# CRIMINAL DEFENDER'S HANDBOOK

## Contents

# INTRODUCTION

This Handbook is intended to give guidance to legal practitioners representing clients who are charged with criminal offences. It is particularly aimed at newly qualified legal practitioners, but it also contains reference material that will be useful for more experienced practitioners. It covers selective aspects of criminal procedure, evidence, substantive law and sentencing.

The following abbreviations are used throughout this work:
CPEA — Criminal Procedure and Evidence Act [*Chapter 9:07*]
CLCA — Criminal Law (Codification and Reform) Act [*Chapter 9:23*]
MCA —Magistrates Court Act [*Chapter 7:10*]
HCA — High Court Act [*Chapter 7:06*]
SCA — Supreme Court Act [*Chapter 7:13*]

The accused person will normally be referred to as "X" but the term "the accused" will be used where the use of the abbreviation "X" might be confusing.

**Bibliography**

Frequent reference is made throughout this work to the *Prosecutors Handbook* by John Reid-Rowland 3rd Edition 1992 published by the Legal Resources Foundation.

Other books referred to in this handbook include:
James Morton *Handling Criminal Cases A guide to preparation and defence* (1986 Waterlow) (This will be referred to as *Handling of Criminal Cases*.)
Storry *Rhodesian Criminal Practice* (1978 Rhodesia Law Journal)
Purver, Young, Davis and Kerper *The Trial Lawyer's Book Preparing and Winning Cases* (Lawyers Cooperative Publishing, New York, 1990)
Feltoe *A Guide to Zimbabwean Criminal Law*
Feltoe Commentary on Criminal Law (Codification and Reform) Act
Feltoe *A Guide to Sentencing in Zimbabwe*
Hoffmann and Zeffertt *The South African Law of Evidence* (4 ed)

# SECTION 1 – DEFENCE LAWYER'S ROLE & RESPONSIBILITIES

## General

The duty of the lawyer in a criminal case is a dual one. He must defend his client competently and conscientiously, but he must also uphold and advance the interests of justice. His duty to his client must be balanced against his duty to promote the interests of justice.

The Constitution of Zimbabwe guarantees, amongst other things, the right of every person

- to protection of law: s 18(1);
- to personal liberty unless the person or is reasonably suspected to have committed or be about to commit a crime: s 13(2)(e). A person can also be deprived of his or her liberty if he or she is convicted and sentenced for a crime;
- not to be subjected to torture or to inhuman or degrading punishment or other such treatment. This right applies when the client is in police custody and when incarcerated for a criminal offence: s 15(1);

- to receive a fair trial within a reasonable period: s 18(2).

It is the duty of every defence lawyer to try to ensure that these, and all the other fundamental rights of his or her client, are not violated.

The constitution also provides that every person charged with a criminal offence has a constitutional right to be represented at his or her own expense by a legal practitioner of his or her own choice. The denial of this right is a breach of a fundamental right [s 18(3)(b)] and a violation of this right is a ground for appeal. For example, in the case of *Mushayandebvu* 1992 (2) ZLR 62 (S) a woman had engaged a lawyer to defend her but he was unavailable on the day of the trial due to previous commitments. The prosecutor knew that she had engaged a lawyer who was unavailable for the trial but did not inform the court about this. The woman, who was unsophisticated, did not herself tell the court about this. She was convicted. The appeal court set aside the conviction on various grounds, one of which was that the woman's constitutional right to be represented by a lawyer at her own expense had been breached, as the prosecutor should have told the court that she had engaged a lawyer who was unavailable on the day of the trial; it was unfair to expect an unsophisticated accused to realise that she could bring to the court's attention this matter.

## Duty to client

The legal practitioner defending a client has a duty to defend him to the best of his abilities, using his skill and judgment. The degree of devotion to the client's case should in no way depend upon the amount of remuneration for the work. The person assigned a lawyer under the *pro deo* system is entitled to the same extent of professional dedication to his case as the client who is paying the normal commercial rates. Many murder cases are defended under the *pro deo* system. Even though the fees for *pro deo* work are meagre, the lawyers assigned to do this work are duty bound to defend their clients properly. After all their clients are usually charged with offences which could attract the death penalty. They are expected to prepare for these cases assiduously; a cursory, last minute interview of the client, a rapidly drawn defence outline and a superficial presentation of his case at the trial do not constitute a fulfilment of the professional duty of the defence lawyer. Mr Justice McNally has said this about *pro deo* work:

> The conduct of the defence in such cases is the highest test of the legal integrity of a practitioner. It is all too easy to approach these cases, especially on circuit, on the basis; 'How many first day fees can I cram into a week so as to make this an economically viable circuit?' It is all too easy to go down early on Monday morning instead of sacrificing your week-end.
>
> This sort of approach is totally unethical and downright wicked. The defence of a man on trial for his life, or facing a long term of imprisonment, is one of the most solemn duties of a [legal practitioner].
> 1988 Vol 1 No 2 *Legal Forum* 3

The same article relates details of a number of murder cases where it is quite clear that the *pro deo* lawyers failed to fulfil their professional duty towards their clients. One of the worst of these cases is that of *Nyandoro* 1987 (2) ZLR 66 (S). Here the defence lawyer pleaded on behalf of his client that he was guilty of murder with actual intention. (The client himself should have pleaded to the charge.)

The plea tendered by the defence lawyer entirely overlooked the fact that in the defence outline there was a completely clear assertion that X lacked intention to kill. Two statements in particular in the outline showed this. They were:

> "I did not intend to kill anybody."
> "I fired a shot at him to frighten him away."

The defence lawyer neither called his client to give testimony nor did he call any defence witnesses. He simply made the quite extraordinary statement that the only "evidence" he was calling was the

defence outline. (The defence outline does not constitute evidence; it is only a summary of the the evidence the defence intends to produce.) The defence lawyer also said that he was tendering the outline as "admissions".

The defence lawyer must not only present his client's case conscientiously but also fearlessly and without regard to any unpleasant consequences which may stem from defending that particular person on that particular charge. The defence lawyer is duty bound to defend clients client vigorously and conscientiously and must not be deflected from doing his duty where his client been charged with a crime which engenders disgust or abhorrence amongst the public or his client belongs to a highly unpopular political movement. Marshall Hall has this to say:

> He was representing a man in Manchester who was alleged to have allowed prostitutes to congregate and solicit in his theatre. A Manchester clergyman implied that it was shameful for the MP for a religious town like Southport to be the advocate for such a man. Marshall replied in vigorous language: 'Barristers are public servants and may be called upon just as a doctor may be called upon to operate on a man suffering from a loathsome complaint.'

*Famous Trials of Marshall Hall*" by Edward Marjoribanks (first published 1929; republished by Penguin, 1989) at p 171.

On duty to represent client even if you believe he is guilty, see Richard du Cann "*The Art of the Advocate*" (Penguin, 1964) p 39.

> The advocate must not impose his opinion of the facts upon the client, though he may feel obliged to press it pretty strongly.

He quotes Dr Johnson:

> Sir, you do not know the cause to be good or bad until the Judge determines it...

and Baron Bramwell:

> A man's rights are to be determined by the court and not by his attorney or counsel... A client is entitled to say to his counsel: 'I want your advocacy, not your [decision]; I prefer that of the court.

To present a client's case in the best possible light does not necessarily mean trying to get an acquittal. It means presenting a case in the way in which best serves the client's interests. The job of the lawyer is to present a realistic case on behalf of his client. If the lawyer believes that the best interests of his client would be best served by a plea of guilty, he will advise the client accordingly. He will try to persuade him that there is such strong evidence against him that the unnecessary contesting of the case will result in the aggravating features of the case being emphasised with the likelihood that a stiffer sentence being imposed. He will point out to him that if he pleads guilty, there is a chance that he will obtain the maximum amount of mitigation in so doing. This does not mean that the lawyer can override his client's instructions merely because he does not believe his client's story or thinks that it will be difficult to prove this story. If therefore at the end of the day the client insists on putting forward a story which appears to the lawyer to be incredible, the lawyer is nevertheless duty bound to put that story forward before the court in its best possible light. He must argue it as if he believes it. The defence lawyer must make a critical assessment of his client's case, but does not pass final judgment on it. It is a disservice to his client and a gross dereliction of his professional duty for the lawyer to present his client's case in such a way that it is patently obvious that he has no faith in the case he is arguing. It should always be remembered that sometimes the most absurd-sounding story turns out to be true. The truth is sometimes stranger than fiction.

In the case of *Mutsinziri* 1997 (1) ZLR 6 (H) the court stressed that where a legal practitioner representing an accused person, whether pro deo or on a private brief, has difficulty taking instructions from the accused, he is nevertheless enjoined to do all he can to represent the interests of his client. It is utterly inimical to those best interests for him to state in open court that he is having

difficulty and wishes to be excused. In the very limited circumstances where a legal practitioner might properly withdraw from further attendance upon the accused in the course of proceedings, he is bound to explain himself, in the most discrete way possible and in a manner least calculated to prejudice his client, not by a dramatic announcement in open court.

As regards the duty of the defence lawyer to apply for a postponement of a case where he has not had enough time to prepare the defence case properly, see under “Postponement of cases” in Section 2.

## Duty to court

The legal practitioner’s duty towards his client must be balanced against the duty owed by him to the court and to the administration of justice. The lawyer's duty to his client is in fact circumscribed by his duty to the court.

The legal practitioner's duty to promote his client's interests must never transcend his duty to promote the interests of justice and truth. He has a paramount duty to the court as an officer of the court to ensure that justice and truth are advanced: *Mukombe* 1991 (1) ZLR 138 (S). His duty to uphold the interests of justice means that he must not seek to obtain an acquittal at all costs; he must never seek to obtain the acquittal of his client by the use of lies and deception.

The first and foremost duty owed by the legal practitioner to the court is that of absolute candour. A lawyer must never knowingly mislead the court. He cannot put anything in the defence outline he prepares for court which he knows to be untrue. If the client insists that the lawyer should put forward something which the lawyer regards as misleading to the court, then it is the lawyer’s duty to withdraw from the case.

The deliberate misleading of the court by a legal practitioner is highly improper. In *Khumalo* HB-70-91 the legal practitioner had cited a case on sentence and, despite being queried on the point, was adamant that the sentence therein was six months' imprisonment; in fact it was six years. The review court said that it was highly improper for counsel to cite cases with which they are unfamiliar or to misquote them in order to try to mislead the court. In *Kawondera* v *Mandebvu* S-12-06, a legal practitioner’s duty to disclose authorities adverse to his client was held to be part of the diligence expected of a legal practitioner. This diligence includes checking of authorities cited by the other side which should never be accepted at face value.

There is, however, nothing to stop a lawyer from defending a client whom he believes to be guilty. In our system a person is presumed to be innocent until his guilt is proven beyond reasonable doubt and he has been convicted by the court. X may indeed be guilty but unless the State can produce sufficient evidence to prove his guilt he is entitled to go free. The fact that the defence lawyer thinks his client's defence is probably a tissue of lies does not mean that he cannot seek to defend him on the basis of his client's instructions. He cannot, however, at any time suggest anything to the court which is contrary to what he knows from his client. For example, he cannot put it to witness that his client was not at the scene of the crime when his client has told him he was there.

What, then, of the situation where the client confesses his guilt to his lawyer before the trial commences but nonetheless wishes to plead not guilty to the charge? In a system where there is no requirement that a defence outline must be put in at the beginning of the trial, the lawyer can still advise a client whom he knows to be guilty to plead not guilty where it is clear that the State does not have the evidence to prove his guilt. If this situation were to arise in our system, it would seem to be proper for the defence lawyer to advise his client not to put in a defence outline and to plead not guilty, knowing that the State will be unable to prove its case, just as he could properly advise a client not to make a warned and cautioned statement in these circumstances.

Although the defence lawyer must not deliberately mislead the court this does not mean that he is under an obligation to volunteer all he knows about his client. If, for example, it becomes apparent

that the State is not aware that X has a previous conviction, his lawyer is not duty bound to disclose that conviction. But he cannot say in his argument in mitigation that his client has no previous convictions whatsoever. He can simply not mention the matter at all or he may say that the State has not proved that his client has any previous convictions.

## Conflicts of interest

In *Banda* HB-34-02 the legal practitioner placed himself in a position where he had a conflict of interests. The accused, a police officer, was charged with corruption. It was alleged that he had taken a bribe from three foreigners whom he had arrested on suspicion of car theft. A legal practitioner had interviewed the foreigners, and thereafter interviewed the accused. The same legal practitioner was called as a State witness during the accused's trial, at which he accused was represented by another member of the practitioner's firm. It was held that the practitioner's testimony was as a result of the privileged position he enjoyed from consulting the three foreigners and interviewing the accused. He should have decided who to represent. Representing the three foreigners and the accused was improper. The conflict of interest in this matter culminating in the practitioner giving evidence against the accused amounted to an irregularity actually resulting in a substantial miscarriage of justice. The proceedings should be set aside.

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# SECTION 2 – PRE-TRIAL MATTERS

## Constitutional provisions

Every person is entitled to the protection of the law: 18(1).

Every person has a right to personal liberty, but a person can lawfully be deprived of liberty upon reasonable suspicion that he or she has committed or is about to commit a criminal offence: s 13(1) & (2).

Any person arrested on reasonable suspicion that he or she has committed or is about to commit a criminal offence must be brought without undue delay before a court and if the arrested person is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial: s 13(4).

Any person who is unlawfully arrested or detained is entitled to compensation from that other person or from the person who arrested or detained him or her or the authority on whose behalf or in the course of whose employment that other person: s 13(5).

Any person who is arrested or detained must be informed as soon as reasonably practicable and in detail of the reasons for his or her arrest and detention. Such person is also entitled to engage a legal practitioner to represent him or her and to hold communications with this legal practitioner. The arrested person must be permitted to see his or her lawyer *without delay*: s 13(3).

A person charged with a criminal offence must be afforded a fair hearing within a reasonable time by an independent and impartial court established by law: s 18(2).

## Clients held in custody by police

### *Lawful arrest*

Defence lawyers must know what constitutes a lawful arrest so that they can take appropriate action where their clients have been unlawfully arrested and detained.

In cases of arrest without warrant, a person can only be **lawfully** arrested in connection with a criminal offence if the person arresting him has a reasonable suspicion that the person has committed or is about to commit a criminal offence. Where an arrest warrant has been obtained, however, by one police officer, it can be lawfully executed by another officer, even though the second officer may not himself know the basis upon which the warrant was issued and thus cannot say that he reasonably suspected that the person he was arresting had committed an offence. This applies whether the arrest was on the basis of a warrant of arrest or was done without warrant.

The circumstances in which a person may lawfully be arrested without warrant are set out in s 25 CPEA. They include cases where the person arrested has committed or has attempted to commit a crime in the presence of the peace officer arresting him and where the peace officer has reasonable grounds for suspecting that the person has committed any of the offences contained in the First Schedule. The offences in the First Schedule are common law offences, except for certain offences which are excluded such as bigamy, and statutory offences where the maximum punishment is imprisonment for more than six months without the option of a fine.

If the person making an arrest without warrant does not have a reasonable suspicion that a crime has or is about to be committed, the arrest is illegal and the lawyer representing the arrested person can apply to the High Court for the immediate release of that person. See s 13(2)(e) of the Constitution of Zimbabwe. The arresting officer and the Ministry of Home Affairs should be cited as the respondents.

Reasonable suspicion is not the same as proof beyond reasonable doubt. What is required is that the person making the arrest must have information on the basis of which a reasonable person would hold a suspicion that the person to be arrested had committed or was about to commit the criminal offence: *Purcell-Gilpin* 1971 (1) RLR 241; *Miller* 1973 (2) RLR 387; *Moll v Commissioner of Police & Ors* 1973 (1) ZLR 234 (H); *Allan v Minister of Home Affairs* 1985 (1) ZLR 339 (H); Bull v Attorney-General & Anor 1986 (1) ZLR 117 (S); *Gwenyure v Minister of Home Affairs* HH-702-87; *Attorney-General v Blumears* 1991 (1) ZLR 118 (S); *Feldman v Minister of Home Affairs* S-210-92; *Gous v Minister of Home Affairs & Ors* HH-171-92; *Muzabazi v Jabawu & Ors* HH-234-92

Even if there was reasonable suspicion, the police have the discretion whether or not to arrest. If, in the circumstances, the arrest was not justified the arrest will still be unlawful and the arrested person will be entitled to claim delictual damages. The exercise of this discretion to arrest may be interfered with when exercised grossly unreasonably. In *Muzonda v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S) it was held, that although the police officer was authorised to arrest the appellant, he had a discretion as to whether to do so or not; the power of arrest is not intended always, or even ordinarily, to be exercised. Further, the principles applicable to administrative law applied: that the court would have to find that the exercise of the discretion was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it. Some of the considerations to be taken into account in determining whether an arrest is open to challenge are the possibility of escape, the prevention of further crime and the obstruction of police enquiries. On none of these grounds could the exercise of the discretion be justified. In *Paradza* v *Minister of Justice & Ors* S-46-03 the Supreme Court held that there had been an abuse of discretion which was unconstitutional on the basis that it violated ss 13 and 18 of the constitution- right to liberty and to protection of the law. See also *Botha v Zvada & Anor* 1997 (1) ZLR 415 (S); *Nyatanga* v *Mlambo NO & Ors* HH-85-03.

The onus is upon the person making the arrest to prove that the arrest was lawfully justified: *Stambolie v Commissioner of Police* 1989 (3) ZLR 287 (S).

Arrest warrants are issued in terms of s 33 CPEA. The person applying for the warrant of arrest must state that from the information available to him, he has reasonable grounds for suspecting that the person he wishes to arrest has committed a certain specified offence.

## *Maximum periods of custody*

Criminal defence lawyers must know the maximum periods that the police can hold their clients after they have arrested them. They must note that there are special provisions for prolonged detention of persons who are charged with offences in the Ninth Schedule of CPEA.

### *Arrest with warrant*

Where the person is arrested on the basis of an arrest warrant, he must be brought as soon as possible to a police station or a charge office unless the warrant specifically authorises that he be taken to some other place: s 34(3) CPEA

Thereafter he must be brought as soon as possible before a judicial officer upon the charge mentioned in the warrant: s 34(3) CPEA.

### *Arrest without warrant*

Where a person is arrested without warrant he must be taken as soon as possible to a police station or a charge office and if he is not released, he may not be detained for more than forty-eight hours (or not more than ninety six hours if there is a holiday or a Sunday within the forty-eight hour period). However, the detention can be extended beyond this period if a judge, magistrate or justice of the peace issues a warrant for further detention: s 32(2) CPEA. The CPEA does not specify the duration of such a warrant.

In *Makwakwa* 1997 (2) ZLR 298 (H) the court observed that the Constitution requires that an arrested person be brought before a court without undue delay. This is the guiding principle in determining what power the police may have to detain a person before his first appearance in court. The fact, though, that the person arrested may be detained does not mean that he should be detained. Just as the exercise of the power to arrest is open to challenge, so the decision whether or not to hold him for the maximum period permissible under the Act or whether to permit his further detention without bringing him before a magistrate is likewise open to scrutiny. Delay in bringing a detained person before a magistrate will only be countenanced where that delay is excusable on some objective ground. The ground might relate to physical difficulties in presenting the person in a court, or it might relate to a legitimate, genuine and justifiable decision to use to the fullest extent the discretionary powers vested in the police by the law.

In the case of *Nyamhoko & Ors* v *OC ZRP Manicaland Province & Ors* HH-37-06 the applicants were arrested by the police on allegations of committing offences under the Public Order and Security Act. They were maltreated while in custody and denied access to their legal practitioners. State counsel who tried to intercede were threatened by the police and had to flee the district. The applicants sought a declaratur that their detention, which had been for more than 48 hours, was unlawful, as well as an order for the return of property taken from them. No warrant for further detention was shown to the court. The court held that where an applicant has been held beyond the 48 hour period, it is competent to declare the whole detention period illegal. Even assuming in favour of the respondents that somewhere in their offices warrants for further detention lay unattended, the facts before the court required that the detention be declared illegal.

The provision for obtaining a warrant for further detention is open to abuse as the police can obtain this warrant without even having to appear personally before a magistrate and without taking the prisoner before the magistrate by applying to a justice of the peace who is a police officer, or obtaining authorization for further detention from a magistrate. On occasions it has apparently been used as a device for keeping the prisoner *incommunicado* for extended periods without access to his lawyer or relatives and without access to the courts to apply for bail. If the police are using these provisions in an abusive fashion, an urgent application can be made to the High Court for a court order to oblige the police to take the arrested person before a court so that the case can be properly

remanded and an application for bail can be made. Although the provisions are not entirely clear on this point, it was surely not envisaged that the 96 hour upper limit for bringing a person arrested without warrant before a court can be completely circumvented by relying upon the provisions relating to further detention. The police officer who has denied access and the Ministry of Home Affairs can be cited as respondents in this action.

## *Special provisions for offences in Ninth Schedule*

Defence counsel should be aware of the fact that there are special provisions for prolonged detention of persons who are charged with offences in the Ninth Schedule of CPEA. There apply both to persons arrested with warrant and those arrested without warrant.

There are special provisions in connection with charges under the Ninth Schedule. If the charge is for an offence in paragraph 10 of the Ninth Schedule and the judicial officer is satisfied that there is a reasonable suspicion that he has committed the offence, he *must* order the continued detention of that person for a period of 21 days: s 34(4)(a) CPEA (with warrant) and s 32(3a) CPEA (without warrant)

If the charge is for any offence in the Ninth Schedule, the Attorney-General may produce a certificate that the offence in question involves significant national interest of Zimbabwe and further detention for a period up to 21 days is necessary because of the complexity of the case, and/or the difficulty of obtaining evidence in relation to the offence, and/or the likelihood of X concealing or destroying evidence relating to the offence. Where such a certificate is produced and the judicial officer is satisfied that there is a reasonable suspicion that X committed the offence, he *must* order the continued detention of X for a period of 21 days or the lesser period specified in the Attorney-General's certificate: s 34(4)(b) CPEA (with warrant) and s 32(3a) and (3b) (without warrant). However, with arrest without warrant there are certain requirements in addition to the Attorney-General's certificate. The arresting officer must be an officer of or above the rank of assistant inspector at the time of the arrest and where the arrest was disclosed through an anonymous complaint, there must be a copy of the recorded complaint must be laid before the judicial officer.

No court may admit to bail any person detained for 21 days under the provisions above: 34(5) CPEA and s 32(3c) CPEA.

Where X is detained for 21 days under these provisions, the arresting officer must make period reports at intervals of not more than 48 hours to the Attorney-General on the progress of the investigations. If the Attorney-General believes on the basis of such a report that X's detention is not longer justified, he may order the immediate and unconditional release of the person: 34(5) and 32(3c) CPEA.

Within 48 hours of the expiry of the 21 day detention period the detaining authority may obtain an order or warrant for further detention of such person pending the outcome of their criminal investigations. However, X will still have the right to apply for bail: s 34(6) and s 32(3d) CPEA.

