which case he or she shall be released after the expiration of such period.
- (5) No person, other than an officer in the service of the State acting in the performance of his or her official duties, shall have access to a person detained under subsection (2), except with the consent of and subject to the conditions determined by the **[attorney-general] Director of Public Prosecutions** or an officer in the service of the State delegated by him or her.

...

- (9) (a) In this section the expression 'judge in chambers' means a judge sitting behind closed doors when hearing the relevant application.
- (b) No information relating to the proceedings under subsection (1) or (2) shall be published or be made public in any manner whatever.

17. Section 191 of the Principal Act is hereby amended by the substitution for subsections (1), (2) and (3) of the following subsections:

191 Payment of expenses of witness

- (1) Any person who attends criminal proceedings as a witness for the State or defence shall be entitled to such allowance as may be prescribed under subsection (3): Provided that the judicial officer or the judge presiding at such proceedings may, if he or she thinks fit, direct that no such allowance or that only a part of such allowance shall be paid to any such witness.
- (2) **[Subject to any regulation made under subsection (3), the judicial officer or the judge presiding at criminal proceedings may, if he thinks fit, direct that any person who has attended such proceedings as a witness for the accused, shall be paid such allowance as may be prescribed by such regulation, or such lesser allowance as such judicial officer or such judge may determine.]**
- (3) The Minister may, in consultation with the Minister of Finance, by regulation prescribe a tariff of allowances which may be paid out of public moneys to witnesses in criminal proceedings including the accused if he or she has been released on bail, and **[may by regulation prescribe different tariffs for witnesses according to their several callings, occupations or stations in life, and]** according **[also]** to the distances to be travelled by such witnesses to reach the place where the proceedings in question are to take place, and may by regulation further prescribe the circumstances in which such allowances may be paid to any witness for an accused.

18. Section 198 of the Principal Act is hereby amended by the substitution for the section of the following section:

198 Privilege arising out of marital state

- (1) A husband shall not at criminal proceedings be compelled to disclose any communication which his wife made to him during the marriage, and a wife shall not at criminal proceedings be compelled to disclose any communication which her husband made to her during the marriage.
- (2) Subsection (1) shall also apply to a communication made during the subsistence of a marriage or a putative marriage which has been dissolved or annulled by a competent court, as well as a customary marriage or a marriage concluded under any system of religious law.

19. Section 212 of the Principal Act is hereby amended by the substitution for subsection (10)(a) of the following subsection:

212 Proof of certain facts by affidavit or certificate

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

20. Section 217 of the Principal Act is hereby amended by the substitution for the section of the following section:

217 Admissibility of confession by accused

- (1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his or her sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided-
- (a) ...
- (b) **[that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question-**
- (i) ...
- (ii) **be presumed, *unless the contrary is proved*, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.]**
- (2) **[The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under proviso (b) to subsection (1).]**

21. Section 219A of the Principal Act is hereby amended by the substitution for the section of the following section:

219A Admissibility of admission by accused

(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him or her at criminal proceedings relating to that offence [: **Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained-**

(a)

(b) **be presumed, unless the contrary is proved, to have been voluntarily made by such person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person.]**

(2) **[The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1).]**

22. Section 237 of the Principal Act is hereby amended by the substitution of subsections (1) and (2) for the following subsection:

237 Evidence on charge of bigamy

(1) At criminal proceedings at which an accused is charged with bigamy, it shall, as soon as it is proved that a marriage ceremony, other than the ceremony relating to the alleged bigamous marriage, took place within the Republic between the accused and another person, be prima facie proof **[presumed, unless the contrary is proved,]** that the marriage was on the date of the solemnization thereof lawful and binding.

(2) At criminal proceedings at which an accused is charged with bigamy, it shall be prima facie proof **[presumed, unless the contrary is proved,]** that at the time of the solemnization of the alleged bigamous marriage there subsisted between the accused and another person a lawful and binding marriage-

(a) if there is produced at such proceedings, in any case in which the marriage is alleged to have been solemnized within the Republic, an extract from the marriage register ...

23. Section 238 of the Principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

238 Evidence of relationship on charge of incest

(1) At criminal proceedings at which an accused is charged with incest-

(a) it shall be sufficient to prove that the **[woman or girl]** person on whom or

27. **Section 249 of the Principal Act is hereby amended by the substitution for the section of the following section:**

249 Presumption of failure to pay tax or to furnish information relating to tax

When an accused is at criminal proceedings charged with any offence of which the failure to pay any tax or impost to the State, or of which the failure to furnish to any officer of the State any information relating to any tax or impost which is or may be due to the State is an element, the accused shall be deemed to have failed to pay such tax or impost or to furnish such information, unless the accused raises a reasonable doubt to the contrary **[is proved]**.

28. **Section 269 of the Criminal Procedure Act 51 of 1977 is hereby repealed.**

269 [Sodomy

If the evidence on a charge of sodomy or attempted sodomy does not prove the offence of sodomy or, as the case may be, attempted sodomy, but the offence of indecent assault or common assault, the accused may be found guilty of the offence so proved.]

29. **Section 274 of the Principal Act is hereby amended by the substitution for the section of the following section:**

274 Evidence on sentence

- (1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
- (2) The **[accused] prosecution** may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the **[prosecution] accused** may likewise address the court.