## *Helping police with inquiries*

Sometimes the police will say that the person in their custody has not been arrested but is simply "helping the police with their inquiries." In fact this person may often be a criminal suspect and the police will be using the subterfuge that he is "assisting them in their inquiries" in order to allow them to hold and interrogate this person beyond the maximum periods laid down. There is no provision made for this procedure in the Criminal Procedure and Evidence Act. There is only s 26 which allows the police to arrest a person without warrant and to hold him for up to **twelve hours** if the suspect refuses to furnish the police with his name and address or gives a name and address which appears on reasonable grounds to be false.

## *Locating client*

Lawyers may be engaged to represent persons who are in police custody and who have not yet been brought to court. In order for lawyers to protect the interests of persons in custody, it is imperative that access to their clients is obtained as soon as possible.

Usually there will be no difficulty in finding out where the client is being held. He may have telephoned from a particular police station and asked the lawyer to come to the station where he is being held.

Where a relative or spouse of the arrested person engages a lawyer to represent the arrested person, this person may have been told to which police station the arrested person was being taken or he may have asked from which police station the arresting detail came. He may have information at which police station the arrested person is being held. If the arrested person is being held at a large city police station, the client should be asked if he or she knows the name of the investigating officer, his section and the number of his office. The client may be able to find out this information for the lawyer. This information is helpful to the lawyer and saves time and thus will reduce the fees charged.

There are, however, situations where the person engaging the lawyer on behalf of the arrested person has no idea where the arrested person is being held. Often arrests take place in the early hours of the morning. The family may be upset and have no clear knowledge of where the person has been taken. If the person engaging the lawyer was present at the place where X was picked up, the first thing to find out is whether members of the arresting detail were in police uniform or in plain clothes. If they were in plain clothes it is likely that it was a C.I.D. or C.I.O. arrest. The lawyer should also find out if it is known for what sort of crime the person arrested was picked up.

If it is known that the arrest was made by the uniformed branch of the police, these sorts of procedures should be followed to try to locate the arrested person. In smaller centres it is usually a fairly straightforward matter to locate the client as there will be only a limited number of police stations where he could be held. The main police station in that area is the logical starting point for inquiries. Even if the prisoner has been transferred from the small centre to one of the larger centres for questioning, the local station will know where he has been taken and will usually give the lawyer this information.

In larger centres ascertaining at which police a client is being held may sometimes be more problematical. The best starting point is to check with the Controller or Member-in-Charge at the Central Police Station in order to find out whether your client is being held at that station. Many of the people arrested are taken to the Central Police Station first, especially if they are arrested for more serious crimes. If the client is not there, the Controller or Member in Charge should be asked if he has or is able to find out any information as to where the client is being held. If this proves unsuccessful and the exact place where the client was arrested is known, a check should be made at the police station closest to where the arrest took place. If this does not produce positive results then Police Headquarters should be contacted to obtain information. It should be borne in mind that where an arrested person is being held in police custody, his name and details are recorded in the custody or detention book.

Where the persons effecting the arrest were in plain clothes the arrest was probably made by the C.I.D. or the C.I.O. If you know the nature of the crime for which the arrested person was arrested this will help to indicate which unit would have made the arrest. If it is fraud or a currency contravention, it is likely to be C.I.D. fraud squad. If it is a security related matter it may have been the C.I.O. If it is a homicide case the case will be in the hands of the homicide squad. Both the C.I.D. and the C.I.O. will usually have sections at the main police station and inquiries may be made to the persons in charge of these sections.

In the past, in some security cases, the police or the CIO have deliberately moved persons in custody around various remote police stations in order to make it difficult for legal practitioners to locate their clients. If this happens the best thing to do is to contact Police Headquarters or the CIO Headquarters and insist that whereabouts of your client be revealed. If this fails, you may have to seek a High Court

order to force the authorities to reveal where your client is being held in custody. The Ministry of Home Affairs should be cited as respondent in such an action.

Where the CIO have their own sections at police posts, the CIO usually does not reveal details of their arrests to the ordinary police and thus inquiries to the ordinary police will prove fruitless. Direct inquiries to the CIO itself will have to be made.

It should be borne in mind that it is not only police officers who have powers of arrest. The other persons who have powers of arrest are listed in the Criminal Procedure and Evidence (Designation of Peace Officers) Notice of 1990 (SI 130 of 1990). For example, in certain circumstances officers and inspectors in the Department of Parks and Wildlife have powers of arrest.

## *Ascertaining the charge*

Having located the client, the client should be visited at the police station or other place of detention as soon as possible. On arrival at the police station the first thing to do is to find out who is the investigating officer and to find out from him what offence the police suspect the client of having committed. If the investigating officer is unavailable, the lawyer should speak to the member-in-charge about this. If the arrest was done on the basis of an arrest warrant, the lawyer should ask to see the arrest warrant as this will specify the charge. If the arrest was without warrant, in terms of s 32(5) CPEA the police must inform the person arrested forthwith of the cause of his arrest. The lawyer must ask the police why the client was arrested without warrant.

It is important that the lawyer finds out as much as possible about the charge and the basis thereof from the police so that when he interviews his client he can discuss the State case with him and compare the client's version with the State case, as far as it is known.

## *Access to client*

Having found out from the police why the client was arrested, the next stage is to obtain access to the client. The client has a right to access to his lawyer and the lawyer has a right to access to his client: *Slatter & Ors* 1983 (2) ZLR 144 (H).

Should the police or other detaining agency refuse to allow the legal practitioner to speak to his client, an urgent application should be made to the High Court compelling the police or other agency to allow access by the lawyer to his client. Section 13(3) of the Constitution lays down that an arrested person must be permitted to see his lawyer *without delay*.

Sometimes, where the lawyer attempts to gain access to his client over a weekend, the police will say that access cannot be allowed until the investigating officer or a more senior officer gives his permission and that that officer is not presently on duty and it will only be possible to contact him on Monday. It is legally impermissible to deny access on these grounds. This should be pointed out to the police and the lawyer should insist that he be able to interview his client without delay.

If the police insist on knowing the name of the person who instructed you to seek access to the prisoner and refuse to allow you access to the prisoner unless this information is revealed, you must be in a position to deal with this situation. You must ask the person instructing you whether he is prepared to have his name and address revealed to the police. It would seem, however, that the police actually do not have the right to demand revelation of the name of the person who has instructed you.

## *Presence of legal practitioner when warned and cautioned statement recorded*

If the client has decided to make a warned and cautioned statement and has instructed his legal practitioner to be present when he makes this statement, the legal practitioner is legally entitled to be present when this statement is being recorded.

## *Interviewing client*

The main purpose of the interview of the client at the stage when he is still being held by the police will usually be to find out whether the police have reasonable grounds for holding the client in custody and, if they do, to ensure that the client is not held beyond the maximum period allowed by law for holding a person without bringing him before a court of law. The lawyer will also need to obtain relevant details to enable him to make a bail application when the client is brought before a court for remand. This will apply especially where the client is likely to be charged with a serious crime and where it is likely that remand in custody will be sought by the State (i.e. it will oppose bail.).

The lawyer has a right to interview his client in private without any police officer or prison officer present. The police cannot insist that the client be interviewed within their presence or with a police officer within earshot who can hear what is being said between the lawyer and his client.

During this interview the lawyer must find out all relevant information including:

- the client's response to the allegations levelled against him;
- the names of the officers who arrested him and that of the investigating officer;
- what the arresting detail said to him at the time of the arrest;
- what questioning, if any, the client has been subjected to since he was arrested and by whom the questioning was done;
- whether he has made any sort of statement and, if he has, what sort of a statement it was and what its contents were (i.e. was it made orally or was it a handwritten statement; was it a warned and cautioned statement which was typed and read over to him before he signed it; has the statement been confirmed before a magistrate? etc.)
- if a statement has been made, whether it was made freely and voluntarily (If the client says he was physically maltreated or threatened in order to force him to confess, the lawyer should carefully note down the details of the alleged maltreatment or threats. The client should also be asked to show the lawyer any injuries and bodily marks which resulted from his mistreatment and the lawyer must carefully note down his observations about these.) If a medical practitioner has already given medical treatment to his client, the lawyer should ask the police for a copy of the medical report.

Where the client has already made a statement to the police and this has been recorded, the lawyer should ask the police to allow him to see this recorded statement and he should request that he be provided with a copy of this statement.

## *Taking items to client*

The considerate lawyer will take to his client who is in custody some items to make his time in custody more comfortable, if these items can be made available by the client's spouse or relatives. The lawyer can take his client some food, some clothing such as a jersey or a track suit and some blankets. Any liquid refreshments that he takes his client such as orange juice must be in plastic containers as no glass containers are allowed to be given to prisoners. The reason for this is to prevent glass containers being used as weapons or to commit suicide. The client is entitled to receive such items whilst he is in police custody and in custody at the prison on remand. Although relatives can also take these items to the prisoner, it is often easier for the lawyer to ensure that they reach his client. The police and the remand prison authorities will allow the prisoner to receive such items.

## *Advice on statements to police*

Where the client has not yet made a statement to the police, the lawyer, having listened to what his client has to say, will have to decide on what advice to give his client about making a statement. In general terms the client should not be rushed into making a statement before careful consideration has been given to the matter.

The defence lawyer will obviously advise the client to make a statement in circumstances where a statement will be beneficial to his client's interests. An innocent person will clearly proclaim his innocence at the outset and the failure not to so proclaim it will look suspicious. Adverse inferences may be drawn from such failure at a later juncture. If it seems clear to the lawyer that his client is innocent and that his innocence can be very easily established by, for instance, checking an alibi, it is sensible that the client makes a statement as soon as possible so that the client's story can be investigated and the matter can be cleared up and the client can obtain his release.

It may appear that the client has a defence to the charge and it will obviously assist in establishing the defence in court if the client makes a statement to the police at an early stage, setting out the details of this defence.

If the client wishes to confess his guilt and the lawyer is satisfied, on the basis of his instructions, that the client is guilty of the crime charged, the lawyer will advise him to make a statement to that effect.

The lawyer will often advise the client to allow the lawyer to draft the statement based on the client's instructions so that the statement is carefully worded and sets out the client's case clearly and in logical sequence and includes only relevant detail. The lawyer would then inform the police that he is preparing a statement which his client will sign and hand over to the police. The client should also be told that should the police seek to obtain a statement from him, he should inform them that his lawyer is compiling a statement for him and that it will be submitted in due course.

The client may wish his lawyer to be present when his statement is recorded so that he can act as a witness to this process or the lawyer may advise him that it would be advisable that he, the lawyer, be present when the statement is recorded. In these circumstances, the lawyer is legally entitled to be present when the statement is recorded. Before leaving the police station the lawyer should inform the appropriate police authority of his client's instructions and insist that he is to be summoned before any such statement is recorded. As quickly as possible the lawyer should also confirm in writing that he has been instructed to be present at the recording of the statement and that he must be informed when the statement is to be recorded so that he can be present. A letter to this effect should be addressed to the officer in charge of the investigations or to the member-in-charge of the police station.

After the police have been so notified it would be improper conduct for them to record a statement in the absence of the lawyer.

In some cases it may be better for the client not to make any statement at all to the police. This would be the case where, for instance, from the information to hand it seems that the police have no evidence of the commission of the alleged crime against the client and that they are hoping to construct their case around incriminating statements from X.

### *Maltreatment of client by police*

If, when the lawyer interviews his client in custody, he discovers that his client has been subjected to physical mistreatment in order to force him to confess, he should complain immediately about this to the Member in Charge of the police station and demand that his client be medically examined as soon as possible. If a medical examination is refused, the lawyer should either take the matter up with Police Headquarters or make an urgent application to the High Court for an order obliging the police to have the prisoner medically examined. It is particularly important that the client be medically examined as soon as possible where he has already made an incriminatory statement as a result of the alleged mistreatment.

There may be instances where, on information received, the lawyer believes that his client who is in custody is being physically maltreated but his access to his client is being obstructed by the authorities. Here the lawyer will have to make an urgent application to the High Court to order that he be allowed immediate access to his client in order to check upon his physical condition.

The civil court will award substantial damages where a person has been tortured whilst in police custody. In *Karimazondo & Anor* v *Minister of Home Affairs* 2001 (2) ZLR 363 (H) a police officer and his wife were arrested on allegations of murder. The wife was tortured while in custody and suffered long-lasting physical and psychological effects, full details of which were disclosed in medical reports. The court held that the circumstances of the case were exceedingly grave and warranted a substantial award of damages. The actions of the police were in flagrant and reckless disregard of the rights of the persons concerned. The fact of the detention in itself created a hardship. The brutality and callousness with which the assaults were perpetrated on the woman instilled in any right thinking person a sense of horror and shock. The unlawful and inhumane treatment to which P1 was subjected to was totally unnecessary, vindictive and malicious. The court would make an award which in money terms expressed its disapproval of the seriousness, brutality and humiliating effect of such treatment. The decline in the value of money in recent years would also be taken into account.

In the case of *Reza & Anor* HH-02-04 the court strongly condemned the practice of torture by police officers. The two police officers had tortured a criminal suspect by beating him on the soles of his feet. The officers were convicted of assault with intent to do grievous bodily harm. The court stated that the torture inflicted by the police officers called for severe censure in terms of punishment.

## *Release from police custody on police bail*

One way to try to secure the immediate release of a client without having to wait for him to be brought to court is to seek to persuade the police to grant police bail. The police have the power to admit a person to bail without going through the courts in circumstances.

### *Who may grant police bail?*

Only an assistant inspector or a person of higher rank or a policeman of any rank who is in charge of a police station may grant such bail.

### *When can police bail be granted?*

In terms of s 132 CPEA police bail may be granted at times when a judicial officer is not available (e.g. in the evening or on a Sunday or a holiday). Such bail may only be granted for an offence which is not one of those specified in the Fifth Schedule.

The offences for which bail may not be granted by the police are:

- Murder;
- Rape or aggravated indecent assault;
- Robbery;
- Assault in which a dangerous injury is inflicted;
- Malicious damage to property committed in aggravating circumstances;
- Unlawful entry into premises committed in aggravating circumstances;
- Theft, making off without payment, receiving stolen property, fraud or forgery if the amount or value involved exceeds $500 000
- Any offence under any enactment relating to unlawful possession or dealing in precious metal or precious stones;
- Contravening ss 20, 21, 22, 23, 24, 25, 26, 27 or 29 of the CLCA;
- Any conspiracy, incitement or attempt to commit any of the above offences.

### *Amount of police bail*

Bail may be granted in an amount which the officer granting it fixes.

The police may, in certain circumstances, be prepared to release the client under an assurance from his lawyer that the client will appear in court as specified by the police.

It is very helpful for the lawyer to take steps before going to see his client which will facilitate the release of his client from custody. If possible he should obtain from the spouse or relatives of the client the client's passport and national identity card and should take these with him when he goes to

see his client in police custody. The identity card will verify the client's identity if the police are still doubtful that the client has given the correct identity particulars to them. By taking the client's passport, the lawyer is in a position to tender the surrender of the client's passport to try to facilitate his release. If the client's spouse or relatives are prepared to hand over cash for bail the lawyer should take this cash with him when he negotiates with the police for release of his client on bail. It is also useful for the lawyer to ascertain if there are any persons of substance who are prepared to stand surety for his client. If there is such an available surety this may help to persuade the police to release the client. If the police refuse to release the client, the lawyer, when he applies for bail in court, should obviously know how much his client can raise for bail, either himself or through friends and relatives. When possible, he should have willing sureties available.

As regards juveniles (i.e. persons under the age of eighteen years) there is a special provision in s 135 CPEA. Where the juvenile has committed a crime other than treason, murder or rape and the police would have the power to grant police bail to him, the police may instead:

- release him without bail and warn him to appear in court at a specified time and place;
- release him to the care of a person in whose custody he is and warn the custodian to make sure that the juvenile is to court at a specified time and place;
- place him in a place of safety as defined in s 2 of the Children's Protection and Adoption Act, pending his appearance in court or until he is otherwise dealt with by the law.

(A judge or magistrate also has these same powers)

Where the police have arrested a person on the basis of an arrest warrant which has authorised his arrest on suspicion that he has committed a crime, he can still be released on police bail if the crime involved is one in respect of which police bail may be issued under s 132 CPEA. In terms of s 33(3) CPEA, an arrest warrant remains in effect until it is cancelled by the person who issued it **or until it is executed.** Thus after the warrant has been executed by arrest of the person named, the police have the normal powers to grant bail in such cases. Where, however, a warrant of arrest has been issued in order to bring a person before the court because he has failed to obey a summons or because he has breached bail conditions, then only the court which issued the warrant can revoke the warrant.

Where the client is facing grave charges and the case against him appears to be strong and thus the police had reasonable grounds for arresting the client and holding him for the period specified by law, it is poor strategy for the lawyer to adopt an aggressive approach to the police in an effort to try to secure his client's release from custody. Threats to take legal action against the police in these circumstances will hardly be helpful. The police will resist such efforts to force them to release the client and the behaviour of the lawyer will simply alienate and antagonise the police. The client's interests are far better served by seeking to engender a co-operative climate so that the lawyer can obtain full details of the case against his client so that he can prepare the defence case on the basis of full information.

## *Remedy for unlawful arrest and detention*

In *Minister of Home Affairs & Anor* v *Bangajena* 2000 (1) ZLR 306 (S) the Supreme Court stated that the deprivation of personal liberty is an odious interference and has always been regarded as a serious injury. The courts have properly taken the stance that deprivation of liberty through unlawful arrest and imprisonment is a very serious infraction of fundamental rights. Damages for this delict should therefore be exemplary and punitive to deter would-be offenders.

In *Chituku* v *Minister of Home Affairs & Ors* HH-6-04 the court stated that treatment of an arrested, detained or convicted person that affronts the dignity of that person or exceeds the limits of civilised standards of decency and involves the unnecessary infliction of suffering or pain is inhuman and degrading. If the High Court is satisfied that the actions complained of violate the rights of the plaintiff as granted under the Constitution, it could grant suitable relief to redress the injury. This is part of the inherent jurisdiction that the court enjoys. The plaintiff is not restricted to bringing an application under s 24 of the Constitution. The right to dignity is recognised in the Roman-Dutch law as an independent right that can be protected by the *actio injuriarum,* the *actio injuriarum* being wide enough to encompass any action that violates the *corpus* or *dignitas* of the

plaintiff. Inhuman and degrading treatment affronts the dignity or self-respect of an individual and could found a claim. It seems that that in an application under s 24 of the Constitution, the Supreme Court has the power to award damages.

## Search of persons and premises

### *With warrant*

For a search warrant to be valid it must satisfy the requirements set out in s 50(1) CPEA. A search warrant can be issued either by a judicial officer or by a justice of the peace. The premises or persons to be searched must be precisely described and the items to be searched for must be specifically stated. The warrant may only be issued if the person issuing it is satisfied that there are reasonable grounds for carrying out the search in that there is a reasonable basis for believing that the search will lead to the seizure of items used to commit a crime or provide evidence of the commission of a crime.

In the case of *Elliott v Commissioner of Police* 1986 (1) ZLR 228 (H) it was held that the search warrant was invalid because it was far too general and vague. It failed to identify any specific offence in connection with which the search was being carried out. No particular documents were identified as the documents to be searched for and no attempt was made to link these documents with a particular offence. The Court ordered the return of all the documents seized.

In *Capital Radio (Pvt) Ltd v Minister of Information & Ors (2)* 2000 (2) ZLR 265 (H), it (was held that the warrant issued by the magistrate was invalid as it contained two serious flaws. Firstly, the warrant purported to be applicable throughout the country, whereas a magistrate only has jurisdiction to issue a warrant in respect of his area of jurisdiction. Secondly, the warrant was far too broad and vague and was lacking in specific detail. The warrant did not specify the premises to be searched, nor did it state what the reason for the search was. Further, the courts must ensure that the power of search and seizure is not abused. The police cannot be allowed to exercise uncontrolled powers of search and seizure. Search warrants will be interpreted with reasonable strictness and, in cases of doubt, they will be interpreted so as to protect the liberty and privacy of the subject.

A search warrant can also be issued by a magistrate in terms of s 26 of the Serious Offences (Confiscation of Profits) Act [*Chapter 9:17*] to search for "tainted property", which includes property used in connection with serious offences and the proceeds of serious offences committed inside and outside Zimbabwe. The magistrate must be satisfied that there are reasonable grounds for issuing the warrant. The magistrate does not have to be told at the time that he issues the warrant what specific offence may have been committed. The police must, however, inform the magistrate of this detail within forty-eight hours of the application for a warrant. Although the kind of property to be seized must be specified in the warrant, the police nonetheless may seize property which they believe on reasonable grounds to be -

- tainted property in relation to the offence even if it is not specified in the warrant;
- tainted property in relation to another offence; and
- anything believed on reasonable grounds to be able to afford evidence of the commission of ‘a criminal offence’.

### *Without warrant*

The circumstances in which the police can lawfully carry out searches without warrant are set out in s 51 CPEA.

Before the police may lawfully search without warrant and seize items during that search two conditions must be satisfied, namely -

- the police officer seizing the items must believe on reasonable grounds that a warrant would be issued to him by the appropriate authority if he applied for one; and

- he must believe, on reasonable grounds, that delay in obtaining a warrant would prevent the seizure.

See *Chizano v Commissioner of Police* HH-392-88; *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Madzingo NO & Anor* HH-157-03.

The police also have powers to search without warrant under s 28 of the Serious Offences (Confiscation of Profits) Act [*Chapter 9:17*]. They may go onto land or into premises and search for and seize "tainted property" without warrant if they believe on reasonable grounds that this course is necessary to prevent the destruction or loss of the property and the circumstances are so serious and urgent as to require an immediate search.

## Remands

### *Generally*

A remand is requested by the State when it is not ready to bring a case to trial because police investigations are still taking place. The State will ask that X be remanded either in custody or out of custody. The magistrate may not order the postponement of a trial for a period in excess of fourteen days without X's consent: s 165 CPEA.

In terms of s 13(2)(e) of the Constitution, deprivation of a person's liberty on the grounds of the commission of a criminal offence is permissible only if there is a reasonable suspicion that he committed that crime. In terms of s 18(2) of the Constitution a person charged with a criminal offence is entitled to have his case tried within a reasonable time. This applies whether or not he is held in custody.

Where a legal practitioner goes to the courts to represent a person who is coming up for remand, he should check the records and visit the cells to make sure that his client has in fact been brought from the police station or remand prison to court on that day.

### *Reasonable suspicion*

Where at the initial or subsequent remand the State is seeking the remand in custody of X, the court may only grant this application provided that there is a reasonable suspicion that X committed the crime with which he is being charged. In the case of *Attorney-General v Blumears & Anor* 1991(1) ZLR the following principles were laid down by the Supreme Court:

> The State must allege facts that constitute a crime and justify a reasonable suspicion that the accused committed the crime. The accused's lawyer may submit that the State has not alleged such facts or may lead cogent evidence which obliges the magistrate to reject those facts. The remand procedure is an important protective process to ensure the finding of a reasonable suspicion by someone independent of the police and prosecution. The hearsay rule and cross-examination of witnesses do not apply. Statements can be made from the bar by legal counsel. Although the onus is on the State, it does not have to show guilt beyond reasonable doubt or on a balance of probabilities. The court cannot reject State allegations simply because they seem to be of doubtful validity.

In *Blumears* the appeal court said that the prosecutor must be as open and forthright as possible when advising the remand court of the facts relied on. It can be very difficult for the prosecutor to decide what to reveal and what to conceal in sensitive investigations which X might interfere with, but he should never conceal facts simply to hinder the defence and must ensure that he alleges enough to implicate X. In *Smyth v Ushewokunze & Anor* 1997 (2) ZLR 544 (S), it was held that in order to justify the applicant's deprivation of freedom on the grounds of reasonable suspicion that he had committed an offence, it was not necessary to establish his guilt beyond a reasonable doubt or even

on the balance of probabilities. The test was the same as that for arrest without a warrant. There had to be sufficient information to warrant a prudent person in suspecting that the applicant was legally responsible for the alleged offence.

If the defence lawyer alleges that there is no case against his client and therefore that there is no basis for remanding him, the court may only remand X if it is satisfied that there are reasonable grounds for the remand. The remand magistrate should obtain information from the prosecutor justifying the existence of a reasonable suspicion on the initial remand, and the prosecutor must satisfy the court that there is still a reasonable suspicion against him at all subsequent remands.

## *Unreasonable delay*

It is the responsibility of the magistrate hearing applications for initial and further remands to ensure that the Constitutional provision giving an entitlement to trial within a reasonable period of time is observed. It is the duty of the remand court to decline to grant requests from the State for further remands when unreasonably long periods of time have elapsed since X was first charged. It must ensure that the State proceeds to trial within a reasonable time: *Bull v Minister of Home Affairs* 1986 (1) ZLR 202 (S). Even where X is out of custody pending trial, the State is nonetheless obliged to ensure that the case is brought for trial within a reasonable time. Where X is in custody it is particularly important that the case be brought for trial within a reasonable time.

The accused's lawyer must ensure that his client's rights in this regard are not violated. If the State does not proceed to trial within a reasonable time he must complain to the remand court. Where the defence alleges that there has been an undue delay in bringing his case for trial, the onus is on it to prove that there has been such an undue delay: *Fikilini v Attorney-General* 1990 (1) ZLR 105 (S) and that he has asserted his right to a speedy trial: In re *Hativagone & Anor* S-67-04

If his client is out of custody, the defence lawyer can ask that a trial date within the near future be set, failing which the charge should be withdrawn. This will obviously not apply where the client has given the lawyer specific instructions not to push for the matter to be brought to trial speedily.

If his client is in custody he can apply for the release from custody of his client on the grounds that an unreasonably long period has elapsed in bringing the case for trial. Section 13(3) of the Constitution specifically lays down that if a person who is being held in custody is not brought for trial within a reasonable period of time, he must be released from custody conditionally or unconditionally but may still be brought to trial later. The onus is on the defence to establish that the accused person is entitled to be released because of unreasonable delay: In re *Hativagone & Anor* S-67-04

The lawyer may also ask that, in addition to the release of his client, the State should either proceed to trial within a short space of time or that the charges against his client be withdrawn.

If there have been protracted and unjustifiable delays in bringing the matter for trial the defence lawyer can apply for a permanent stay of the proceedings.

## *Accused in custody*

In *Fikilini v Attorney-General* 1990 (1) ZLR 105 (S) it was laid down that in determining whether a person's detention pending trial had become unlawful because of failure to bring him to trial within a reasonable time the court should take account of:

- whether in all the circumstances the length of his detention has been unreasonably long. The nature of the charge and the investigation process required to investigate that charge should be examined. Is the charge a complex one which demands lengthy and painstaking investigation or is it simple and straightforward and could have been disposed of speedily if the police had been efficient? Does the case require the gathering of evidence in other countries? Are there some vital witnesses which the State is still trying to locate?
- the reasons which the State has advanced for the delay. The State should obviously be required to advance reasons for the delays which have occurred in bringing the matter to trial.

A proper reason, such as difficulties in locating a vital witness will justify an appropriate delay. But if it turns out that the State is improperly delaying bringing the case to trial in order, for instance, to hamper the defence, this will weigh heavily against the State.

- whether the accused asserted his right to have the case brought to trial within a reasonable time. If he has asserted his right this is evidence that he is being deprived of this right; but if he has not done so this may be indicative that his right is not being breached. (But the undefended accused may fail to assert this right because he does not know that he has this right.)
- the prejudice which may be occasioned to X by the delay. Will the preparation of the defence be impaired by the delay? Will it cause oppressive pre-trial incarceration? Will it lead to disproportionate anxiety and mental suffering?

### *Accused out of custody*

Section 160(2) CPEA provides that if X is not brought to trial after the expiry of six months from the date of his committal for trial, his case shall be "dismissed". This provision is meant to protect accused persons from being unreasonably kept under committal for trial for longer than six months when the trial has failed to take place during that period, as well as to ensure that the Attorney-General ensures that trials of accused persons committed for trial are expeditiously conducted. See *Mukuze & Anor* v *A-G (2)* HH-17-05. In the *Mukuze* case the court decided that the six-month period mentioned in s 160 could be interrupted (a) if X is through circumstances beyond the control of the Attorney General not available to stand trial or (b) if the Attorney-General has in terms of s 108 ordered a further examination to be taken.

The responsibility of the court to prevent unreasonable delays is a continuing one. At each further remand the progress of the investigations should be checked. If at the last remand the State has asked for further time so that the police can locate a missing witness or carry out some further investigations and the State is now applying for a further remand on the basis of the same reason advanced previously, the court should obviously check that the police have been vigorously attempting to deal with these matters. The defence lawyer will clearly push hard on these points except where his client has instructed him not to press for the matter to be brought forward for trial.

In re *Hativagone & Anor* S-67-04 The appellants were arrested on criminal charges in 1998 and placed on remand. They denied the charges. In 1999 the charges were withdrawn before plea. Four years later, the accused were summoned to appear to answer the charges. The Attorney-General had deferred the prosecution of the applicants until the trial of the accomplice who was to be the principal witness against them was complete. This person had been prosecuted, but the proceedings were set aside and had to be restarted. The applicants brought an application for a permanent stay of proceedings, arguing that their right under s 18(2) of the Constitution to a fair trial within a reasonable time had been violated. The court held that in order for the application to succeed, it was necessary to consider

- the length of delay and whether it was presumptively prejudicial;
- the reasons for the delay;
- whether the applicants had asserted their right to a speedy trial; and
- the prejudice to the applicants.

In considering the length of the delay, the fact that the charge had been withdrawn before plea did not assist the State, as the withdrawal was not unconditional. The overall delay was presumptively prejudicial. However, the reasons given for the delay were reasonable in the circumstances and to a large extent the Attorney-General was not to blame for the delay. The applicants had failed to discharge the onus on them to show that they had asserted their right to a speedy trial. Although the applicants were prejudiced by the fact that potential defence witnesses were not available, having either died or emigrated, nonetheless, because the Attorney-General's explanation was reasonable and because the applicants had failed to assert their rights, the application must fail.

In *Watson* S-17-06 the applicant, while driving his vehicle, had negligently caused the death of a pedestrian. He was initially placed on remand on a charge of culpable homicide, but later placed off

remand. Eleven years later, he was summoned to appear on the same charge. It was held there was an inordinate delay by the State in bringing the applicant to trial. The explanation for the delay was neither adequate nor reasonable. The delay was, by any standards, unreasonably long and could not be supported by any court of law. The applicant's rights under s 18(2) of the Constitution to a fair hearing within a reasonable time had been infringed. Anyone arrested or detained on a criminal charge should be promptly brought before a competent court of law, which will then exercise its judicial power over him, and such trial should be held within a reasonable time. This is to ensure that the accused does not suffer unduly prolonged uncertainty and that evidence is not lost in the process. The inordinate delay caused irretrievable prejudice to the applicant and a permanent stay of proceedings would be granted.

Similarly in In re *Masendeke* 1992 (2) ZLR 5 (S) there had been seven years' delay in a case involving a policeman who was on two simple charges of taking bribes. The magistrate referred the case to the Supreme Court under s 24(2) of the Constitution. There was no justification for such a protracted delay and it was not suggested that the accused was to blame for the delay. The Supreme Court ordered a permanent stay of proceedings.

See also *Ruzario* 1990 (1) ZLR 359 (S) and *Kundishora* 1990 (2) ZLR 30 (S).

## Postponement of cases

Instructions have been given to magistrates that they should hear in open court all applications for postponement of cases before they have commenced. (The same applies to postponement or adjournment of cases after they have commenced.) The prosecutor or X's legal representative must explain to the court why a postponement or further remand is being sought. The court must be satisfied that the reason provided is a genuine one and that the postponement is necessary. The reasons for the postponements must be recorded. Where there is doubt about the genuineness of the reason for the requested postponement, the matter can be stood down and, if necessary, the matter can be referred to the Senior Public Prosecutor or to the senior prosecutor at the station.

This procedure is designed to ensure that there is a written record of who applied for the postponement and why. Disputes can arise months later between the defence and prosecution as to who was to blame for the delay in finalising the case. These disputes can be easily resolved by checking the records of the case. This will ensure that X will not escape proper punishment where the defence and not the State was responsible for the prolonged delay in finalising the case.

Defence lawyers should also take written notes about what is said when cases are postponed because sometimes court records are inadequate or missing.

When cases are postponed witnesses in attendance can be brought into court and warned by the court to come back on the new trial date so as to avoid having to serve fresh *subpoenas* on them.

Postponed cases are supposed to be given priority over all other cases set down for that date. The more often the case has been postponed, the greater the priority which it must be accorded. (This is mostly based on the Chief-Magistrate's Circular No.17 of 1990 and the Attorney-General's Circular No.5 of 1991).

Unfortunately it not infrequently happens that *pro deo* cases are assigned only a very short time before the cases are due to be heard. It is the duty of the lawyer assigned such a case to ensure that he has adequate time to prepare the case by way of interviewing his client and witnesses and drafting a defence outline. If he is left with inadequate time to prepare properly, he is duty bound to apply for a postponement of the case so that he can have an adequate amount of time for preparation. Even if his own dilatoriness is the reason why he has been left with inadequate time for preparation, he is obliged to apply for a postponement and to explain honestly to the court why it is that he is unable to proceed with the case. It is improper and completely unfair to his client for the lawyer to go ahead with the case when he is inadequately prepared. Another situation which arises is where a senior

partner in a law firm hands a criminal case over to a legal assistant at the last moment because the senior has double dated himself and instructs the legal assistant to go and appear in the case. The legal assistant must apply for a postponement where he does not have enough time to prepare to argue the case even though this may be against his instructions from his senior. The client must not be prejudiced by the disorganisation of the senior. It should be noted that in terms of s 18(3) of the Constitution it is provided that every person charged with a criminal offence shall be given adequate time and facilities for the preparation of his defence.

## Bail pending trial

### *General*

The defence lawyer must be fully conversant with the factors which the courts take into account in deciding whether or not to grant bail. In taking instructions from clients, all the information which will assist in arguing in favour of bail must be extracted, such as whether X has a fixed place of abode and how much bail he can afford if the court is inclined to grant bail. The State will often oppose bail simply because the police have indicated that X should not be allowed out on bail. The defence lawyer must obviously probe to establish whether the State has any proper basis or justification for opposing bail. In cases where there would appear to be a good reason against granting bail, the defence lawyer may nonetheless seek to persuade the court that the danger pointed to by the State in opposing bail can be overcome by the imposition of certain types of conditions attaching to the granting of bail.

In *Ncube* S-126-01 the court said that in considering a bail application, a judicial officer must bear in mind the presumption of innocence, and should grant bail where possible. In *Biti* HH-23-02 the court stated that the court should always grant bail where possible and should lean in favour of the liberty of the applicant provided that the interests of justice will not be prejudiced. The approach is one of striking a balance between the interest of society (i.e. the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused (who, pending the outcome of his or her trial, is presumed to be innocent).

In *Ndhlovu* 2001 (2) ZLR 261 (H) the court said that the primary question to be considered in deciding whether the accused should be admitted to bail is whether he will stand trial or abscond. It is equally important to consider whether he will influence the fairness of the trial by intimidating witnesses or tampering with the evidence. A further consideration is whether, if released, he will endanger the public or commit further offences. In bail applications, the court has to strike a balance between the interests of society (which are that the accused should stand trial and that there should be no interference with the administration of justice) and the liberty of the accused (who is presumed to be innocent). Grounds for refusal of bail should be reasonably substantiated. The court should always grant bail where possible and should lean in favour of the liberty of the subject, provided the interests of justice will not be prejudiced.

### *Procedure in bail case*

In *Ncube & Anor* HB-126-02 the judge pointed out that bail applications are *sui generis*: there is no prescribed format or procedure. It is the duty of the presiding officer, with due allowance for the circumstances of each case, to determine the way in which each party must submit its evidence. In a majority of cases *ex parte* statements are made by both the defence and by the public prosecutor who intimates what the police objections are. There are no formalities; no evidence is led, no affidavits are placed before the court and the record is so meagre that there may be little or nothing to place before the superior courts if the matter is taken on appeal.

The evidence in a bail application does not have to be in affidavit form. In most cases, ex parte statements are made by both sides, without formality: *Ndhlovu* 2001 (2) ZLR 261 (H)

In the South African case of *Maki & Ors* (1) 1994 (2) SACR 630 (E) the court said that the procedure for hearing and adjudicating on bail applications should be flexible and adaptable. The laying down of rigid rules as to what evidence is admissible in a given situation should be avoided, except that both oral evidence and affidavits should be admissible and, in appropriate cases, other material such as *ex parte* statements.

## *Application in magistrates court*

Magistrates powers to grant bail or to alter bail conditions are now severely restricted. In terms of s 116(1)(b) CPEA, where X has been charged with any of the offences specified in the Third Schedule, magistrates may only grant bail if the Attorney-General has consented to X's admission to bail.

Section 117(6) contains further restrictions on the granting of bail by magistrates.

For charges of offences contained in Part 1 or Part II of the Third Schedule, unless the Attorney-General has consented to the admission to bail, the magistrate must order the detention of X in custody except if X has adduced evidence which satisfied the magistrate that exceptional circumstances exist which in the interests of justice permit his release: 117(6)(a) CPEA.

The specified offences in Part 1 of the Third Schedule are:

- murder where it was committed in certain specified circumstances such as where it was premeditated;
- rape or aggravated indecent assault where it was committed in certain specified circumstances such as multiple rape of a victim;
- robbery where it was committed in certain specified circumstances such as where firearms were used;
- assault or indecent assault of a child under 16 involving the infliction of grievous bodily harm;
- kidnapping or unlawful detention involving the infliction of grievous bodily harm ;
- contravening the following sections of CLCA: 20 (treason); 21 (concealing treason); 22 (subverting constitutional government); 23 (insurgency, banditry, sabotage or terrorism); 24 (recruiting or training insurgents, bandits, saboteurs or terrorists); 25 (training as insurgent, bandit, saboteur or terrorist); 26 (supplying weapons to insurgents, bandits, saboteurs or terrorists); 27 (possessing weapons for insurgency, banditry, sabotage or terrorism) or 29 (harbouring, concealing or failing to report insurgent, bandit, saboteur or terrorist);
- An offence in Part II of the Third Schedule where the accused has previously been convicted of any offence specified in the Third Schedule or has allegedly committed such offence whilst on bail in respect of an offence in the Third Schedule.

The offences specified in Part II to the Third Schedule are:

- treason;
- murder in circumstances other than those specified in Part I;
- attempted murder involving the infliction of grievous bodily harm;
- malicious damage to property involving arson or conspiracy, incitement or attempt to commit this offence;
- theft of a motor vehicle or conspiracy, incitement or attempt to commit this offence;
- any offence relating to dealing in or smuggling of ammunition, firearms, explosives or armaments or the possession of an automatic or semi-automatic firearm, explosives or armaments or conspiracy, incitement or attempt to commit this offence;
- any offence where the Attorney-General has notified the magistrate of his intention to indict the case direct to the High Court.

## *Application in High Court*

The general power of the High Court to admit a person to bail no matter what charge has been levelled against him is set out in s 116(a) CPEA. However, this power is now subject to various restrictions.

For charges of offences contained in Part 1 or Part II of the Third Schedule, the judge must order the detention of X in custody except if there X has adduced evidence which satisfied the magistrate that exceptional circumstances exist which in the interests of justice permit his release. S 117(6)(a)

The High Court of Zimbabwe (Bail) Rules, 1991 (SI 109 of 1991) lay down procedures to be followed and the documents to be produced when applications for bail are made in the High Court. Because of the importance of these Rules they are reproduced in full in an Appendix at the end of this Handbook.

## *When and how can be applied for*

X can make an oral application for bail at any time to a magistrate before whom he is appearing. A written application for bail must be in the form of a petition and must be accompanied by a copy of the document authorizing the detention of the applicant or an affidavit that a copy is denied. All such applications must be disposed of without undue delay: s 117A(3) CPEA.

It is provided in s 117A(10) that for the purposes of a bail application, X is not entitled to have access to any information, record or document relating to the offence in question that is contained in the police docket.

## *Grounds for refusal*

The fundamental principle governing the court's approach to bail applications is to uphold the interests of justice. Section 117 (1) provides that, subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence has been imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody. However, numerous restrictions have been imposed on magistrates and judges in respect of the granting of bail.

The court must take into account the factors set out in s 117(2) CPEA and try to strike a balance between the protection of the liberty of the individual and the administration of justice: *Aitken & Anor v Attorney-General* S-67-92. In our law persons are presumed innocent until their guilt has been proven. When a person applies for bail he has not yet been tried and the allegations against him have not yet been proven. Pre-trial incarceration cuts across the presumption of innocence as a person is being incarcerated before trial despite the fact that he may be found not guilty when he is tried. Wherever the interests of justice will not be prejudiced by pre-trial release, the courts should lean in favour of liberty and grant release on bail with or without additional conditions. This is particularly so if the offence with which X is being tried is not likely to attract a prison sentence. Pre-trial incarceration of petty offenders means that they end up being punished to a disproportionate extent. If they are found guilty and fined, they will already have spent time in custody; if they receive short prison sentences, they may already have spent longer in prison waiting for their trial than the period of the prison sentence imposed. For petty offences, therefore, there must be very cogent reasons for refusal of bail.

Bail may be refused if the judicial officer considers it likely that if the person were to be admitted to bail:

- he would abscond and would not stand trial (or, if he has been tried already but has not yet been sentenced, he would not appear to receive his sentence);
- he would interfere with the evidence against him;
- he would commit a further offence.

In addition to these grounds for refusal, the judicial officer may refuse to admit to bail for any other reason which seems to him to be good and sufficient.

## *Well founded grounds for State opposition to bail*

It was made quite clear in *Hussey* 1991 (2) ZLR 187 (S) that where the State seeks to rely on one or more of these grounds when opposing bail, it is insufficient for the State merely to make bald assertions that the particular grounds applied. Its assertions must be well-grounded. It must produce cogent reasons why the particular ground in question applies and these reasons must be supported by proper information. In *Malumjwa* HB-34-03 it was held that in bail applications the court has to strike a balance between the interest of society (that the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused person (who pending the outcome of his trial is presumed to be innocent). The likelihood of a lengthy prison term being imposed (i.e. the seriousness of the offence) is a factor to be taken into account in assessing the risk of absconding. Where is has been shown that the accused has interfered with evidence, the court is justified in denying him bail. The court should, however, not refuse bail on the bare assertion of the State; there must be enough reason for such a conclusion. In other words, grounds for refusal of bail should be reasonably substantiated.

## *Likelihood that accused will abscond*

An accused person who has decided not to stand trial may either flee the country (if he has the capacity to do so) or he may try to go to a place inside the country where he believes the authorities will be unable to find him. The problems of bringing X to justice are obviously greater if he has fled from the country than if he hides himself within Zimbabwe.

If there are good grounds for believing that X will take flight and become a fugitive from justice if he is granted bail, then bail will be refused. If, before or after his arrest, X escaped or tried to escape from custody, this would clearly show his predisposition to abscond and not to stand trial: *Chiadzwa* 1988 (2) ZLR 19 (S). In *Jongwe* S-62-02 it was held that when assessing the risk of an applicant for bail absconding before trial, the court will be guided by the character of the charges and the penalties which in all probability would be imposed if convicted; the strength of the State case; the accused's ability to flee to a foreign country and the absence of extradition facilities; the past response to being released on bail; and the assurance given that it is intended to stand trial. The most critical factors are the nature of the charges and the severity of the punishment likely to be imposed upon conviction and also the apparent strengths and weaknesses of the State case.

There is need for the court to assess the strength of State case. Where allegations in police papers raise a *prima facie* case, there is need for accused to rebut allegations and show that he should be granted bail. In *Makamba* S-30-04 the appellant was refused bail in the High Court on various charges under the exchange control legislation. Among other grounds of appeal, it was argued that the judge *a quo* should not have relied on the mere allegations made by the investigating officer. The strength of the State case had not been assessed by the judge *a quo*, though it should have been. However, the allegations made in the affidavit of the investigating officer were fairly detailed and raised at least a *prima facie* case against the appellant. In such circumstances an applicant would be expected, in attempting to discharge the onus upon him, either to deny the allegations; or to place before the court such information as would tend to establish his innocence; or to show that even if he were to be convicted the likely penalties were not such as to present a temptation for him to abscond; or to show that the interests of justice would not be prejudiced by his release on bail.. The appellant had done none of these things. There was nothing in the papers to persuade the judge *a quo* that the appellant had discharged the *onus* which is upon him to satisfy the court that he would stand his trial if released on bail.

In the absence of such concrete evidence of a predisposition to abscond, the courts take account of a number of factors which common experience have shown influence a person either to stand trial or to take flight.

These factors are the gravity of the charge and the likely sentence for that crime, the capacity and opportunities of X to flee and whether he has contacts abroad who will offer him sanctuary. Other factors which are relevant are the property holdings of X and his status in society. It may be in some cases that X would lose so much if he absconded that flight is unlikely.

The case of *Chiadzwa* 1988 (2) ZLR 19 (S) examines the combination of factors which make international flight likely. Where a person is facing a serious charge which will lead to lengthy incarceration on conviction, the evidence against him is very strong and conviction probable, and where that person has the capacity to leave the country and has persons outside the country who will support him, there will be a substantial risk of external flight. In these circumstances the person may be quite prepared to abandon substantial assets in Zimbabwe to avoid the prospect of spending years in prison. With less serious charges, especially if the evidence for such charges is weak, it will be unlikely that a wealthy person will flee the county leaving behind substantial assets, particularly if that person has no external assets and few acquaintances outside the country who could assist him to re-establish himself.

In considering whether flight is likely, the courts take into account whether a person has a fixed abode and whether he has a job. In these days of high unemployment, it can be strongly argued that employment, even in the informal sector, should weigh in favour of bail. Similarly, with the drastic shortages of accommodation in urban areas, the fact that a person does not have permanent accommodation should not necessarily be held against him. Attaching of regular reporting conditions will usually ensure that a person who only has temporary accommodation can be located when necessary.