30. **Section 332 of the Principal Act is hereby amended by the substitution for the section of the following section:**

332 Prosecution of corporations and members of associations

- (1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law-
 - (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
 - (b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director

or servant of that corporate body,

in the exercise of his or her powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

- (2) In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he or she were the person accused of having committed the offence in question: Provided that-
- (a) if the said person pleads guilty, other than by way of admitting guilt under section 57, the plea shall not be valid unless the corporate body authorized him or her to plead guilty;
 - (b) if at any stage of the proceedings the said person ceases to be a director or servant of that corporate body or absconds or is unable to attend, the court in question may, at the request of the prosecutor, from time to time substitute for the said person any other person who is a director or servant of the said corporate body at the time of the said substitution, and thereupon the proceedings shall continue as if no substitution had taken place;
 - (c) if the said person, as representing the corporate body, is convicted, the court convicting him or her shall not impose upon him or her in his or her representative capacity any punishment, whether direct or as an alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body and may be recovered by attachment and sale of property of the corporate body in terms of section 288;
 - (d) the citation of a director or servant of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, shall not exempt that director or servant from prosecution for that offence **[in terms of subsection (5)]** also in his or her personal capacity either jointly with or separately from the corporation.
- (3) In criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of the corporate body within the scope of his activities as such director, servant or agent, or any document which was at any time in the custody or under the control of any such director, servant or agent within the scope of his or her activities as such director, servant or agent, shall be admissible in evidence against the accused.
- (4) For the purposes of subsection (3) any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his or her custody or under his or her control, shall be presumed to have been made or kept by him or her or to have been in his or her custody or under his or her control

within the scope of his or her activities as such director, servant or agent, **[unless the contrary is proved]** in the absence of evidence which raises a reasonable doubt to the contrary.

- [(5) When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.]**
- (6) In criminal proceedings against a director or servant of a corporate body in respect of an offence-
- (a) any evidence which would be or was admissible against that corporate body in a prosecution for that offence, shall be admissible against the accused;
 - (b) whether or not such corporate body is or was liable to prosecution for the said offence, any document, memorandum, book or record which was drawn up, entered up or kept in the ordinary course of business of that corporate body or which was at any time in the custody or under the control of any director, servant or agent of such corporate body, in his or her capacity as director, servant or agent, shall be prima facie proof of its contents and admissible in evidence against the accused, unless he or she is able to **[prove]** raise a reasonable doubt that at all material times he or she had no knowledge of the said document, memorandum, book or record, in so far as its contents are relevant to the offence charged, and was in no way party to the drawing up of such document or memorandum or the making of any relevant entries in such book or record.
- [(7) When a member of an association of persons, other than a corporate body, has, in carrying on the business or affairs of that association or in furthering or in endeavouring to further its interests, committed an offence, whether by the performance of any act or by the failure to perform any act, any person who was, at the time of the commission of the offence, a member of that association, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it: Provided that if the business or affairs of the association are governed or controlled by a committee or other similar governing body, the provisions of this subsection shall not apply to any person who was not at the time of the commission of the offence a member of that committee or other body.]**
- (8) **[In any proceedings against a member of an association of persons in respect of an offence mentioned in subsection (7)]** When a member of an association of persons, other than a corporate body, has been charged with the

commission of an offence in respect of the carrying on of the business or affairs of that association or in furthering or in endeavouring to further its interest any record which was made or kept by any member or servant or agent of the association within the scope of his or her activities as such member, servant or agent, or any document which was at any time in the custody or under the control of any such member, servant or agent within the scope of his or her activities as such member, servant or agent, shall be admissible in evidence against the accused.

- (9) For the purposes of subsection (8) any record made or kept by a member or servant or agent of an association, or any document which was at any time in his or her custody or under his or her control, shall be presumed to have been made or kept by him or her or to have been in his or her custody or under his or her control within the scope of his or her activities as such member or servant or agent, **[unless the contrary is proved]** in the absence of evidence which raises a reasonable doubt to the contrary.

31. **Section 337 of the Principal Act is hereby amended by the substitution for the section of the following section:**

337 Estimating age of person

If in any criminal proceedings the age of any person is a relevant fact of which no or insufficient evidence is available at the proceedings, but is not an essential element of the offence charged, the presiding judge or judicial officer may estimate the age of such person by his or her appearance or from any information which may be available, and the age so estimated shall be prima facie proof of the [deemed to be the correct] age of such person[.] . **[unless-**

- (a) **it is subsequently proved that the said estimate was incorrect; and]**
- (b) **the accused at such proceedings could not lawfully have been convicted of the offence with which he was charged if the correct age had been proved.]**

32. **Section 319(3) of the Criminal Procedure Act 56 of 1955 is hereby amended by the substitution of subsection(3) by the following subsection:**

- (3) If a person has made any statement on oath whether orally or in writing, and he or she thereafter on another oath makes another statement as aforesaid, which is in conflict with such first mentioned statement, he or she shall be guilty of an offence. In the absence of evidence which raises a reasonable doubt as to the accused's belief in the truth of each statement he [and] may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, [unless it is proved that when he made such statement he believed it to be true.]

33. **Short title and commencement**

This Act shall be called the Criminal Procedure Amendment Act, 20.., and shall come into operation on a date determined by the State President in the **Gazette**.

LIST OF RESPONDENTS

- C Criminal Law & Procedure Committee of the Law Society of the Cape of Good Hope
- C Natal Law Society
- C The office of the legal component of the SA Police Service
- C The Superintendent General, Department of Education
- C Judge L van den Heever, retired Judge of the Supreme Court of Appeal
- C Mr D Lambrechts, a legal tutor
- C Dr SV Hooctor, of the University of Port Elizabeth