In *Mambo* HH-47-92 X had originally been refused bail on the grounds that he was very likely to abscond. On appeal, the High Court held that bail should be granted as on the probabilities it was unlikely that X would abscond. He was aware for some time that he was under investigation for the alleged fraud in question and had not absconded; he had travelled to South Africa and when he was informed that the Zimbabwean police were looking for him, he had returned to the country and surrendered himself to the police. The fact that X was facing a very serious charge and that the sums involved in the alleged fraud were considerable was not a sufficient basis for refusing bail.

If the State opposes bail on the ground that X is of no fixed abode and will therefore probably not attend court when his case is tried, but X asserts that he lives at a particular address, then the State should indicate in specific terms the basis of its belief that X does not live at that place: *Gwatiringa* HH-128-88.

Often the attaching of conditions to the granting of bail, such as surrender of a passport and reporting to a designated police station at particular hours, may be enough to minimize the danger of the X absconding. A defence lawyer may argue that that the imposition of certain bail conditions will remove any danger of his client absconding.

In the case of *Biti* HH-23-02 the court decided that where evidence is given that there is a strong case for the prosecution, that a heavy sentence is likely, increasing the risk of the accused absconding, and that other perpetrators of the crime are still at large, the onus then falls on the accused to show that the interests of justice will not be prejudiced, namely, that it is likely that he will stand his trial and not otherwise interfere with the administration of justice or commit an offence.

In *Jongwe* S-62-02 Chidyausiku CJ indicated that when assessing the risk of an applicant for bail absconding before trial, the court will be guided by

- the character of the charges and the penalties which in all probability would be imposed if convicted;
- the strength of the State case;
- the accused's ability to flee to a foreign country and the absence of extradition facilities;
- the past response to being released on bail; and
- the assurance given that it is intended to stand trial.

He pointed out that the most critical factors are the nature of the charges and the severity of the punishment likely to be imposed upon conviction and also the apparent strengths and weaknesses of the State case.

*In Ndhlovu* 2001 (2) ZLR 261 (H) the court said that in deciding whether there is a risk of X absconding, the court should consider such factors as the seriousness of the offence, the likely sentence and the incentive to abscond, X's mobility and access to cross-border travel, and the

strength of the prosecution case. It may be desirable for X to disclose his defence and not merely make a bald statement that he is not guilty of the offence. Such a defence is of great, and often of decisive, importance in the exercise of the court's discretion. X's personal circumstances, such as financial position and business interests, are of little value in assessing the risk of absconding. They may, in some cases, be used to facilitate abscondment. The fact that X surrendered to the police should normally be a factor in his favour, though if he surrendered under a false name with the intention of deceiving the police, it would not count in his favour.

### *Likelihood that accused will commit further offences*

The courts are duty bound to protect the public against further criminal activities of a person pending trial. This is especially so in respect of dangerous criminals who may commit grave crimes whilst out on bail. However, the majority of persons facing trial are unlikely to commit further crimes if released prior to trial. The impending trial will usually act as a restraint against an accused as he will realise that any such misconduct before his trial may prejudice his impending case and that he will face serious penalties if he engages in further criminal conduct before his trial.

If the State maintains that further criminal conduct is likely, it must point to some facts that suggest that there is such a danger and that this danger cannot be averted by the imposition of stringent bail conditions. It is permissible for the State to produce a list of X's previous convictions: *Fourie* 1973 (1) SA 100 (D).

If he has a string of previous convictions, there is a substantial chance that he might commit further crimes whilst on bail. In the case of *Attorney-General v Phiri* 1987 (2) ZLR 33 (H) the evidence of the propensity to commit further crimes whilst at liberty was particularly strong. In addition to a bad criminal record, there was evidence that X had committed further similar crimes to the crimes for which he was yet to be tried. Such previous conduct whilst on bail showed a disregard for the law and a contempt for the administration of justice. Bail was understandably refused.

However, in the case of *Demba* HH-133-89 the High Court said that if after a person has been granted bail for one offence he is then suspected of having committed another similar crime some time **before** the current offence, this does not necessarily mean that he will be more likely to commit yet another offence whilst at liberty. See also *Patel* 1970 (3) SA 565 (W).

In *Ndhlovu* 2001 (2) ZLR 261 (H) the court stated that where X has given every indication that he is an incorrigible and unrepentant criminal, it would be irresponsible and mischievous for a judicial officer to grant bail. The court should remember, though, that this is a sort of preventive detention, and that the refusal of bail should not be used as a means of deterring the offender.

### *Likelihood that accused will tamper with evidence*

The argument that there is a likelihood of interference with evidence will obviously be strong if the State can show that there have already been attempts by X to do this. This was the situation in *Maharaj* 1976 (3) SA 205 (D) where X had already tried to persuade a State witness to disappear, in *Chiadzwa* 1988 (2) ZLR 19 (S) where there was evidence suggesting X had attempted to bribe a police officer and had composed a plan whilst in prison to discredit witnesses against him and in *Maratera* S-93-91 where there was evidence that there had been an interference with the course of justice. See also *Bennett* 1976 (3) SA 652 (C).

Even where there is no evidence of attempts already made of this description, the court may still refuse bail on the basis of police testimony that such attempts are likely to be made. In *Hlogwa* 1979 (4) SA 112 (D) the court stated that it may, in appropriate circumstances, rely on the investigating officer's assertion that X was likely to tamper with evidence if he were to be released, even if this assertion is unsupported by any direct evidence. The defence lawyer will obviously want to question the police officer as to the basis upon he holds his belief and will seek to establish to the court that this belief has no reasonable foundation. However, in *Hussey* 1991 (2) ZLR 187 (S) the Supreme Court held that a bald assertion by the State that X was likely to interfere with witnesses is not

enough. The State must produce some information which establishes that this assertion is well grounded.

## *Attitude of Attorney-General*

In *Ndhlovu* 2001 (2) ZLR 261 (H) the court stated that the attitude of the Attorney-General is a relevant but not a decisive factor. His opinion commands respect because of his experience and the responsibility of his office, unless it is evident that he is no better informed than the court. However, his assertion cannot be substituted for the court's discretion.

The attitude of the police or prosecutor is not a decisive factor in the grant or refusal of bail. It was held to merely be a relevant consideration in *Mahata* v *Chigumira NO & Anor* HH-24-04. Accordingly, bail cannot merely be refused on the grounds that the state is opposed to it.

## *Invalid reasons for refusal*

The seriousness of the offence is not *per se* a reason to refuse bail: *Kanoda & Ors* HH-200-90. In *Hussey* 1991 (2) ZLR 187 (S) the Supreme Court stated that the fact that X was charged with a serious offence which was prevalent and which would normally attract a lengthy prison sentence on conviction was only one of the factors to be considered when deciding whether or not to grant bail. This fact alone does not justify refusal of bail.

It is not proper to refuse bail just because a date has been set for hearing the case, except in exceptional cases as, for instance, where release of X on bail would create transport or accommodation problems for him: *Chiadzwa* 1988 (2) ZLR 19 (S).

Fears for the safety of the accused because of the unlawful actions of a mob outside the court room, threatening to kill the accused, are not a ground to refuse to grant bail, particularly once the accused is removed from the area: *Bhebhe & Ors* HB-25-02.

## *Onus of proof*

After the State has led sufficient evidence to show that there is a real likelihood that the administration of justice will be prejudiced if X is admitted to bail, the onus lies on the person applying for bail to show on a balance of probabilities that his admission to bail would not prejudice the interests of justice: *Chiadzwa* 1988 (2) ZLR 19 (S); *Maharaj* 1976 (3) SA 205 (D) and *Hudson* 1980 (4) SA 145 (D). In bail applications both sides may make submissions from the bar, or lead evidence. Evidence should be led in support of any fact which is in dispute.

In *Ncube* S-126-01 the court said that the onus (the quantum of which varies from case to case) is on the accused to show why he should be granted bail. He can discharge this onus by calling witnesses to show that the allegations against him are unfounded. Failure by the court to allow him to call such evidence is a serious misdirection, one which would allow the Supreme Court to interfere with a decision of a judge of the High Court to refuse bail. This was reiterated in the case of *Biti* HH-23-02.

In *Ndhlovu* 2001 (2) ZLR 261 (H) the court stated that once the police have made credible allegations against the accused, which could provide grounds for refusing bail, the onus is then on the accused to prove on the balance of probability that the court should exercise its discretion in favour of granting him bail. He must show that it is likely that he will stand trial and that he will not otherwise interfere with the administration of justice or commit an offence.

On the other hand, *Kureneri* HH-111-04 by the judge held that there is no statutory authority for placing an onus upon an applicant for bail, and that prior rulings to that effect were based on South African cases. These are based on a statute which is materially different from the Zimbabwean legislation. In arriving at the decision, the learned Judge held that Section 13(4) of the Constitution requires that any person who is arrested or detained should be tried within a reasonable time, failing which he or she should be released from custody. In other words, the discretionary power of a judge

or magistrate to deny bail may not be exercised in violation of the accused's constitutional right to be brought to trial within a reasonable time or be freed from custody. What is in dispute is whether there is an onus on the accused person to show on a balance of probabilities why it is in the interest of justice that he should be freed on bail. Decisions of the superior courts of Zimbabwe have followed decisions of the South African courts, but the South African provisions are not worded the same as the Zimbabwean ones. The notion of the accused having an onus to discharge to enable him or her to be admitted to bail is not part of our law as legislated. The constitutional presumption of innocence in bail application operates fully and at the general level. It is because of the presumption of innocence that the courts are expected, and indeed required, to lean in favour of the liberty of the accused. If the state's fears of abscondment or interference with witnesses and the applicant's assurances to the contrary are equally balanced, then the presumption of innocence would require the court to lean in favour of the liberty of the accused person and grant bail.

### *Amount of bail*

An excessive amount of bail may not be demanded: 120 CPEA. If bail is set at an amount which is beyond the capacity of X to raise, he will end up in custody and the granting of bail will have been a futile gesture; in effect a person is denied bail if bail is set well beyond his means to pay. In respect of persons with little or no financial means, bail can be set at a low level or a person can be released on his own recognizances, with or without further conditions, or he can be released subject to sureties being found, provided that there is a reasonable prospect of his finding such sureties. The defence lawyer must obviously seek to persuade the court to set the bail at an amount which is within the financial reach of his client. Instead of cash bail the court can order X to deposit property: 131 CPEA.

### *Deposit of property or recognizance in respect of property*

Instead of or in addition to cash bail the court can order X to deposit property belonging to him or enter into a recognizance in respect of property belonging to him. Thus in *Aitken(2)* S-168-92 the court ordered that, in addition to cash bail, X enter into a recognizance in a certain amount against the security of a house registered in his name: s 131 and s 118 (1) CPEA.

### *Sureties*

The accused may also be required to find persons to stand surety for him. The sureties will be required to enter to recognizances to pay a certain amount of money in the event of X defaulting and not standing trial: s 119 (109) CPEA. The court should property explain to sureties that if X defaults on his bail conditions, they will have to pay over the amount agreed to in the recognizance and they will lose this amount.

### *Conditions attached to bail*

Conditions may be added

- requiring X to surrender all his passports and travel documents;
- specifying that he report to the police or other authority at a specified place and at specified times;
- forbidding him from going to particular places (in land acquisition cases a person contesting the acquisition of his farm cannot be ordered not to go back to his farm; he can only be evicted after being convicted of failing to vacate a farm that has been lawfully acquired See *Micklethwait* HH-3-03 and *Prior* HH-163-02;
- prohibiting him from communicating with prosecution witnesses;
- imposing other conditions as to his conduct, such as that he places himself under the care and supervision of a particular organization.

Once conditions are imposed, it is not permissible for the state to seek further conditions to those already imposed in the absence of further violations while on bail. In *Tsvangirai & Ors* HH-92-03 the accused were on trial on charges of treason. They had been granted bail, and had not breached any

of the conditions. The State applied to have further conditions added. It alleged that the accused had indulged in activities which occurred after the grant of bail and which were unlawful and bordered on treason. No charges were being brought in respect of those alleged activities. It was held that the grant of bail is a consequence of the arrest and remand of an accused person on a specific charge. The nature of the offence charged and other relevant considerations are factors to be taken into account in determining the grant or refusal of bail and, where such bail is granted, the conditions to be attached to the recognizance. Any conditions attached to a recognizance must have some bearing to the offence of which the accused is charged, in particular the need to secure his attendance; to ensure that he does not interfere with the evidence and to ensure that he does not commit further offences whilst awaiting trial. The conditions added to the recognizance cannot refer to some other allegation that the accused person may possibly face in future and in respect of which he has not been charged. What the State wanted was to prevent the accused from conducting themselves unlawfully. It could not do so through conditions added to bail.

In another linked application, the court expressed the view that conditions should be imposed where these can dispense with State fears adequately. In *Tsvangirai* HH-100-03 the applicant, along with 2 others, was on trial on charges of treason. They had been granted bail, and had not breached any of the conditions. The State unsuccessfully applied to have further conditions added. That application was dismissed on the grounds that bail conditions cannot refer to some other allegation that the accused person may possibly face in future and in respect of which he has not been charged. The applicant was then arrested on a further charge of treason, based on statements he was alleged to have made, urging a mass stay-away as a means of removing the government from power. The State conceded that it had no reason to fear that the applicant would not stand trial or interfere with the evidence, but expressed apprehension that, if granted bail, the applicant was likely to commit or influence his supporters to commit similar crimes; that the applicant has a propensity to commit such crimes when out of custody. The court held that the fact that the applicant was facing other charges previously preferred against him and for which he had not been convicted was not by itself a reason for denying him bail. However, the State's fears that he might commit similar crimes were not totally unfounded, but were not incapable of being catered for by the imposition of appropriate conditions, something the court was empowered to do. Bail would be granted on that basis.

## *Equal treatment of accused*

In *Lotriet & Anor* HH-164-2001 the applicants were granted bail by a magistrate but the Attorney-General's appeal against the grant of bail was upheld by the High Court, so they remained in custody. In a further application to the High Court it was revealed that an accomplice had been granted bail. The court granted their application on the basis of two fundamental principles: the right of the individual to liberty and the need for justice to be seen to be administered evenly. The judge commented that it was "vital that in the administration of justice there does not appear any form of discrimination, particularly in a matter where the liberty of a person is involved."

## *Cancellation and forfeiture of bail*

If X breaches any of the conditions of his bail the judicial officer who admitted him to bail or the judicial officer before whom X is brought may declare the bail to be forfeited: s 133(a) CPEA.

Where X has failed to appear in court for trial (his name having been called three times both inside and outside the courtroom), the prosecutor may apply for a warrant of apprehension and for the forfeiture of X's bail and any recognizances that have been entered into: s 119 CPEA.

The court will usually refrain from ordering forfeiture of bail until X is arrested and brought before the court and asked to explain his default. The correct procedure is merely to issue a warrant for the apprehension of X. The court should only order forfeiture when, after hearing X's explanation, it is satisfied that the default was wilful or deliberate: *Sibanda* (1) 1980 ZLR 413 (GD). X's lawyer can appear at this hearing to explain why his client failed to appear in court for trial and to try to persuade the court not to order forfeiture of bail but instead to extend the previous bail and to set a new trial

date. However, if the default of X was wilful the court *is obliged to order forfeiture of bail*: *Knight NO v Van Tonder & Anor* 1962 R & N 405 (SR).

It is impermissible for the court to order both forfeiture of bail and the imposition of a fine for failure to appear in court. This amounts to punishing X twice for the same offence: *Sibanda (1)* 1980 ZLR 413 (GD).

## Bail pending appeal

### *Cases in magistrates court*

Where a person has been convicted of any of the offences specified in the Third Schedule, a magistrate may only admit a person to bail or alter his bail conditions if the Attorney-General has given his consent. Proviso (iii) to s 123(1) CPEA. The specified offences are:

The specified offences in Part 1 of the Third Schedule are:

- murder where it was committed in certain specified circumstances such as where it was premeditated;
- rape or aggravated indecent assault where it was committed in certain specified circumstances such as multiple rape of a victim;
- robbery where it was committed in certain specified circumstances such as where firearms were used;
- assault or indecent assault of a child under 16 involving the infliction of grievous bodily harm;
- kidnapping or unlawful detention involving the infliction of grievous bodily harm ;
- contravening the following sections of CLCA: 20 (treason); 21 (concealing treason); 22 (subverting constitutional government); 23 (insurgency, banditry, sabotage or terrorism); 24 (recruiting or training insurgents, bandits, saboteurs or terrorists); 25 (training as insurgent, bandit, saboteur or terrorist); 26 (supplying weapons to insurgents, bandits, saboteurs or terrorists); 27 (possessing weapons for insurgency, banditry, sabotage or terrorism) or 29 (harbouring, concealing or failing to report insurgent, bandit, saboteur or terrorist);
- An offence in Part II of the Third Schedule where the accused has previously been convicted of any offence specified in the Third Schedule or has allegedly committed such offence whilst on bail in respect of an offence in the Third Schedule.

The offences specified in Part II to the Third Schedule are:

- treason;
- murder in circumstances other than those specified in Part I;
- attempted murder involving the infliction of grievous bodily harm;
- malicious damage to property involving arson or conspiracy, incitement or attempt to commit this offence;
- theft of a motor vehicle or conspiracy, incitement or attempt to commit this offence;
- any offence relating to dealing in or smuggling of ammunition, firearms, explosives or armaments or the possession of an automatic or semi-automatic firearm, explosives or armaments or conspiracy, incitement or attempt to commit this offence;
- any offence where the Attorney-General has notified the magistrate of his intention to indict the case direct to the High Court.

Where a person who has been convicted for an offence, other than one of these specified ones, applies for bail, the magistrate who has convicted him has the discretion to grant bail pending the appeal.

### *Cases in High Court*

The High Court can grant bail pending appeal to the Supreme Court where it has convicted and sentenced X or has sentenced him after the case has been referred to it for sentence: s 123(1)(a) CPEA.

If a person, who has been convicted of one of the offences specified in the Eighth Schedule, applies to the High Court for bail pending appeal, the Minister of Home Affairs is entitled to certify that, in his opinion, public security will be prejudiced if X is admitted to bail. The certificate must specify the grounds upon which the Minister has formed his opinion that public security will be so prejudiced. Wherever possible, a copy of this certificate must be served on the person applying for bail before his application for bail is heard: s 123(2), (2a), (2b), (2c) and (2d) [112(2), (2a), (2b)] CPEA.

The effect of this certification is to cast the onus on the person applying for bail pending appeal to satisfy the court that, despite what is stated in the certificate, he should be granted bail; bail may only be granted by the judge if this onus is discharged.

## *Criteria*

The main factors which are weighed in the balance are the interrelated factors of the prospects on appeal and whether the granting of bail will jeopardize the interests of the administration of justice.

In *Kilpin* 1978 RLR 282 (A) the appeal court pointed out that the principles governing the granting of bail after conviction were different to those governing the granting of bail before conviction. Where the person has not yet been convicted he is still presumed innocent and the courts will lean in favour of granting him liberty before he is tried. On the other hand, where he has already been convicted, the presumption of innocence falls away. There are certain cases where bail pending appeal should not be granted, such as where the person has been convicted of an offence which almost invariably attracts a lengthy prison term and there are no reasonable prospects of an appeal against the lengthy prison term succeeding. The trial magistrate had thus been wrong simply to extend bail granted before trial to the post-trial stage where the person had pleaded guilty to such an offence.

In *Williams* 1980 ZLR 466 (A) the appeal court said that even after conviction the court should lean in favour of liberty if this would not endanger the interests of the administration of justice. The prospects of success on appeal must be balanced against the interests of the administration of justice. The less the chance of success on appeal the greater the chance there was of the convicted person absconding. But it was putting it too highly to say that bail should only be granted where there was a reasonable prospect of the appeal succeeding. On the other hand, in serious cases even where there was a reasonable prospect of success on appeal bail should sometimes be refused, notwithstanding that there is little danger of the convicted person absconding.

Where the evidence of guilt is overwhelming, there is no reasonable prospect of a successful appeal against conviction; but if there is room for a difference of opinion regarding conviction there would be a reasonable prospect on appeal. In *Labuschagne* S-21-03 the court that the mere fact that leave to appeal has been granted does not, *per se,* entitle a convicted person to be allowed out on bail. The *onus* of establishing that justice will not be endangered and that there is a reasonable prospect of success is upon the applicant. It is improper to allow people convicted of serious crimes to be walking in the streets instead of serving their sentences when the prospects of success are non-existent. Society would lose faith in the system and revolt.
See also *Benatar* 1985 (2) ZLR 205 (H).

In deciding whether the administration of justice will be prejudiced if bail is granted the court will take into account the seriousness of the offence, the seriousness of the penalty imposed, whether the appeal is against conviction or only against sentence and the prospects of success on appeal. With a serious offence which normally attracts a substantial prison sentence, there will be a pronounced risk that the convicted person will flee from justice if released, especially if he has no reasonable chance of successfully appealing against conviction. There will be a very great risk of flight if X is only appealing against sentence and where the most he can hope for is that the prison sentence will be subject to some minor adjustment. Even where there is a reasonable prospect of success on appeal

against such a conviction, the convicted person may not be inclined to take the chance of the appeal succeeding, but may take flight instead if he is released pending appeal. With less serious offences not attracting drastic penalties the position will be radically different.

In assessing the prospects of success on appeal the magistrate is obviously placed in a somewhat difficult position as, to a certain extent, he is being asked to come to a decision on the reliability of his conviction and/or sentence. He must try to assess this as objectively as possible.

It is however not sufficient to show reasonable prospects of success in of the appeal to be entitled to bail. In *Manyange* HH-1-03 the applicant was convicted of theft a motor vehicle. He applied for bail pending appeal. The State did not oppose the application, considering that the applicant had an arguable case. The Court held that in an application for bail pending appeal the presumption of innocence is inoperative, as the applicant is a convicted and sentenced offender. For his application to succeed, the applicant must show that there are positive reasons why bail should be granted. In the absence of positive grounds, bail should be denied. The mere fact that there are reasonable prospects of success on appeal or that the applicant has a reasonably arguable case does not entitle him to bail. He must show that in addition to his prospects of success on appeal, the interests of justice will not be endangered if he is granted bail. This the applicant had failed to do, and bail would be refused.

## *Further applications for bail*

Even if bail has been refused by a court, a further application for bail can be made at subsequent remand proceedings if this application is based on new or different facts from the previous application: s 116 (1)(c) proviso (ii)].

The passage of time since the last application for bail can be a new fact arising after the last application. See *Murambiwa* S-62-92 and *Aitken (2)* S-168-92. The fact that the police have had sufficient time since the last application to investigate the case but have not been able to strengthen their case will be a factor which must be considered in the further application for bail. See *Murambiwa* and *Aitken (2)*. In *Stouyannides* S-170-92 the court pointed out that where a considerable period of time has elapsed, the Attorney-General acts at his peril if he fails to put before the court specific facts strengthening the case over the period of time which has elapsed. This was confirmed *Barros & Ors* HH-110-02 where the judge held that a postponement of a trial is a change in circumstances entitling a court to reconsider the question of bail. Whether bail should in fact be granted will depend on the circumstances of the case in question, the length of the postponement and the nature of the charges.

If X previously had no money for bail but now has raised some, his lawyer can inform the court of this and request that bail now be granted.

## *Appeal against refusal of bail by High Court*

In *A-G* v *Mpofu & Anor* S-50-02 the Supreme Court ruled that where a party wishes to appeal against an order of a judge of the High Court refusing bail, the leave of the judge must be sought. If leave is refused, a judge of the Supreme Court may entertain an application for leave to appeal. This is a statutory requirement, and failure to comply with it may not be condoned. See also *Aitken* 1992 (2) ZLR 84 (S).

Where a person convicted in the magistrates court makes his initial application for bail, not to the magistrate but to a judge of the High Court, an appeal still lies with leave to a judge of the Supreme Court: *Dzawo*1998 (1) ZLR 536 (S)

In Ncube 2001 (2) ZLR 556 (S) it was pointed out that the power of the Supreme Court to interfere with a decision of the High Court in a bail application is rather limited. It may only interfere where the judge a quo committed an irregularity or misdirection, or where the manner in which he exercised his discretion was so unreasonable as to vitiate the decision made.

### *Single appeal against decision on bail by magistrate*

Where a person applies for bail in the magistrates court and the application is refused he is only entitled to a single appeal against this decision to the High Court. Section 121(8) of the Criminal Procedure and Evidence Act had removed the right of the person concerned who had appealed to a judge of the High Court against the bail decision of a magistrate to take the judge's decision, subject to leave, on appeal to a judge of the Supreme Court.

In *Chiyangwa* v *AG & Ors* S-1-04 it was held that there is only one appeal against the grant or refusal of bail by a judge or magistrate, no matter which party appeals. If a magistrate refuses bail and a judge of the High Court grants bail on appeal by the accused, that is the end of the matter. The Attorney-General has no right of appeal to the Supreme Court. See also *AG v Lotriet & Ors* 2001 (2) ZLR 168 (H)

However, an exception arises in respect of currency offences, as in the case of *Attorney-General* v *Fundira* S-33-04. In that case, the respondent, who was charged with currency offences, had been granted bail in the High Court. The Attorney-General immediately announced his intention of appealing and applied for leave to appeal. The judge refused leave, and within two days the Attorney-General applied to the Supreme Court for leave to appeal. The respondent argued that as the Attorney-General had not noted an appeal within 7 days, there was no appeal before the court and the respondent should be released. It was held no appeal lies to the Supreme Court from an order of a High Court judge sitting as an appeal judge in a bail application. However, there is an exception in respect of persons charged with currency offences: applications for bail in respect of those offences can commence in the magistrate's court, then proceed to the High Court and thereafter to the Supreme Court. No party is relieved of the requirement to obtain leave to appeal in a bail application, where the appeal is against the decision of a judge of the High Court. The Attorney-General's application, within 7 days, for leave to appeal constituted compliance with s 121 of the Criminal Procedure and Evidence Act. It cannot have been the intention of the legislature to require the Attorney-General to file the notice of appeal at a time when it was legally not possible to file such a notice of appeal, by reason of awaiting the outcome of his application for leave to appeal.

Where bail has been granted by a magistrate, and the state appeals, the High Court cannot substitute its own discretion for that of the magistrate in the absence of misdirection or irregularity: *A-G* v *Ruturi* HH-26-03. When there is an appeal against a decision to admit a person to bail, that decision should not be set aside unless there are compelling reasons to do so.

### *Police Bail*

See Section 2 "Release from police custody".

## Statements by accused to police

### *Importance to police*

The police must obtain evidence of the commission of the alleged crime in order to secure a conviction in court. Not infrequently the sole or primary evidence which is produced in court is an incriminatory statement made by X to the police. The police tend to rely heavily on obtaining such statements. It is relevant here to note that in terms of s 273 CPEA a person may be convicted on the basis of his confession alone, provided that the offence confessed to has been proved by other competent evidence to have actually have been committed.

### *Advice on making statement*

The defence lawyer may be brought into a case at an early stage and obtain access to his client who is in the custody of the police before the client has made a statement to the police. The client may, for instance, have insisted that he consult with his lawyer before he is prepared to make a statement.

After hearing the client's story, the lawyer will be able to advise his client about the making of a statement to the police. The nature of the advice will depend on the instructions he is given. In some instances he will advise his client to make a statement; in some he will advise him not to make a statement; in some he will advise him to allow him (the lawyer) to draw up the statement based on his client's instructions. The factors affecting the advice in this regard are dealt with earlier under "Arrests -Advice on statements to police".

### *Presence of lawyer when statement being made*

If his client instructs his legal practitioner to be present when the police record a warned and cautioned statement, the legal practitioner is entitled to be present to protect his client's interests when the police record the statement.

### *Access after statement made*

The lawyer often is only brought into the case or only manages to obtain access to his client after his client has already made a statement to the police.

The denial of access of a person to his lawyer is a violation of that person's constitutional rights. If the person asks for his lawyer before or during police interrogation, the police are supposed to stop the investigations and only resume after X has had consultations with his lawyer: *Slatter & Ors* 1983 (2) ZLR 144 (H).

In the process of taking instructions from his client the lawyer must find out these details from his client pertaining to the statement which he has made to the police:

- the circumstances surrounding the making of the statement: was he forced to make the statement or were any incentives offered to him to make it? The legal practitioner must not, however, put questions in such a way as to suggest that he must allege that he was illegally pressurised by the police into making the statement;
- whether he asked to consult with his lawyer before making the statement and whether he had been denied access to his lawyer until after he made a statement;
- what sort of a statement it was: was it an oral statement or a written one; in what language did he give the statement; did he write out the statement himself; was he warned and cautioned before making the statement; was the statement typed and was his signature witnessed? (It is important to find out whether X understands the language in which the statement was recorded. For instance if the statement was recorded in Shona or English when X only speaks and reads Ndebele then X could not possibly have made this statement.)
- what did he say in the statement?
- was he taken before a magistrate to have the statement confirmed and, if he was, what did he say in reply to the magistrate's questions?

If the client is literate he should be allowed to read over the statement. If he is not, the statement should be read to him. Especially with the unsophisticated client, care must be taken to find out whether the client accepts that he made the entire statement to the police. Enquiries must be made to ascertain whether the client is in fact alleging that he was forced to sign a statement which was concocted in its entirety by the police or that he made some of the statement consisted of portions added on by the police about which he had made no statement.

If the client says he was forced to make the statement or was unduly influenced thereto full details must be extracted as to what pressures were brought to bear upon him to make the statement. If the client alleges that he was subjected to physical maltreatment to extract a statement from him, the lawyer should ask his client to show him any signs of such maltreatment on his body and, if it seems

that there is substance in these allegations, the lawyer should insist that the police immediately allow his client to be physically examined. If the police refuse to allow this, then the lawyer can apply to court for a court order requiring that such a medical examination be carried out.

### *Unconfirmed statement*

Where the client maintains that he did not make the statement voluntarily and the statement has not yet been confirmed before a magistrate, the client should be told that he must insist on having his lawyer present at any such confirmation proceedings. If the client is brought before a magistrate to confirm a statement and his lawyer has not been informed of these proceedings, the client should tell the magistrate that he has a lawyer and has instructed him to represent him at these proceedings. The lawyer should also inform the police that he has been instructed to appear for his client if his client is taken before a magistrate in order to have his statement confirmed and that he should be notified before any such proceedings take place.

If the client does not have enough money to engage the lawyer to represent him at the confirmation proceedings, the lawyer should tell his client to give full details to the magistrate of the circumstances surrounding the making of the statement and the pressure which was exerted upon him to make it.

Where the State seeks to introduce an unconfirmed statement in evidence at X's trial and this statement is challenged on the basis of duress or undue influence, the *onus* will be on the State to prove beyond reasonable doubt that the statement was made freely and voluntarily: *Slatter & Ors* 1983 (2) ZLR 144 (H); *Attorney-General v Slatter & Ors* 1984 (1) ZLR 306 (S)

### *Confirmed statement*

In terms of s 113 CPEA, X may be brought before a magistrate for the purposes of having a statement made by him confirmed. Statements include confessions. Also encompassed are statements made to the police while X is pointing out things or making indications and statements made on the way to the location where indications are to be made. The confirmation proceedings take place in camera.

The confirmation procedure was introduced to try to cut down on the numbers of “trials within trials” consequent upon challenges in court by X to the admissibility of their confessions. The purpose of the confirmation proceedings is to give X the chance to object to the manner in which a statement was extracted from him. If he did not make the statement voluntarily or made it because of undue influence, he is supposed to tell the magistrate about this at the confirmation proceedings and then the statement will not be confirmed.

Once a statement has been properly confirmed, it becomes far more difficult to challenge the admissibility of that statement. This is because the onus is then placed on the defence to prove that despite the confirmation of the statement, the statement was not made by X or that it was not made freely and voluntarily and without undue influence.

On the other hand, if the police have not had the statement confirmed or the magistrate refuses to confirm it because X has alleged that it was not made freely and voluntarily, the onus will then rest on the State to prove beyond reasonable doubt that the statement was made freely and voluntarily and without undue influence.

The correct procedure at confirmation proceedings, where X is not legally represented, is as follows:

- The proceedings should take place in camera.
- The prosecutor produces the statement by handing it to the magistrate and informing the magistrate of when, where and to whom it was made.
- The statement is then read over to X and he is informed of when, where and to whom he made the statement.
- The magistrate will then ask X whether he admits making the statement and making it freely and voluntarily and without being subject to undue influence. The magistrate must explain

that if X admits these things or refuses to answer these questions the statement will be confirmed and that it can then be used in evidence against him at his trial on mere production of the statement by the prosecution;

- If X admits that he freely made the statement or refuses to answer the questions, the statement will be confirmed and can be admitted in evidence at his trial on mere production.
- If X denies he made the statement or alleges that it was not freely made, the magistrate will ask him to give sufficient facts to back up his denial or his allegation of duress or undue influence and, where it is reasonably possible for him to do so, to identify those who applied the undue pressure on him. The magistrate must also tell X that if he fails to mention any facts salient to his allegations concerning the making of the statement, adverse inferences may be drawn from this failure when the admissibility of his statement is being dealt with at his trial.
- If X alleges that he has been subjected to physical ill-treatment to extract a confession, the magistrate must note and record any signs of injury on the body of X. The magistrate has power to order an immediate medical examination of X. This power should usually be invoked in these circumstances in order that any evidence of ill-treatment can be detected by a medical expert.
- The magistrate also has the power to order such other investigations as he considers to be necessary or desirable in the circumstances.
- If X gives replies in which he implies that some inducement has been offered to him to make the statement (such as that he would be released if he did so), the magistrate must clarify what X means. He should refuse to confirm the statement if it emerges that X is saying that undue influence was brought to bear upon him.
- The magistrate should also look for factors which indicate that undue pressure has been applied, such as that an appreciable amount of time has elapsed between the recording and signing of a confession and the bringing of X to have his statement confirmed. If X has alleged he was tortured to extract a confession and confirmation has been sought a long time after the statement was made, this delay may suggest that this time lapse was to allow signs of injury to disappear.
- If X indicates that parts of his statement were not freely and voluntarily made, the magistrate should decline to confirm the statement. It is not proper to confirm some parts and to decline to confirm the parts which X has said were not freely and voluntarily made: *Munukwa & Ors* 1982 (1) ZLR 30 (S).
- During confirmation proceedings the magistrate should ensure that the investigating officer and his colleagues remain outside the courtroom and are kept far enough away so as not to be able to overhear what is going on inside the courtroom.

If these procedures are not strictly adhered to the confirmation proceedings will be invalid. In *Slatter & Ors* 1983 (2) ZLR 144 (H) it was laid down that denying X access to his lawyer violates the constitutional rights of X and constitutes undue influence upon him. If X is denied access to his lawyer before or during the confirmation proceedings, the confirmation proceedings will be rendered invalid and the onus would revert to the State to prove that the statements were made freely and voluntarily. This would even apply where relatives of a person in police custody had instructed the lawyer without X being aware of this and the lawyer is prevented from seeing the person concerned subsequently.

In many cases the defence lawyer will only be brought in at a stage when his client has already made an incriminatory statement to the police and the statement has already been confirmed before a magistrate. It may still, however, be possible to challenge the admissibility of the incriminatory statement at the trial. If the defence can establish that the confirmation proceedings were improperly conducted, the proceedings will be ruled to be invalid and the statement will be treated as if it had not been confirmed.

Even if the confirmation proceedings were properly conducted, the admissibility of the statement can still be challenged either on the basis that the original statement was not made freely and voluntarily without undue influence or on the basis that the statement was not made at all by X and the statement is not true. The onus lies on the defence to prove the inadmissibility of a confirmed statement. In determining the admissibility of a statement the court may draw adverse inferences from X's failure to mention facts at the confirmation proceedings which in the circumstances he could

reasonably have been expected to have mentioned: s 115 CPEA. Any failure of X to tell the magistrate about the undue pressure applied to him to force him to make the statement would therefore be explained. The reason for X's failure may have been that he was threatened with further violence by the police when he was returned to their custody if he did not tell the magistrate that he had made the statement freely and voluntarily.

Even if the confirmation proceedings were properly conducted, the admissibility of the statement would still be open to challenge at the trial in certain circumstances. For example, the client may inform his lawyer that although the police forced him to make the statement he did not tell the magistrate about this at the confirmation proceedings because he had been warned by the police that he would face dire consequences once he was returned to their custody if he told the magistrate that he had been forced to make the statement.

The circumstances in which a statement would be inadmissible because it was not free and voluntary or was the result of undue influence are dealt with later under "The Trial - Production of Statements by the accused to the Police."

## Discovery of mental unfitness before trial

If, as a result of his interviews with his client, the defence lawyer considers that X is not mentally fit to stand trial, he should liaise with the prosecutor in the case so that the mental condition of X can be brought to the attention of a magistrate and an order can be made for a psychiatric investigation into the mental competence of X to take place.

Where X is mentally unfit to stand trial he must be dealt with under s 27 of the Mental Health Act.

In terms of s 27(1) of the Act, if it appears that a person being held in custody pending trial is mentally disordered or defective, the prosecutor or the person in charge of the place of detention (which may be a police station or a prison) must report this fact, without delay, to a magistrate of the province in which the place of detention is situated.

The procedures to be followed in this sort of case are set out in subsections (2), (3), (4) and (5) of s 26.

The Chief Magistrate's Circular No 9 of 1984 suggests that in this sort of case the magistrate should request the prosecutor, as soon as possible, to obtain from the police docket copies of the witness statements as to X's conduct at the time of the crime, and, where necessary, any further information about his mental condition from relatives and associates. The case should be remanded. The circular says that on receipt of the information, if it appears that X may be mentally disordered, arrangements should be made through the police or prisons for the requisite medical examination to be made as required by the Mental Health Act.

Section 26 actually requires that, within twenty-four hours of receipt of a report, the magistrate must direct that the medical examination take place.

Two medical practitioners (or one, if two are not available) must state in writing their opinion as to the mental condition of the prisoner. Based on this opinion the magistrate must then decide what to do with X. If such person is considered to be unfit to stand trial because he is mentally disordered or defective he will be committed to a mental institution until he has recovered. After recovery he can then be put on trial: s 30 Mental Health Act.

Often persons who are mentally unfit to stand trial may also have been mentally disordered or defective when they committed the crime. It is, therefore, useful if the doctors also consider whether X is likely to have been mentally disordered or defective at the time that the offence was perpetrated. This may save having to have a further medical investigation after X has recovered and is put on trial.

If the doctors say that X was mentally disordered or defective at the time of the offence, there is little point in putting him on trial after his recovery unless there is some doubt about the opinion of the doctors. If he were to be tried, a special verdict would be returned under s 28 of the Mental Health Act. He would then have to be sent to a mental institution even though he has already been in a mental institution and he has recovered from his mental condition.

As regards the procedure for dealing with an accused person who displays signs of being mentally disordered after the trial commences, see later under "Trial - Mental Unfitness of X to Stand Trial".

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# SECTION 3 – JURISDICTION OF COURTS

## Place of trial

### *Magistrates courts*

An ordinary, senior or provincial magistrate may normally only try offences committed within his province and a regional magistrate may only try cases within his regional division. This basic rule is, however, subject to numerous exceptions and qualifications. A case may be tried by a court which has jurisdiction to try cases in a particular province or regional division

- if any act or omission or event which is an element of the offence takes place in that province or regional division;
- if the offence was commenced or completed in that province or regional division;
- if the offence was committed within five kilometres of the boundary of that province or regional division;
- if the offence was committed on any vehicle, including a train, during a journey which passed through that province or regional division or within five kilometres thereof;
- in cases of theft or receiving or obtaining property unlawfully, if X has or has had any of the property in his possession in that province or division.

In addition,

- persons charged with incitement or as accessories (after the fact) may be tried by any court having jurisdiction to try the principal offenders;
- in respect of statutory offences which the legislature has provided may be tried extra-territorially, a court in a province or regional division may try the case even though no part of the offence was committed within the province or regional division.
- in cases where offences have been committed in several jurisdictions, these may be tried in any of such jurisdictions;
- provided X consents to it, the Attorney-General may cause X to be tried for the offence in the court of any province;
- when a court has remanded a person in custody for trial before another court, the prisoner must be transmitted forthwith to the prison of the province where he or she is to be tried.

s 56(2) & (7) MCA

### *High Court*

The High Court can try cases committed in any part of the country.

## Crimes triable

### *By magistrates*

No magistrate may try treason, murder or statutory offences attracting the death penalty: s 49(1) MCA. Magistrates courts may try any other crime

However, only a regional court can try rape cases, unless the Attorney-General remits the case for trial to a magistrates court other than a regional court or it is a summary trial in respect of a person under 18 and the Attorney-General has authorised the trial: s 54(6) MCA.

### *By High Court*

The High Court can try any type of criminal cases, including crimes which may attract the death sentence, including murder and treason.

## Penalties imposable

### *By magistrates*

*Ordinary jurisdiction*

In terms of s 50 MCA, in summary trials and on remittal from the Attorney-General the maximum sentences which may be imposed by the different grades of magistrates are as follows:

| Regional | Provincial | Senior | Ordinary |
|---|---|---|---|
| 10 yrs or level 12 | 5 yrs or level 10 | 4 yrs or level 9 | In summary trial, 2 yrs or level 7<br><br>On remittal from Attorney-General, 4 yrs or level 9 |

In all cases where imprisonment may be imposed by any court it may be imposed with or without labour. It is virtually unknown for imprisonment to be imposed without labour.

*Special jurisdiction*

In terms of s 50 MCA, in summary trials and on remittal from the Attorney-General the maximum sentences which may be imposed by the different grades of magistrates are as follows:

| Grade of magistrate | Maximum sentencing jurisdiction |
|---|---|
| Regional | 10 yrs or fine up to level 12, whether on summary trial or remittal by AG |
| Provincial | 5 yrs or fine up to level 10, whether on summary trial or remittal by AG |
| Senior | 4 yrs or fine up to level 9, whether on summary trial or remittal by AG |
| Ordinary | On summary trial 2 yrs or fine up to level 7<br>On remittal by AG under increased jurisdiction given in s 50, 4 yrs or fine up to level 9 |

In all cases where imprisonment may be imposed, it may be imposed with or without labour.

*Increased jurisdiction*

Under s 51 MCA these jurisdictional limits are increased in certain circumstances.

| Grade of magistrate | Offences | Maximum sentencing jurisdiction |
|---|---|---|
| Regional magistrate | Public violence, malicious damage to property or attempt to commit these crimes or robbery or attempted robbery in aggravating circumstances (aggravating that X or his accomplice had firearm or dangerous weapon, that X killed a person or inflicted or threatened to inflict grievous bodily harm) | 12 yrs or fine up to level 13 |
| Regional magistrate whether on summary trial or remittal from AG | Sexual offences (rape, aggravated indecent assault, sexual intercourse of performing indecent acts with young person, bestiality, sexual intercourse within the prohibited degree of relationship or complicity in sexual crimes) | All these magistrates will have special jurisdiction to impose the penalties prescribed for these offences in CLRA. |
| Regional magistrate whether on summary trial or remittal from AG | Deliberate infection of another with sexually-transmitted disease or deliberate transmission of HIV | Jurisdiction to impose penalties prescribed for these offences on CLRA |
| Ordinary, senior & provincial magistrate whether on summary trial or remittal from AG | Dangerous drug offences in Chapter VII of CLCA | 10 yrs or fine up to level 12 |
| Ordinary, senior & provincial magistrates whether on summary trials & remittal from AG. | Public violence, malicious damage to property or attempts to commit these crimes. | 7 yrs or to fine up to level 11 |
| Ordinary, senior, provincial and regional magistrates | Theft, stock theft and unlawful entry into premises | 20 yrs or fine up to level 14 |

In various other statutes magistrates are given increased sentencing jurisdiction.

### *By High Court*

The High Court can impose any competent penalty, including life imprisonment and the death sentence.

## Crimes committed outside Zimbabwe

Section 5 of CLCA provides that a court can try any crime either in terms of CLCA or any other enactment if the crime or an essential element of the crime was committed:

- wholly inside Zimbabwe;
- partly outside Zimbabwe if the conduct that completed the crime took place inside Zimbabwe;

- wholly or partly outside Zimbabwe if the crime is a crime against the public security in Zimbabwe or against the safety of the State of Zimbabwe or the crime has produced or was intended to produce a harmful effect in Zimbabwe or the accused realized there was a real risk that it might produce such an effect (There are numerous offences in CLCA of this nature).

Section 5(2) provides that any other enactment providing for extra-territorial effect will continue to apply. For instance, there are various offences under the Exchange Control Act [*Chapter 22:05*] which can be committed extraterritorially.

For the position under the common law see *Mharapara* 1985 (2) ZLR 211 (S) and *Kapurira* S-110-92

## Illegally bringing accused into jurisdiction

This a complex issue. If this issue arises in a case in the magistrates court, the magistrate should refer to case of *Beahan* 1991 (2) ZLR 98 (S) where this matter is dealt with. If X has been kidnapped from the foreign State thereby violating the sovereignty of that State, jurisdiction will not be assured. But the court will have jurisdiction if X is surrendered by the foreign State in contravention of the municipal law of the State of refuge.

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# SECTION 4 – PREPARING FOR TRIAL

## Relevant documentation

Once the legal practitioner has informed the prosecutor dealing with the case that he is representing X, the prosecutor will normally provide the legal practitioner with a copy of the charge and of any warned and cautioned statement made by X. If this has not been done, the legal practitioner should request that he be supplied with these documents.

## Charge

The first task is to understand what the case against X is. The charge should be critically examined to see if it is legally competent and that adequate details have been provided to enable a proper defence to be prepared.

The indictment, summons or charge must contain such details of the State case as are reasonably necessary to inform X of the nature of the charge. It must set out:

- the alleged time and place of the commission of the offence;
- the person, if any, against whom it was committed;
- the property, if any, in respect of which the offence was committed.
  s 146 CPEA.

In theft cases it is permissible for the State to allege that the theft took place between certain dates: s 147 CPEA and, in cases of theft of money or property entrusted into the custody of X, it is permissible to allege a general deficiency: s 148 CPEA. Where the theft is of bank notes and coins it is not necessary for the State to specify the particular bank notes or coins alleged to have been stolen s 149 CPEA. In respect of crimes of dishonesty generally, the charge does not have to allege intention to defraud a specific person: s 157 CPEA.

There are special provisions relating to the type of detail required in respect of a number of particular crimes- perjury: s 150 CPEA); homicide: s 154 CPEA; forgery: s 155 CPEA; and an offence relating to insolvency: s 156 CPEA.

There are special provisions relating to charging companies: 152 CPEA, jointly charging several X for the same offence: s 158 CPEA, and joint trials of persons charged with different offences: s 159 CPEA).

Finally there are special provisions in s 151 CPEA relating to what may be alleged regarding ownership or possession of various types of property such as testamentary instruments, property hired to offender, State property and corporate property.

With all charges, other than those with which the defence lawyer is thoroughly familiar, the defence lawyer must do research in order to find out what are the essential ingredients of the criminal charge levelled against his client. If the criminal offence is a statutory offence, he should study the enactment in which the criminal offence is contained. He must carefully analyse the relevant section to ascertain the essential elements of the offence. In particular, he should find out whether the State is required to prove *mens rea* and, if it is, whether it must prove intention or merely negligence. Sometimes the statutory offence will be a strict liability offence, in which case proof of neither intention nor negligence will be required; all the State will have to prove is the *actus reus*. In order to determine what the essential ingredients are, the statutory criminal offence must be examined in the context of the entire enactment in question.

It is important to study the entire enactment for several other reasons. The penalty for the offence, provisions relating to methods of proof of the offence, and presumptions against X may sometimes be contained in sections other than that which creates the offence. Usually presumptions are placed at the end of the section dealing with the offence, whereas methods of proof come at the end of the statute as they may relate to various of the offences found in the statute.

## Material contained in police docket

The High Court ruling in the case of *Sithole* 1996 (2) ZLR 575 (H) is important. The court decided that X is normally entitled to have access to the witness statements contained in the police docket unless the State claims privilege for this material and discharges the onus of establishing that the State interests in protecting that material from disclosure outweighs the right of X to a fair trial.

## Summary of State witness testimony

When X is committed for trial in the High Court, the State is obliged to serve on X at the same time as the indictment is served a document listing the witnesses which the State intends to call and a summary of the evidence which each will give in sufficient detail "to inform the accused of all the material facts upon which the State relies": s 66(6) CPEA. The person defending X will thus know *at the time his client is committed for trial* not only the particulars of the charge and the facts upon which it is based, but also the witnesses the State will be calling and the main points of their prospective testimony.

Where the case will be heard in the magistrates court, the defence lawyer will be provided with a copy of the charge sheet or summons. He is entitled to ask the State for a list of the witnesses it intends to call against his client. He can also ask for a copy of the summary of the case prepared by the police.

## Further particulars

If the prosecution case is not clear, further particulars should be sought in terms of s 177 CPEA. Even though the charge may comply with s 146 CPEA, the legal practitioner may still find that he requires further particulars in order to prepare the defence. For example, in a case of negligent driving the charge may give the required details as to date and place of the offence but the defence is still entitled to ask for particulars of the alleged negligence in order to prepare for trial. These particulars should be requested from the prosecutor. If the prosecutor refuses to supply such particulars, the defence lawyer can apply to the court for an order in terms of s 177 CPEA that such further particulars must be supplied.

## Pre-trial discussion with prosecutor

In the *Prosecutors Handbook* Reid-Rowland says this in Chapter 9:

> Discussion of an impending prosecution with the accused's legal adviser is perfectly in order and indeed is usually advisable. Such discussion may well result in the defence agreeing to make admissions in order to shorten the State's case, or the defence may intimate that certain facts will not be disputed by the defence, with the result that the State may be able to dispense with calling certain witnesses.
>
> Any such discussion should take place without the accused being present. Never hold any such discussion in the presence of the accused or any person other than his legal adviser.

It is thus perfectly permissible for defence counsel to negotiate with the prosecutor about the case. Defence counsel may want to talk to the prosecutor to try to narrow down the areas of dispute between the defence and the State and thus save time when the case is tried. He may wish to see whether the prosecutor is prepared to accept a plea of guilty to a lesser charge than that charged against his client instead of having a full scale argument in court as to whether the more serious crime was committed. (For instance, X may admit that he committed common assault but dispute that he committed assault with intent to do grievous bodily harm.) He may even wish to discuss with the prosecutor whether there is indeed any case for his client to answer on the basis of the evidence at the disposal of the State and whether the charge should not be withdrawn. In this latter instance the defence lawyer may lay on the table the defence case and query with the prosecutor whether there is any case for X to answer.

## Plea bargaining

It may be that a client is prepared to plead guilty if the State reduces the charge to a lesser offence. The defence lawyer may engage in a process of plea bargaining with the prosecutor to try to get the State to reduce the charge. The State may be prepared to reduce the charge in order that the case can be disposed of on the basis of a guilty plea. See *Prosecutors' Handbook* pp 74-85 for discussion of how the State will approach plea-bargaining by defence lawyers.

## Perusal of statements of State witnesses

The High Court ruling in the case of *Sithole* 1996 (2) ZLR 575 (H) is important. The court decided that X is normally entitled to have access to the witness statements contained in the police docket unless the State claims privilege for this material and discharges the onus of establishing that the State interests in protecting that material from disclosure outweighs the right of X to a fair trial.

## Defence interviewing State witnesses

This will arise only on very rare occasions. Such interviews may only take place after the prosecutor has agreed to them. The prosecutor will only give consent if he has been given sound reasons in support of this request. The State representative will normally insist on being present when such an interview is conducted.

A “State witness” is a witness whom the State intends to call. The term does not include a witness from whom the police took a statement but whom the prosecutor has decided not to call and has made available to the defence. If the prosecutor decides not to call a witness from whom a statement was originally taken, a copy of this statement should be made available to defence in case it wishes to call this witness as a defence witness.

## Taking instructions

Once the defence lawyer has understood the State case and has familiarised himself with the essential ingredients of the criminal offence which has been levelled against his client, he is then in a position to take instructions from his client.

If he has not done this preliminary work, he will not be able to take proper instructions. For instance, if he does not know the essential elements of the crime charged, he will not be able to ask salient questions of his client to determine whether all the essential elements appear to have been satisfied.

In an address (reproduced in 1988 Vol 1 No 2 *Legal Forum* 3) MCNALLY JA gave guidance on preparing to defend an accused person. Although this speech related to murder cases, it is of more general application as well.

> Read your papers carefully before you see the client. Try to recreate, in your mind's eye, the picture that the State seeks to create. Fit together, in chronological order, the various bits of evidence referred to in the State Outline. At the end you should have in your mind a clear picture of what happened, on the State's version.
>
> Even at this stage, before speaking to your client, there may be a few questions in your mind. Perhaps the identification is weak. Perhaps a key witness has a reason to be lying or may be trying to shift the blame from himself or from his friend or relative. Perhaps there is a hint of drink or provocation, or insanity. Keep these thoughts in the back of your mind. They are provisional only, at this stage, depending on what your client will say.

He goes on to say in respect of a *pro deo* client who is facing a murder charge:

> When you see your client, spend some time reassuring him. He may have been locked up for months. He has probably just been told by a warder; "Come with me". He doesn't know who you are or why you are there. You may be the prosecutor or a member of the CID as far as he is concerned. So spend a little time making sure that he knows you are there to help him. I always used to stress that I had been appointed by the Judge to defend him. I think that is easier for him to understand than if you say you are appointed by the State. After all, it is the State which is prosecuting him.

Initially the client should be allowed to tell his story in his own words with as few interruptions as possible. In this way the defence lawyer will obtain a general description of the problem from the client. Any questions asked at this stage should be open-ended questions rather than specific questions. Open-ended questions are questions which call upon the client to describe the course of the events such as "What happened after that?" If you interpose with specific questions on precise detail when the client is relating his story the client may lose his train of thought and consequently omit important facts which otherwise the client would have disclosed. When the client has finished relating his story and you have obtained a general description of the events, you can then probe for

specific details and seek clarification and elaboration on points which require this. At this stage specific questions can be asked to fill gaps in the story and to probe ambiguities.

The lawyer must listen carefully to what his client says and take full instructions. This does not mean that he must take down everything a client says. He must extract from the client information which is relevant to his defence to the charges levelled against him.

The legal practitioner knows what the State allegations are that need to be answered and he must obtain from his client all information which is relevant to these allegations.

In complex and serious cases the lawyer will usually have to see his client on several occasions in order to take full instructions.

The weaknesses in the client's defence and ways of tackling them must be carefully considered.

The defence lawyer should bring to the client's attention fundamental weaknesses in his case which are likely to lead to his defence not being believed. The client should be questioned closely about all unconvincing aspects of his defence.

In court the defence lawyer must present the case of his client to the best of his abilities, using his skill and judgment. The case is compiled on the basis of instructions given by the client. The lawyer, however, is not a mere mouthpiece of his client who must reproduce in court everything he was told by his client in the form in which it was told by the client. He has to sift through the welter of information and discard what is irrelevant and useless for defence purposes.

The defence lawyer will obviously be able to discern when putting forward a case in the way in which the client wants it put will do more harm than good. If, in a murder case, the client says that he accidentally stabbed the deceased six times, a good lawyer would not accept such instructions at face value. The inherent absurdity of such instructions should be pointed out to the client in very strong terms. Where the defence is downright untenable it should be put to the accused that this line of defence appears to be ridiculous and will not be believed by court. It would be far more in the client's interests to drop a ridiculous line of defence and plead guilty in order to try to obtain the maximum amount of mitigation. If he puts forward a totally implausible story the usual result is that aggravating features are emphasised rather than minimised.

MC NALLY JA has this to say about what he considers to be the most critical part of taking instructions:

> It is necessary to explore [the accused's] story by putting to him the evidence of the witnesses whose accounts conflict with his. You must obviously be careful not to suggest to him avenues of escape so that he gradually tailors his story untruthfully to fit a line of defence you have suggested to him. That is patently unethical. But there is a world of difference between saying:
>
> > 'You had better say you were drunk otherwise you will hang for sure'
>
> which is totally unethical, and saying;
>
> > 'Several of the witnesses say you were drunk. You should not be afraid to admit that if it is true. Now would you like to think about that?'
>
> which is entirely proper. Many people are ashamed to admit they were drunk, or they think it will make matters worse for them.
>
> You may end up with a story which sounds wildly improbable. Your duty is to check it out. Are there witnesses who can support it? If the story is an alibi, get hold of the supporting witnesses. If they are wholly unhelpful go back to your client and tell him. I have had sometimes had to say to a client:

> Look, I have checked out your story and it just not hang together. I must advise you that I do not think the Court will believe it. If you insist that it is true, I must accept that, and I will do the best I can with the facts you have given me. But I must advise you to think very carefully. If you are not telling me the truth it may be better for you to tell me the truth now.

But be very careful, because he may then say to you:
'Well, what should I say?', and there, of course, you may not prompt him.

If the lawyer tells his client that his story is implausible and calls upon him to “tell the truth”, there is the risk that the client will proceed to admit his guilt and ask the lawyer to find ways to "get him off". It may be better simply to advise the client of the weaknesses in his defence case and to see how he responds.

The defence lawyer must not override his client's instructions merely because he does not believe the client's story. If he does, it will be extremely difficult for him to get the court to accept his client's version of the facts. It is not the lawyer's role to sit in judgment over his client. If the client insists on putting forward a story which to the lawyer appears incredible, the lawyer is still bound to advance that story in its best possible light. It is entirely wrong for him to present case in such a way that it is patently obvious that he has no faith in it. It must always be remembered that sometimes the most absurd sounding story turns out to be true.

In his article in the *Legal Forum* 3, MCNALLY JA advises that:

> When you go to Court you should have a plan of action in your mind. Assuming, as you must, that your client's version is correct, then you may have to discredit witness A completely. How will you set about that? Could he have a motive for lying? Explore it. Could he be mistaken? Explore that line. Your client may have given you useful ammunition to use. Witness B may be different. His evidence may need only a change of emphasis to accord completely with your client's evidence. How are you going to deal with him? It may be easy. The police may have recorded his statement inaccurately. He may readily agree with what you put to him.

## Plea and admissions

The final stage of pre-trial consultation, apart from discussing the witnesses you should call, is to discuss with your client how he is going to plead to the charge.

Regarding the plea and admissions in murder cases MC NALLY JA has this to say:

> We have had some appalling mix-ups recently: *Masibhere & Anor* S-103-87 and *Nyandoro* 1987 (2) ZLR 66 (S).
>
> I find it difficult to understand why defence counsel get involved in such mix-ups. If you have reached agreement with the prosecutor on a plea to a lesser charge, such as culpable homicide or assault, you will advise your client to plead guilty to that lesser offence, and the prosecutor will then indicate that he accepts the plea. In all other murder cases X should be advised to plead "not guilty". But be careful of problems of interpretation. The client should not be misled into thinking you are advising him to say: "I did not do it".
>
> The place for admissions of fact, if these are to be made, is in the defence outline, not in the plea: *M'Kosi* 1935 SR 96, *Nangani* 1982 (1) ZLR 150 (S) at 154B and *Jokasi* 1986 (2) ZLR 79 (S).

> And counsel should consider carefully before they make far-reaching admissions of fact over such matters as their client's state of mind. For instance, if you want a witness called, so you can cross-examine him, the simplest way to do it is to decline to admit his evidence. The State has to call him. This is often useful with medical witnesses. Frankly I sometimes wonder on whose side defence counsel is.

Before any admissions are made by the defence in a criminal case, they should be fully discussed with and explained to the client. The lawyer should find out the exact extent of any admission his client wishes to make and he should explain to his client the implications of making such admissions. All admissions should be carefully and precisely drafted. The client should be asked to confirm, preferably in writing, exactly what it is that he is being asked to admit to.

## Mental disorder

If, as a result of his interviews with his client, the defence lawyer considers that the client is not mentally fit to stand trial, he or she should liaise with the prosecutor in the case so that the mental condition of the accused can be brought to the attention of a magistrate and an order can be made for a psychiatric investigation into the mental competence of the accuse to take place. Where the client is mentally unfit to stand trial he will be dealt with under s 27 of the Mental Health Act.

The defence lawyer must also consider whether the client was suffering from a mental disorder at the time that he or she did the act constituting the charge such that in terms of s 29 of the Mental Health the judicial officer will return a special verdict to the effect that the accused person is not guilty because of insanity. The mental disorder does not have to be permanent disorder. The crucial question is whether the disorder existed at the time the "crime" was committed. The Mental Health Act a special verdict will be returned if the accused was at the time the act was done "mental disordered or intellectually handicapped so as not to be responsible for the act. It defines "mentally disordered or intellectually handicapped" as meaning that person suffering from mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of the mind. "Psychopathic disorder" is defined as a persistent disorder or disability of the mind, whether or not subnormality of intelligence is present, which has existed or is believed to have existed in the patient since before 18 years old; and results in abnormally aggressive or seriously irresponsible conduct on the part of the patient. Various cases have interpreted these provisions. These cases have decided that under these provisions:

- the disorder or mental disorder or disability can be temporary - if it existed at the time of the act was committed it does not matter that X no longer suffered from that mental condition subsequently and at the time of the trial;
- the cause of the mental disorder or disability is immaterial - organic (e.g. brain tumour); physical (e.g. blow to head); functional (e.g. affecting functions with no discernible organic cause)

See *Senekal* 1969 (2) RLR 498 (A); *Mawonani* 1970 (1) RLR 41 (A); *Ncube* 1977 (2) RLR 304 (R)

Where the crime is apparently motiveless, this should alert the defence lawyer to the possibility that the client may have been suffering from some form of mental instability when he committed the crime. In the case of murder odd, inexplicable and bizarre behaviour before, during or after the killing or from the way in which the instructs his lawyer or the way in which he behaves must not be ignored, as it may provide the basis for establishing that X it entitled to the special verdict or at least there was diminished responsibility to an extent that constitutes extenuation. The defence lawyer has a duty to pursue this matter and to ask for a psychiatric examination where appropriate. The psychiatrist who carries out this investigation must be asked not only to give an opinion as to whether X was mentally irresponsible to an extent that a special verdict is justified, but also if X was suffering was suffering from diminished responsibility. See *Taanorwa* 1987 (1) ZLR 62 (S) and *Mukombe* 1991 (1) ZLR 138 (S). Where the conduct of X at the time of the act was strange, the defence counsel would be well-advised to interview members of X's family, his friends, co-workers and former employers to ascertain whether he had any history of strange behaviour.

If the client was suffering from a temporary mental disorder at the time of the act but is now mentally stable, he or she may be reluctant to allow the lawyer to plead the special verdict on his or her behalf. The client may fear that if this route is taken he or she may end up being incarcerated in a mental asylum for the criminally insane. The lawyer should explain to the client that if this defence succeeds and the court also decides that the accused is no longer suffering from any mental disorder, it can simply order that he or she be released from custody. For instance, in the case of *Machona* HH-14-02 After a series of personal misfortunes, the appellant attempted to commit suicide by cutting his own throat. When taken to a doctor for treatment, he attacked the doctor, severely and permanently injuring him. The medical evidence was that the appellant, who was charged with attempted murder, had suffered a brief "reactive psychosis" or "psychotic episode" which was unlikely to recur. The court held that the appellant was mentally disordered at the time, and not merely suffering from diminished responsibility, and should have been found not guilty by reason of insanity. Because he was no longer mentally disordered, he was entitled to be released from custody. However, with a serious offence like murder, if the psychiatric evidence indicates that the accused is or may be still mentally disordered, the court may order that he or she be returned to prison for transfer to a mental institution for treatment or for further examination to decide his or her mental state. On the other hand, with petty offences the court does not have to order that the accused be sent to a mental institution. Petty offences are those in respect of which the accused would not have been sentenced to imprisonment without the option of a fine or to a fine exceeding level three. In respect of petty offences if the court finds that the accused was mentally disordered at time of alleged crime but that he is no longer mentally disordered at the time of the trial, it may make any of these orders:

- that he or she submit himself to examination and/or treatment at a specified institution;
- That his or her spouse, guardian or close relative apply for a civil detention order.

The court may then make an order to secure his or her release from custody or for purpose of such examination or treatment: s 29(2) of Mental Health Act.

One point that defence counsel must be aware of is that even if the defence does not raise the defence of mental disorder, if the court suspects that X was suffering from a mental disorder at the time of the crime, the court itself can order that X be subjected to a psychiatric examination to determine whether the special verdict is applicable.

## Other defences

The requirements for the various defences that can be raised in respect of criminal charges are set out in Chapter 14 of the Criminal Law (Codification and Reform) Act. Defence counsel should obviously familiarise themselves with what defences are available and what the essential requirements are for these defences.

In cases involving violence the most important defences are self-defence, provocation and intoxication.

Self-defence and defence of a third person can be full defences if all the requirements for this defence are satisfied. Involuntary intoxication can be a full defence. Involuntary intoxication involves a situation such as where someone slipped a drug into X's drink and X consumed it without X knowing that it contained the drug. If X lacked the *mens rea* for the crime because of the effects of the drug, he or she will have a full defence. On the other hand, provocation and voluntary intoxication can only be defences to a charge of murder. If as a result of the provocation or intoxication or a combination of the two, X lacked the intention to kill, he or she will be found guilty of culpable homicide. In respect of provocation, even if X did intend to kill, if the provocation great and caused X to lose his or her self-control and even a reasonable person subjected to that degree of provocation would also have lost his or her self-control, the crime of murder will be reduced to culpable homicide. Even if the provocation or voluntary intoxication do not constitute a partial defence, they may still amount to extenuating factors so that the death penalty will not be imposed. In respect of all crimes other than murder, the provocation and voluntary intoxication can at most be mitigatory factors.

The question, "Why did you do this?" should always be put to see whether there is some defence which may be open to X. With property crimes like theft and malicious damage to property the legal practitioner should always investigate whether X committed the property crime under any sort of claim of right, claim of right can be a full defence Although ignorance of the law is no defence in our law (except where X acts on the basis of mistaken advice of an administrative official, claim of right can be a defence. See ss 118, 122 and 144 of the Criminal Law (Codification and Reform) Act. See, for instance, *Kawocha* S-22-92.

## Defence witnesses

It is obviously important to find out from potential defence witnesses what they actually know about the events in question. It is dangerous to rely upon what X or his relatives say that certain witnesses know and to subpoena such persons as witnesses based upon what you have been told they will say. Possible defence witnesses should be interviewed to see what they know about salient matters. They can be called if they can give testimony which is favourable to the defence case.

A problem may arise where the legal practitioner finds from interviewing a witness that the witness could provide valuable evidence for the defence, but the witness has indicated that he is unwilling or reluctant to give this testimony in court. If the testimony of the witness is vital to the defence, the defence may have to have the witness subpoenaed. In deciding whether to have a reluctant witness subpoenaed, the defence lawyer will have to consider what evidence he is likely to be able to extract from the reluctant witness in court and whether his testimony will do his client any good.

Unless X is a young child, witnesses should not be interviewed in the presence of X. If the witnesses are interviewed when X is present, a suggestion could then be made that the lawyer has collaborated with X in influencing the witness to testify along certain lines or to embellish his testimony in a manner which is favourable to the defence.

If the client has limited financial means, the defence lawyer can seek the assistance of the Registrar or the clerk of court in securing the attendance of the defence witnesses both for pre-trial interview and for the purposes of giving evidence in court.

## Defence outline

### *In the magistrates court*

Section 188(a) CPEA lays down that, if X pleads not guilty in a trial in the magistrates court, the prosecutor must first give an outline of the nature of the State case and the material facts on which he relies. The defence will be requested to give an outline of his defence and a summary of the evidence which each witness will give in sufficient detail to inform the State of all the material facts on which X relies in his defence.

In practice what often happens is that before the case is heard the State provides only a general summary of the State case and does not provide a summary of the evidence of each witness. Frequently the defence will not supply its defence outline in advance of the commencement of the case but the defence outline will only be handed over to the State just before the case begins or at the beginning of the case.

### *In the High Court*

When an X is indicted for trial in the High Court, in terms of s 66(6) CPEA, he must be served with the indictment which sets out the details of the charge against him and a notice of trial. At the same time he will be served with

- a document containing a list of witnesses the State will call at the trial and a summary of the evidence which each witness will give, sufficient to inform X of all the material facts upon which the State relies; and
- (b) a notice requesting X
    - to give an outline of his defence, if any, to the charge; and
    - (ii)to supply the names of any witnesses he proposes to call in his defence, together with a summary of the evidence which each witness will give, sufficient to inform the State of all the material facts on which he relies in his defence.

In terms of s 66(8) CPEA, where X is legally represented, the legal representative must send the defence outline to the office of the Attorney-General and lodge a copy with the registrar of the High Court at least three days before the trial (Saturdays, Sundays and public holidays excluded.)

### *Drafting the outline*

Before drafting the defence outline, the defence lawyer must have studied carefully the basis of the State case. He must be fully conversant with the essential elements of the crime charged, as the defence case may revolve around submissions that one or more vital ingredient of the crime was absent.

Before the defence outline is compiled, the defence lawyer should also obviously have a thorough knowledge of his client's case. Unless full instructions have been taken from the client, the lawyer will not be in a position to compile an appropriate outline of defence and to conduct a proper defence when the matter is tried.

The legal practitioner must ensure that he has sufficient time to investigate X's version of what happened before the defence outline is finalised. If X has witnesses whom he wishes to call, these witnesses should, wherever possible, be interviewed before the defence outline is handed in. It is certainly not going to do the client any good if the defence outline says that witnesses will say such and such and thereafter the evidence which they give is a totally different version of the facts.

If for some valid reason it is not possible to interview some witnesses before the trial is due to start, apply for a postponement of the case so that the witnesses can be interviewed. Unfortunately not infrequently *pro deo* cases have been assigned a short time before the case is due to be heard. It is the duty of the lawyer to ensure that he has adequate time to prepare the case by way of interviewing his client and witnesses and drafting a defence outline. If he is left with inadequate time to prepare properly, he is duty bound to apply for a postponement of the case so that he can have an adequate amount of time for preparation. Even if the reason why he has been left with inadequate time for preparation is his own dilatoriness, he is obliged to apply for a postponement and to explain honestly to the court why it is that he is unable to proceed with the case at the present time. It is improper and completely unfair to his client for the lawyer to go ahead with the case when he is inadequately prepared.

Another situation which sometimes arises is where a senior partner in a law firm hands a criminal case over to a legal assistant at the last moment, because his senior has double dated himself possibly, and instructs the legal assistant to appear in the case. The legal assistant must apply for a postponement he does not have enough time to prepare to argue the case, even though this may be against his instructions from his senior. The client must not be prejudiced by the disorganisation of the senior.

The purpose of the defence outline is to inform the State and the court about the nature of the defence and to define the issues between the State and the defence.

All material facts must be included. If they are not, the State is likely to cross-examine on basis of whether X told his defence counsel about these facts when he was instructing him and, if he did, why these facts are not in the defence outline.

In the case of *Mandwe* 1993 (2) ZLR 233 (S) the court pointed out that the outline of the defence cases is similar in function to pleadings in a civil trial, serving to identify what may be in issue and advising each side of the substance of the matters in issue. Further, because the defence outline is a categorical assertion by X of facts on which he relies for his defence, any significant and unexplained departure by the accused in evidence from the outline may be a matter for comment or even adverse conclusion.

However it was pointed out in *Pandehuni* 1982 (2) ZLR 133 (S) at 135 that X's outline is no more than just that. It is merely an initial outline, given in response to a similar outline of the State case. It is not a comprehensive and detailed exposition such as would be expected in the course of evidence in chief given in the normal way after the State witnesses have testified. This comment, however, was made in relation to an outline given by an accused who is not legally represented.

The defence outline is not supposed to be a detailed statement of the facts constituting X's defence and of everything that the defence witnesses will say. It is intended simply to portray the key aspects of the defence. Indeed, from a tactical standpoint, it is inadvisable to insert minute details into the outline, as there is then increased scope for discrepancies to arise between what is in the outline and what the defence witnesses say in court. These can be exploited by the prosecutor.

It is best simply to narrate the major aspects of the defence rather than to give a verbatim account of what X will say in court in his defence. If the defence lawyer gives an account of what X will say prefaced by the phrase "The accused will say..." and X deviates from what the outline indicates he will say, then the prosecution will be likely to make much capital out of these discrepancies to the prejudice of X. On the other hand, if the nature of the defence is related in broad terms, it is then open to X to express his defence in his own words at the time of the trial.

Note must be made of the fact that the defence outline does not constitute evidence; it is merely a summary of the evidence which the defence intends to produce during the trial: *Nyandoro* 1987 (2) ZLR 66 (S).

### *Failure to give outline*

Neither in the High Court nor in the magistrates court is X obliged to provide a defence outline when requested to do so. However, adverse inferences can be drawn from the failure to mention facts relevant to his defence at the start of the trial: s 189 CPEA.

In deciding whether X committed the crime:

- the court can draw such inferences as appear proper from the failure of X to mention facts relevant to his defence which, in the circumstances existing at the time, he could reasonably have been expected to have mentioned.
- the court may, on the basis of such inferences, treat X's failure to mention these facts as evidence corroborating any other evidence given against X.

It is thus normally very ill-advised in any case, where X is pleading not guilty, to decline to outline the defence at the start of the trial. About the only situation where non-submission of the outline may be justified is where the State does not have the evidence to prove its case and the defence does not want to provide ammunition upon which the State could build its case by outlining a defence case which is weak. Even in this instance it would seem that an outline could be submitted in which X simply states that he denies the charge and puts the State to the proof of the case against him. If the defence will argue that the facts upon which the State case is to be based do not constitute a *prima facie* case, this should obviously be set out in the defence outline.

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# SECTION 5 – TRIAL

## Bias of judicial officer

Every accused person has the right to a fair trial by an impartial judicial officer. If the judicial officer is biased or there is a reasonable suspicion that he or she will be biased, the defence lawyer has a duty to raise this matter and to request that the judicial officer concerned recuse himself or herself. Before making such an application, the legal practitioner must satisfy himself or herself that there are well-founded grounds for applying for the recusal of the judicial officer concerned. The legal practitioner must not simply base the application on what he has been told by his client without checking this information. Thus in the case of *Muzana & Ors* S-105-89, the Supreme Court severely censured a defence lawyer who had made serious allegations of partiality and bias on the part of a magistrate in an effort to get him to recuse himself. He had simply repeated his client's assertions without having made any effort to check whether there were any facts to substantiate these allegations. In the case of *S C Shaw (Pvt) Ltd* v *Minister of Lands* S-32-05 the lawyer representing a client who was challenging the validity of compulsory acquisition of land alleged that the acceptance of offers of land by judges prior to the determination of the validity of the acquisition of the land, together with improper pressures brought to bear on judges by members of the government and cabinet, was not compatible with constitutional concept of a fair trial before an independent tribunal. No evidence was submitted in support of this allegation. It was held that courts in Zimbabwe have a responsibility to protect their dignity. Where legal practitioners, who are officers of the court, and as such, are expected to know better, make irresponsible submissions scandalizing the court mere admonition is inadequate and action should be taken to punish such legal practitioners for contempt of court.

For the public to have confidence in the administration of justice, it is essential that the courts are seen to be fair and impartial. A judicial officer should therefore not try a case if X or the complainant is his friend or enemy or is his relative So too he should not try a case involving his wife's mother or the spouse of one of his long standing and trusted court officials.

If the prosecutor wrongly discloses the previous convictions to the magistrate during the course of the trial, the judicial officer is obliged to recuse himself or herself. If he or she does not do so, the defence lawyer should request that her or she recuse himself or herself.

The conduct of a judicial officer during the course of the trial can lead to a reasonable apprehension of bias. Judicial officers who are presiding over criminal cases must not descend into the arena in the sense that they must not intervene during the course of trials in such a manner or to such an extent as to lead to an inference of lack of impartiality and open-mindedness. They are entitled to ask questions of witnesses in order to clarify the evidence, but they must refrain from bombarding them with questions to such an extent that they are disconcerted. If magistrates take over the role of examining or cross-examining witnesses they will not be able objectively to adjudicate on the evidence. He or she should not engage in questioning in way that gives the appearance that he or she is displaying bias in favour of prosecution. In *Jesse v Pratt & Anor* 2001 (1) ZLR 48 (H) it was held that the conduct of the magistrate towards the applicant throughout the trial was such that a fair trial of the applicant was impossible in her court. Apart from a number of irregularities, there were numerous indications of biased and irrational conduct on the part of the magistrate, all of which showed that the applicant would have reasonable grounds to suppose that he might be disadvantaged in the trial by reason of bias or prejudice actuating her.

In *Masedza* 1998 (1) ZLR 36 (H) the applicants were being prosecuted for a criminal offence in the magistrates court. During an adjournment of the proceedings, the applicants became aware of certain facts and, based on these facts, they applied for the recusal of the presiding magistrate. The magistrate refused the application. The trial was postponed to enable the magistrate's decision to be taken on review. The applicants applied to the High Court for an order stopping the criminal proceedings in the magistrates court, pending a review of the decision in relation to the application for recusal. The High Court held that if in the present case the application for recusal had been well founded, the court would have been prepared to grant an order stopping the trial pending review, as no purpose would have been served by putting accused through motions of a trial that would have

been abortive. If there had been a reasonable apprehension of bias then justice will have failed and it might not be attained by other means. However, it found that the grounds upon which recusal was requested did not give rise to a reasonable apprehension of bias and thus the application for stopping the criminal proceedings must fail.

If a magistrate has to recuse himself during the course of the trial, the case cannot be taken over from that stage by another magistrate. The case will have to start *de novo* before a different magistrate. If, however, a magistrate recuses himself after he has convicted X, the case can be referred to a different magistrate for sentence: *Moyo & Ors* HB-211-87.

## Attendance of accused

If X person is in custody, he will be brought to court on the date which has been set down for his trial.

If X is out of custody, his attendance at his trial can be brought about in a number of ways.

- He can be summoned to appear: 140 CPEA
- He can be warned by a magistrate to appear on a particular date, time and place to answer the charge: s 142 CPEA
- If a peace officer to on reasonable grounds that a magistrates court on conviction will not impose a fine more than level 3, he can give written notice to the person to appear in court at the date, time and place specified by the police to answer the charge and he with then be released: s 141 CPEA.

A person who fails to appear in court after receiving a deposit fine form can be treated in the same way as a person who fails to obey a summons.

If X fails to comply with a summons which has been properly served upon him, the prosecutor can request that a warrant for arrest be issued against him. When X is brought to court he can be fined up to level 3 or imprisoned for up to one month for his default: s 140(4) CPEA. This fine, however, must be imposed when he is brought before the magistrate. It cannot be imposed some time afterwards: *Ncube* HH-174-83 and *Knight* v *Van Tonder* 1962 R & N 405 (SR).

If X is out on bail, fails to appear and is arrested and brought to court, the judicial officer will order the forfeiture of his bail if the default was wilful or deliberate. (See under "Bail" above).

It is impermissible both to impose a fine and to order forfeiture of bail as this would amount to punishing a person twice for one offence: *Sibanda* (1) 1980 ZLR 413 (GD).

If witnesses required by the defence refuse or are reluctant to come to court to testify, in terms of s 232 CPEA the defence can take out process to compel the attendance of witnesses.

## Trial in absence of accused

The defence lawyer should be aware of the fact that in minor cases the trial can proceed in the absence of his client in certain circumstances

Section 357 CPEA allows proceedings in minor cases to be conducted in X's absence if he fails to appear on the trial date. The constitutionality of this provision is dubious in the light of s 18(3) of the Constitution, which requires that criminal trials are held in the presence of X unless he consents or so conducts himself as to render the continuation of the proceedings in his presence impracticable.

This section was relied upon in *Kamanga* HH-134-91. X had failed to appear in court after receiving a warning to appear in connection with a traffic ticket. The High Court said that in such a case the trial could go ahead without X. The court must, however, hear the evidence before convicting.

## Mental unfitness of accused to stand trial

The defence lawyer must determine the mental fitness of his client to stand trial. When taking instructions it may become apparent to the defence lawyer that his client is acting in a manner which suggests that he is mentally disordered or intellectually handicapped. In such eventuality he should notify the Attorney-General's office about this and ask that his client be given a psychiatric examination. The matter will then be dealt with in terms of s 27 of the Mental Health Act. The Attorney-General office will report the matter to a magistrate who must, within 24 hours of receiving the report, direct two medical practitioners (or one medical practitioner and one psychiatric nurse to examine the person to determine his mental state. After the receiving the medical reports, if the magistrate decides that the person is mentally disordered or intellectually handicapped and would not be able to understand the nature of any criminal proceedings, he can make various orders.

In respect of cases involving serious charges, he may order he be detained in an institution or, if he is a danger to other, that he be detained in a special institution.

In respect of charges which are not likely to merit imprisonment without the option of a fine or a fine not exceeding level 3, the magistrate may order the proceedings against the person to be stayed for a definite or indefinite period, and—

- order the person to submit himself for treatment in any institution or other place;
- the person's guardian, spouse or close relative to make an application for the person to be received for treatment in any institution or place;

and give such directions for the person's release from custody or continued detention or transfer to an institution or other place as he considers necessary to ensure that the person receives appropriate treatment.

Cases may arise where the client appeared to be mentally normal when his defence lawyer takes instructions but after the commencement of the trial the client starts to behave in a fashion which suggests that he is mentally deranged and incompetent to stand trial. The lawyer should draw this fact to the attention of the court and request that the court exercise its powers to order a psychiatric examination of the person to determine whether he is fit to stand trial. Such a case will be dealt with in terms of s 28 of the Mental Health Act. (In terms of s 192 CPEA, if at any time after the commencement of a criminal trial it is alleged or it appears that X is not of sound mind, the case must be dealt with under the Mental Health Act.) If it appears to the presiding judge or magistrate that the person on trial is mentally disordered or intellectually handicapped, the judicial officer must inquire into that person's mental state. The judicial officer can adjourn the proceedings and direct two medical practitioners (or one medical practitioner and one psychiatric nurse to examine the person to determine his mental state. When the medical reports are received various courses of action are possible. Where the judicial officer is a judge he may

- order that the person be detained in an institution for a definite or an indefinite period; or
- if it appears to him that the person is a danger to others, order his detention in a special institution for a definite or indefinite period.

If the offence is an offence which is not likely to merit imprisonment without the option of a fine or a fine not exceeding level 3, the judge may order the proceedings against the person to be stayed for a definite or indefinite period, and—

- order the person to submit himself for treatment in any institution or other place;
- the person's guardian, spouse or close relative to make an application for the person to be received for treatment in any institution or place.

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- order that the person be detained in an institution; or
- if it appears to him that the person is a danger to others, order his detention in a special institution.

If the offence is an offence which is not likely to merit imprisonment without the option of a fine or a fine not exceeding level 3, the judge may order the proceedings against the person to be stayed for a definite or indefinite period, and—

- order the person to submit himself for treatment in any institution or other place;
- the person's guardian, spouse or close relative to make an application for the person to be received for treatment in any institution or place.

When X has recovered from the mental condition, he can then be made to stand trial.

## Calling of witnesses

In *Yusuf* 1997 (1) ZLR 102 (H) the court stressed that a person on trial for a criminal offence must be given a full opportunity to give evidence in his defence and to call such witnesses as he may wish. This right is laid down in s 18(3)(e) of the Constitution and is a fundamental principle of natural justice. Section 18(3)(e) provides that the accused is entitled to obtain the attendance of witnesses on the same conditions as those applying to witnesses called by the prosecution. This includes the right to the subpoenaing of reluctant witnesses.

The method of securing the attendance of defence and State witnesses is the same. One way in which witnesses are notified that they are required to attend court to give their evidence is by serving them with *subpoenas*.

If a witness has been served with a *subpoena* to appear in the court named at the particular date and time and he fails to appear, he can be punished under s 237 CPEA. (The word *subpoena* in fact means "under punishment".)

If he decides to act under this section, the prosecutor will hand the magistrate the return of service of the *subpoena* or he may prove service by calling evidence on oath. He will then apply for a warrant of arrest. On the arrest of the witness, the court can enquire summarily into the reasons for his non-appearance and may fine him or imprison him if he has no valid reason for his default.

A witness can also be served with a special type of *subpoena*, namely a *subpoena duces tecum*, which requires the witness to produce a specified document or thing. If the witness disobeys this *subpoena* he can be dealt with under s 233 CPEA.

The court may warn a witness who is in court that he is to attend court on a particular date and a particular time. Failure by such a witness to obey the warning may be treated as contempt of court.

The police are also empowered to warn witnesses to attend court on a particular date and a particular time to testify.

## Holding cases in camera

In order for justice to be seen to be done, criminal proceedings are normally held in public. The public are entitled to attend criminal trials and the press are entitled to report on criminal proceedings so that the public can assure themselves that the processes of justice are fair and that persons found guilty of criminal offences are appropriately punished.

In Zimbabwe criminal proceedings are only held *in camera* in exceptional circumstances for valid and justifiable reasons. Indeed the Constitution lays down that, subject to certain specified exceptions, all court proceedings *must* be held in public and the outcome of trials must be publicly announced.
Normally defence counsel should oppose applications by the State for the holding of criminal proceedings against their clients *in camera* if they consider that this will be prejudicial to their clients. On the other hand, defence counsel should themselves apply for the holding of the proceedings *in*

*camera* where the holding of public proceedings would be likely to be prejudicial to their clients such as where their clients are young persons under the age of 18.

Section 3(1) of the Courts and Adjudicating Authorities (Publicity Restriction) Act sets out the exact powers of the courts to order the exclusion of persons (except parties to the proceedings and their legal representatives) from the proceedings. It also sets out the powers of the court to place restrictions on the disclosure of information pertaining to the proceedings.

The grounds upon which these powers may be exercised are set out in s 3(2). Essentially the court can use these powers if it considers this to be necessary or expedient to protect these interests:

- defence;
- public safety;
- public order or public morality;
- the economic interests of the State;
- the welfare of persons under the age of eighteen years;
- witnesses who believe on reasonable grounds that harm will befall them or their families if it is known that they have given evidence,;
- the lives of persons related to or connected with any person concerned in the proceedings.

These powers can be exercised on the court's own initiative or on application from one of the parties to the proceedings.

Additionally the responsible Minister has extensive powers to prohibit publicity and disclosure of information regarding different aspects of criminal trials where it is not in the public interest that there be such publicity or disclosure.

## Legal representation under Legal Aid Act

Section 10 of the Legal Aid Act provides for the provision of legal aid in certain criminal cases. Where a judge or magistrate or to the Attorney-General believes that it is in the interests of justice that an accused person be provided with legal aid and that person may have insufficient financial means to engage his own lawyer, can recommend to the Director of the Legal Aid Directorate that the person should be provided with legal aid. He will decide whether to provide legal aid to such person after assessing that person's financial means.

The practice is that in all murder cases and in other very serious cases in the High Court so-called *pro deo* lawyers will be assigned. As pointed out earlier in reference to duties of lawyers, lawyers assigned to represent such clients have a duty to represent such clients diligently and professionally despite the fact that paltry fees are paid for such work. (For further discussion on this duty, see Section 1 Role and Responsibility of Defence Lawyers - Duty to Client)

## Joint trials

Where persons are implicated in the same offence they may be tried together: s 158 CPEA. Thus, where a number of persons committed a crime, they can be tried together; accomplices can be tried with the principal offender; and accessories (after the fact) can be tried with the principal offender.

However, the holding of joint or mass trials of persons whose alleged offences are unconnected is totally irregular. Joint trials are permissible for persons charged with different offences where the requirements of s 159 CPEA are satisfied. This section allows for the holding of joint trials where different accused, not acting together, commit different crimes at the same place and at about the same time and the prosecutor informs the court that there is admissible evidence which will be common to the different charges. Thus, if a number of persons, not acting in concert, have all stolen maize from the complainant at around the same time, it would be appropriate to allow the joint trial of

X to save the complainant being called on numerous occasions to state that the property was stolen from him.

## The charge

### *Correct formulation*

The trial starts off with the reading of the charge. The charge must be clearly and correctly formulated and properly laid, either under common law or under statute. The offence must be properly described and adequately particularized. If it is not, the defence lawyer can except to the charge.

Where the charge is a statutory one, the defence lawyer must be check to ensure that the correct section of the Act or Statutory Instrument has been cited as well as the penalty section, and that the particulars correspond with the provision itself. The defence lawyer can except to the charge if these requirements are not satisfied: *Chamurandi* HH-182-86; *Vhere* HH-211-86; *Zvinyenge & Ors* 1987 (2) ZLR 42 (S).

It was pointed out in *Siphambili* 1995 (2) ZLR 337 (S) that if the indictment is deficient in particularity that deficiency would not necessarily be fatal. The test was whether it would prejudice the accused. Unless time is of the essence of the charge, it is sufficient if the day or period alleged in the charge falls within a period of three months before or after the commission of the offence. The court decided that any embarrassment which might have resulted from the inaccuracy in the charge should have been raised before plea, as a request for further particulars or as an exception. If the defence does not object before plea to the lack of particularity in a charge which discloses an offence cannot rely on the defectiveness of the charge at the end of the trial.

It was made clear in *Sabawu & Anor* 1999 (2) ZLR 314 (H) that it is the prosecutor's right to determine charges to prefer and to ensure that which the accused is charged with the correct offence.

### *Exception to charge*

The procedure when there is an exception to the charge is set out in s 171 CPEA. Defence counsel will usually except to the charge on his client's behalf before plea. If the exception is made before plea the court must deal with this matter first before requiring X to plead: 171(1) CPEA. This applies both to an exception on the ground that the charge does not disclose an offence and to an exception on the ground that the charge does not disclose reasonably sufficient particulars to inform X as to the nature of the charge against him as required by s 146 CPEA.

However, if the exception succeeds, the State can be given the opportunity to re-draft the charge and the newly worded charge can then be put.

If the exception is dismissed, X will then be asked to plead.

If X pleads first and the defence lawyer then excepts to the charge, the court has the discretion whether to dispose of the plea or the exception first: s 171(2) CPEA.

### *Unjustified charging of less serious offence*

Defence counsel may have agreed with the prosecutor that his client will plead guilty if he is charged only with a lesser offence than that with which he was originally charged.

However, the cases say that it is not in the interests of justice that a person should be charged with a lesser offence when the admitted facts show that he is guilty of a more serious charge. In such an

event the trial court may query why X is being charged only with the less serious charge. Thus if the State allegations clearly suggest that X has committed the crime of assault with intent to do grievous bodily harm but the State has brought a charge only of common assault against X, the judicial officer is quite entitled to question the prosecutor on why the lesser charge has been preferred: *Chidodo & Anor* HH-215-88.

In the case of *Thebe* HB-16-06 the judge pointed out that while the prosecutor is *dominus litis*, this rule is not absolute. The trial court, as a trier of facts whose main object is to do justice between man and man, therefore has inherent powers to ensure that suitable charges are preferred against those who appear before it. It is, therefore, within its power to prevent the State from proceeding on a lesser charge where justice clearly requires a more serious one.

## *Splitting of charges*

### *Principles*

It is unfair that X be charged with two or more separate crimes in circumstances where he should have been charged with one crime because the conduct really only constitutes one criminal offence. Defence counsel should raise an objection where there has been improper splitting of charges.

In *Zacharia* HH-17-02 it was held that there are two tests for whether there has been an improper splitting of charges, the "single intent" or "continuous transaction" test and the "same evidence" or "dominant intent" test. The latter is related to the intention of the accused person as he performs several acts which are logically and intrinsically connected to the one offence which he then commits. The concern whether the criminal conduct is in reality a single conviction is aimed at avoiding prejudice to the accused where the duplication of convictions arises. If no prejudice is occasioned to the accused, then the question whether or not there has been a duplication of convictions becomes one of little or no consequence. The prejudice to the accused may be avoided by treating all the separate counts as one for the purposes of sentence.

Simply because several criminal acts form part of one related transaction does not mean separate crimes have not been committed and that there has been an improper splitting of charges.

There will, however, be an improper splitting of charges -

- if a person commits two acts, each of which standing alone would be criminal, but does so with a single intent and both acts are necessary to carry out that intention; or
- where the same evidence which is essential to prove one criminal act is also essential to prove another criminal act.

In both these instances, X should be convicted of only one crime: *Peterson* 1970 RLR 49; *Chinemo* 1985 (1) ZLR 32 (H).

Where the charging of more than one offence would constitute improper splitting, the State should charge the offence which represents the dominant purpose of X in engaging in that conduct: *Jambani* 1982 (1) ZLR 213 (H).

### *Cases in which court found that there was splitting*

*Mhandu* 1985 (1) ZLR 228 (S): an improper splitting to charge X with three separate offences of "statutory rape" where he had had sexual intercourse with the under-age girl on three separate occasions during one month.

*Tugwete* HH-672-87: where a person drives a motor vehicle without footbrakes and a handbrake he commits a single offence not two offences.

*Matimba* 1989 (3) ZLR 173 (S): an improper splitting to charge breach of the various duties under

s 61 of the Road Traffic Act (failing to stop, failing to attend to injured persons, and so on) as separate offences.

*Cases in which court found that there was no splitting*

In *Peterson* 1970 RLR 49 The accused stole a car and later abandoned it but burnt it to prevent the discovery of any finger prints in the car. The accused were correctly convicted of both theft and malicious injury to property because, although the offences were related and formed part of one continuous transaction, there was not a single intent and the evidence of theft was not essential to prove malicious injury to property. (The related nature of these crimes could nonetheless be taken into account for the purposes of sentence.)

In *Maniko & Anor* HH-44-91 the review judge decided that in neither of two cases had there been improper splitting. In the first a person had properly been convicted of two counts of assault where he had assaulted one person and had then assaulted another who had tried to intervene. In the second X had properly been convicted of two counts of stock theft where X had stolen cattle from two people at the same place but an hour apart.

*Other cases*

*Frank* 1968 (2) RLR 257 (assault and malicious injury to property); *Attorney-General v Jakubec* 1979 RLR 267 (excessive blood alcohol and negligent driving); *Lamont* 1977 (1) RLR 112 (incitement and substantive offence incited); *P & Ors* 1976 (1) RLR 142 (GD) (possession of arms of war and act of terrorism); *Tebie & Anor* 1965 RLR 198 (robbery and theft); *Simon* 1980 ZLR 162 (GD) (robbery and impersonation of policeman).

### *Withdrawal of charge before plea*

If the State withdraws the charge before plea, no verdict is entered and the State is at liberty to bring X back to court at a later date on the same or a different charge. The State may decide to withdraw the charge before plea for a variety of reasons such as illness of a vital witness or delay in securing important evidence. This is a matter of discretion and where the State has decided to withdraw the charge before plea, the defence cannot demand that the charge be put before withdrawal.

## The plea

### *Types of plea*

At the start of the trial X is asked how he pleads. X must personally plead to the charge; his or her lawyer cannot enter a plea on his behalf.

If X pleads guilty, after the court has checked that X is genuinely and correctly admitting the charge, the court can then find him guilty as charged and sentence him.

If he pleads not guilty, the case then goes for trial.

If X refuses to plead at all or refuses to answer directly and unequivocally to the charge, a plea of not guilty may be entered. X's defence lawyer should obviously advise his or her client to make an unequivocal plea to the charge.

### *Guilty pleas from legally represented accused*

Where X is legally represented, the court itself does not have to explain to X the charge, its essential elements and the acts or omissions upon which it is based. These explanations would be necessary with an unrepresented X. Instead, the court can rely upon a statement by X's legal representative that these things have been fully explained by him to X and that he understands them and is admitting to them: proviso to 271(2)(b) CPEA.

Defence counsel will be asked whether the guilty plea is in accordance with his instructions from his client. The court will ask if he explained all the essential elements of the crime to his client and if the client is admitting to all these elements.

## *Guilty pleas: murder cases*

In a murder case, the client must plead and the defence lawyer must not plead for him.

Even if the client wishes to plead guilty to the murder charge defence counsel must explain to him that the practice is that even where X pleads guilty the court will always enter a plea of not guilty to murder and require that the State establish X's guilt in the normal way. Of course the court can take into account the words spoken by X when he was called upon to plead. *Nangani* 1982 (1) ZLR 150 at 154B.

Even though the defence lawyer knows that practice is automatically to enter a plea of not guilty, he will want to include the admission in the defence outline. He will advise his client to plead guilty if his client has instructed him that he wishes to make a clean breast of it and admit his guilt. A candid admission of guilt, linked up with other factors, may tip the balance in favour of extenuation when it comes to sentence, so it may be critically important that, at the outset, X's admission of guilt is indicated.

## *Unclear or equivocal pleas*

These sorts of pleas should not arise in cases where X is legally represented, because the lawyer should have clarified matters and advised the client upon the correct plea on the basis of his instructions. For example, in a case of receiving of stolen property, the lawyer will have clarified whether or not the client was aware the property was stolen. If the client was unaware of this, the lawyer will advise him to plead not guilty. Thus this type of ambiguous plea should not be made: "I suppose I'm guilty. I agreed to look after my boyfriend's bike and he's now been arrested for stealing it."

## *Plea that previously acquitted or convicted (autrefois acquit or convict)*

A person may only be tried once in respect of a crime. If he has previously been tried and either acquitted or convicted for that crime, he cannot be tried again for it: 180(1)(c) and (d) CPEA. The terms *autrefois convict* and *autrefois acquit* which are used in the cases are not used in the CPEA. A plea that he has been tried previously must be dealt with as a preliminary matter before any evidence is led. The question is whether the facts necessary to support a conviction on the current charge are the same as those in the previous case: *Ndau* 1971 (1) SA 668.

In *Moyo* HB-18-84 X raised the defence of *autrefois acquit*. He had previously been convicted of unlawful possession of a firearm. He had thereafter continued to possess it without a firearms permit. The question was whether he could be tried again for this offence arising out of his continued unlawful possession. The answer was that he could be, since the possession since the previous conviction was a new set of facts.

In *Gore* 1999 (1) ZLR 177 (H) the court held that for the purposes of a criminal charge the payment of a deposit fine is prima facie an unequivocal acknowledgement of guilt and when an acknowledgement of guilt and a deposit fine is confirmed by a magistrate, the offender will stand

convicted and sentenced by a court. He cannot be convicted again in respect of substantially the same offence, as this will violate the autrefois convict rule.

Section 180(2)(c) does not preclude a new trial where the previous conviction has been set aside by reason of irregularity. See s 18(6) (a) and (b) of the Constitution. In such cases a re-trial may be proper because the previous proceedings have been set aside or a re-trial has been ordered: *Manera* 1989 (2) ZLR 92 (S); *Mlauzi* S-48-92.

### *Other pleas*

Other pleas which can be raised are that the court does not have jurisdiction to try the case or that the prosecutor has no title to prosecute: 180(2)(f) and (g) CPEA.

There can also be a plea that he has already received a pardon from the President for the offence charged: s 180(2)(e) CPEA.

### *Guilty plea to lesser offence than that charged*

Where the facts indicate the commission of the crime charged, the State and the court should not accept plea of guilty to a lesser offence to save time: *Mahango* HH-132-87.

### *Change of plea before evidence led*

After X has pleaded guilty before one judicial officer and been found guilty by him *on the basis of the plea*, the proceedings may have been adjourned for some reason. If X then decides to change his plea, another judicial officer is permitted under s 180(6)(ii) CPEA to hear an application to change his plea, provided that no evidence has been adduced at the first hearing: *Dube & Anor* S-126-89.

If X makes an application to change his plea during the course of the enquiry in terms of s 271 CPEA following a plea of guilty, but before verdict has been delivered, there is no *onus* on X to convince the court of the truth of his explanation why he wishes to change his plea: *Haruperi* 1984 (1) ZLR 258 (H).

Sometimes a defence lawyer may have been engaged to represent X who has already pleaded guilty. Sometimes X may wish to change his plea on such grounds as that the police forced him to plead guilty because of threats or that they induced him to plead guilty by telling him he would only be released on bail if he pleaded guilty or by informing that he would receive only a light fine if he pleaded guilty.

### *Withdrawal of charge after plea*

Once X has pleaded he is entitled to a verdict, and if the charge is withdrawn the court must enter a verdict of not guilty: s 9 CPEA.

The Attorney-General has an unfettered discretion to withdraw charge before plea at any time and institute proceedings afresh: *In re Kwenda* 1997 (1) ZLR 116 (S).

Where prosecutor withdraws after plea, the effect is that the court has no power to continue with the trial thereafter: *Chari* 1998 (1) ZLR 180 (H)

The prosecutor may make the decision to withdraw where the case against X runs into problems and it appears unlikely to succeed. In these circumstances the prosecutor may withdraw the charge in order to avoid wasting the time of the court. Sometimes the prosecutor takes this course as a result of a suggestion from the defence lawyer. While it is perfectly in order for a defence lawyer to make such a suggestion during an adjournment, the same cannot be said of whispered comments made to the prosecutor in court.

### *Insistence that plea be recorded at early stage*

Not infrequently there are delays in bringing a case for trial; the case gets remanded on several occasions and then, when finally it comes up for trial, the State requests yet another postponement because, for instance, the State witnesses have failed to attend. These cumulative delays may be so unreasonably long that the defence may apply for further proceedings to be stayed on the grounds that his client has not been tried within a reasonable period of time as required by s 18(2) of the Constitution. Alternatively, the defence lawyer can ask the prosecutor to allow his client who is pleading not guilty to plead to the charge before the case is further postponed so that if the State later decides to withdraw the charge the court will then record a verdict of not guilty and the matter will end there. If on the other hand the State withdraws the charge before plea then X can later be charged again with the same offence. However, the ultimate decision whether to withdraw a charge before or after plea lies with the State and the court has no power to order the prosecutor to put the charge to X in order that he plead thereto. See *Prosecutors Handbook* pp 132-133.

## State and defence outlines

If X pleads not guilty, or a plea of not guilty is recorded because he refuses to plead to the charge or to plead directly thereto, the next stage is to call upon the prosecutor and the defence to give their outlines: s 188 CPEA.

The prosecutor will first be called upon to make a statement outlining the nature of his case and the material facts upon which he relies.

The defence lawyer will then be requested to make a statement outlining the nature of his defence and the material facts on which he relies. If at this stage the defence fails to mention any fact relevant to the defence which, in the circumstances existing at the time, it could reasonably have been expected to have mentioned, the court may when determining the guilt of X for the offence charged or any other crime which he may be convicted of on that charge, draw adverse inferences from this failure and the failure may be treated as evidence corroborating any other evidence against him: s 189(2) CPEA

The State and defence outlines do not constitute evidence; they are merely a summary of the evidence which each side intends to produce during the course of the trial: *Nyandoro* S-114-87.

## Questioning of witnesses

### *Examination-in-chief*

Defence counsel may call witnesses to testify for the defence. He may also call X to testify in his defence.

The purpose of examination-in-chief is to elicit relevant and admissible evidence from the witnesses in a clear and orderly manner. Most witnesses are not familiar with the rules of evidence and it is therefore necessary for legal counsel to ask appropriate questions to ensure that only relevant and admissible evidence is given.

The defence lawyer should carefully plan the sequence of his questions. The aim must be to extract the evidence in a clear and systematic fashion. The questions should follow a logical sequence so that the evidence can be readily understood. If when asking questions the lawyer does not follow a logical order, the witness may become confused and the judge or magistrate will have difficulty in following and understanding the evidence of the witness. In one book the example is given of the irascible judge who said to counsel "Can't you put your case in some sort of order - historical, geographical, or if you can't manage that, why not try alphabetical."

The best way of obtaining evidence is to allow the witnesses to give their own description of the events. After they have finished relating the events, questions can be put to clarify points. However, questions can be put to help the witnesses to relate their own version of events but the witnesses must not be told what to say or questioned in such a way as to suggest the answers to the questions. The questions posed should be kept short and clearly and simply formulated so that they can be readily understood by the witnesses.

Leading questions may not be put to witnesses during examination. A leading question is one which suggests the answer, such as “Do you not agree that what the accused did was dangerous?” The judicial officer has the duty to ensure that leading questions are not asked and that the prosecutor, defence lawyer or X does not end up cross-examining his own witness. It is accepted practice, though, that a witness may be led on facts which are not in dispute such as the witness' name, address, occupation, whether he is married and so forth. The extraction of this routine information by leading is far quicker than by the use of non-leading questions. Prosecutors will not object to these sorts of leading questions, but the defence lawyer can clear the matter in advance by asking if the prosecutor would object if the witness is led in respect of this sort of information.

As regards questioning of X by the defence lawyer, James Morton in his book *Handling Criminal Cases* says that because clients can be unreliable, it is essential to keep examination to a minimum. As regards weaknesses in the defence case, it is a vain hope that both the prosecutor and the court will fail to spot these. Thus it may be strategically better to put the less attractive points in his case to the client when he is being examined in order to soften the blow when he comes to be cross-examined.

There are some questions which X cannot legally be compelled to answer. These include such things as disclosure of communications between married people, communications between lawyers and clients and so on. The circumstances in which a person may not be compelled to answer questions are set out in ss 290- 297 CPEA.

If the witness steadfastly refuses to answer a question which he is legally obliged to answer (or to produce a document or thing which he is legally obliged to produce), the judicial officer should be asked to order the witness to answer the question (or produce the document etc) and warn him that if he refuses, he will be sent to prison. If the witness still declines, the judicial officer may, in terms of s 233(1) CPEA, adjourn the proceedings and order the committal of the person to prison for up to eight days. If at the resumed hearing the person persists in his refusal he can again be imprisoned for up to eight days. This process can continue until the person agrees to do what he has been ordered to do by the magistrate.

On the undesirability and dangers of leading questions from the prosecution see *Musindo* 1997 (1) ZLR 395 (H).

### *Cross- examination*

This is the process of questioning of witnesses by the other side after the testimony has been adduced in the examination-in-chief.

The purpose of cross-examination is to try to get the witness to add to, alter, qualify, amend or retract evidence given, to discredit his evidence and to elicit from him evidence favourable to the party cross-examining. Most cross-examination has one or both of these goals: to elicit testimony favourable to your own case and to expose weaknesses in your opponent's case. However, as James Morton points out, the best that the defence lawyer normally can achieve is to be able to point to so many major discrepancies in a witness’s testimony as to prove that he is shown to be a thoroughly unreliable witness whose testimony is not to be believed. It is only in American films of the 1940s and, more recently, in poor soap operas that a witness will end by gasping, "Yes I did it! It wasn't your client."

The defence lawyer will be looking to pick holes in testimony of State witnesses and to catch them out in contradictions. In order to do this, he must keep track of what have said. He does not necessarily have to put all contradictions to the witnesses themselves; he can highlight inconsistencies when summing up.

Leading questions are allowed in cross-examination and the court should normally allow greater latitude than in examination-in-chief to the questioner, particularly where the questioner is an undefended accused. However, in *Musindo* 1997 (1) ZLR 395 (H) the court pointed out that it is a salutary practice and properly professional for a legal practitioner to refrain in cross-examination from putting as a fact any proposition unless he has instructions to that effect or has laid a foundation in fact for drawing the conclusion which he put to the witness. Gratuitously to put the lie to a witness, when there is no basis upon which to contradict the witness, is misleading and unprofessional.

Thorough advance preparation and planning on the lines of questioning to be pursued when cross-examining State witnesses is vitally important. Careful thought should be given to what the defence hopes to achieve by particular lines of questioning. If, for instance, the State case rests upon identification evidence, questions should be composed which will test and, if possible, cast doubt on the accuracy of the identification. In High Court cases the State is obliged to give summaries of what State witnesses will say when they testify. Study the State evidence carefully and consider what each witness will be likely to say when giving direct evidence. Identify any facts to which the witness may testify that are consistent with the defence case or facts which are inconsistent with the State case so that these matters can be highlighted during cross-examination. When the State case is put to X at the time that the defence lawyer takes instructions from him, X may well say things which provide ammunition for effective cross-examination of the State witnesses. For example, X may have pointed to facts which show that a particular witness has a grudge against him and may thus have a motive for giving false testimony against him. This fact can then be put to the witness during cross-examination. By such advance planning the defence lawyer is able to prepare questions which will be likely to assist his client's case and to avoid using the shotgun technique frequently employed in our courts where questions are asked on a random and indiscriminate basis which will often lead to answers prejudicial to the client's case.

In preparation for a serious and complex case James Morton says that what he calls “role playing” can be very useful. The lawyers in a firm can discuss what questions to ask witnesses. One of them can take the role of the advocate and another that of the witness. They can then try to work out the various permutations which can arise when a witness is cross-examined. It is good practice to use this technique if it is thought that a witness may deliberately try to be difficult. If there is no-one with whom the lawyer can play out the roles, he should still try to envisage the various answers a witness can possibly give. The line of questioning, depending on the answers which may be forthcoming, can then be worked out. Even after such assiduous planning, however, witnesses will from time to time come up with unexpected answers under cross-examination and the defence lawyer will have to think quickly how to continue his cross-examination.

Morton also advises that, if possible, the lawyer should try to go and inspect the scene of the alleged crime before the hearing. It is far easier to examine and cross-examine from a position of knowledge rather than relying on what you have been told, possibly inaccurately. This is particularly true in motoring cases where sometimes the police accident plans are far too sketchy or are misleading in certain vital details. The same will apply in street fights and theft from shops. An on-the-spot check will enable the lawyer to see what street lighting there is, if any, the position of the shelving in relation to the check-out in a supermarket, and so forth. He can also ascertain if it would have been possible for a witness to have been able to have seen the event from a particular location.

Morton further advises defence lawyers to keep their questions short, concise and easily understandable. They should not use long words to display their erudition as these words will often only confuse the witness. Avoid using technical terms in questions which the witness will not be able to understand. Refrain from using compound questions,that is questions which have several parts and which require a number of answers. Do not wrap up several questions into one and then expect the witness to give a single "yes" or "no" answer.

Defence lawyers should ask too few questions in cross-examination rather than too many. Morton says that if the defence lawyer has obtained the answers he wants and his position is now satisfactory, he should not try and improve the position by one last question. All this may do is to give the witness the opportunity of reconstituting the case against his client. He advises the defence lawyer to think what there is to be gained and then think again before asking any more questions. He gives the example of the barrister in Britain who pushed his luck too far when defending client on drunk driving charge. The cross-examination of the arresting officer went as follows:

"You stopped the car and asked my client his name?"
"Yes sir."
"Which he gave perfectly properly?"
"And his address?"
"Yes sir."
"And occupation?"
"Yes sir."
"And you asked him to get out of the car?"
"Yes sir."
"And he did this perfectly properly?"
"Yes sir."
"So from the time you stopped him he had behaved in no way which could cause any criticism?"
"No sir."
"And then he got into the back of the police car?"
"Yes sir."
"Again perfectly properly?"
"Yes sir."

Counsel had laid a very solid foundation for client's argument that he was not drunk. But did not leave it here. He went on

"He sat down in the back next to the lady in a fur coat?"
"No sir, that was police dog Giles."

In any case, even in Britain, it is unusual for police cars to have ladies in the back in fur coats who were not being called to give evidence. It is strange that barrister did not have doubts about this question arising from his instructions.

Morton observes that it is often said that the defence lawyer should not ask any question to which he does not know the answer or at least can reasonably guess the answer. If the defence lawyer asks questions indiscriminately, he can end up getting answers which may well be damaging to your client's case. In reality, the defence lawyer will, from time to time, be obliged to ask a question to which he does not know the answer. Morton advises that the thought in the lawyer's mind before he asks a question to which he does not know the answer should be, "If, as I may, I get a wrong answer, will this be fatal to my client's case?" If the answer is "yes", then, however tempting it might be, the lawyer must not put that question.

As a general practice defence lawyers should be pleasant and courteous in dealing with a witness. Times when it is justifiable to get angry and raise one’s voice are rare. When State witnesses are giving their evidence-in-chief, the defence lawyer should try to evaluate the witnesses. Have they testified in definite and emphatic manner? Are they likely to stick to this testimony doggedly or have they testified in a way which shows they are uncertain about what happened. Is it likely that they will readily concede that they might be wrong? Are they likely to be co-operative in answering questions from the defence or is it likely that they will be hostile and un-cooperative with the defence and will the defence have to adopt a firm and possibly aggressive approach?

The failure to cross-examine a witness on any matter generally implies an acceptance of his evidence on that point. If the point is disputed the questioner would be expected to put questions to the witness suggesting that the witness is mistaken or is lying on that point. The defence lawyer needs to keep careful track of the evidence given by the various witnesses in order to draw attention to

contradictions in the testimony of an individual witness and contradictions between the testimony of different witnesses.

However, where an undefended accused in his defence outline has already asserted facts which contradict the witness, the judicial officer should not normally draw an adverse inference if the omits to cross-examine on the point. The judicial officer (if the prosecutor has not already covered the point) may put the conflict to the witness and invite his comments.

If evidence has already been given or will be given subsequently which is to a different effect from that stated by the witness the effect of that evidence must be put to him in cross-examination to enable him to admit, deny or explain it.

A person may not cross-examine his own witness. During his testimony a State witness may say something in evidence which may mean that X has some defence. He might say, for instance, that X was very drunk. It is impermissible for the prosecutor vigorously to cross-examine his own witness on this point in order to rebut this aspect of the evidence of the witness. The magistrate must stop the prosecutor if he does this. If the prosecutor thinks that his witness has become hostile, he must apply to the court to declare him to be a hostile witness, and only after the witness has been so declared, is the prosecutor entitled to cross-examine him. This topic is dealt with more fully in the section on "Evidence - Inconsistent Previous Statements and Impeachment".

In *Mukombe* S-29-91 the Supreme Court severely criticised a lawyer for his manner of cross-examination of witnesses. He had cross-examined them in an unnecessarily abusive, aggressive, abrasive and bombastic manner. The Court stated that the legal practitioner's duty to promote his client's interests must never transcend his duty to the promotion of justice and truth. He has a paramount duty to the court as an officer of the court to ensure that this is achieved. Witnesses should not be treated in an abusive and immoderate way.

However, it is sometimes necessary to adopt a firm, even somewhat aggressive, approach when dealing with a hostile, uncooperative or facetious witness. The aggressive questioning should not, however, be carried out in an insulting and abusive manner.

In *Ndoro* S-185-89 the Supreme Court stressed that a legal practitioner should not assail State witnesses with accusations unless he can adduce some evidence to justify or substantiate the accusations.

A checklist, intended as a guide to planning and preparation for cross-examination, appears in the American book *The Trial Lawyer's Book Preparing and Winning Cases* by Purver *et al* (Laywers Cooperative Publishing New York 1990). This checklist is reproduced below with aspects omitted which do not have relevance in the context of Zimbabwean procedures.

- Determine what the witness knows or purports to know about the events in question. Do statements indicate that the witness has an incomplete recollection of the event? Do the facts indicate a lack of detailed knowledge, or defects in perception? Determine whether you will challenge the witness's competency to testify.
- Visit the scene of the events in question. Examine the purported action from the places where the witnesses claim to have been during the events. Where appropriate, evaluate the witness's visual perspective of the events at issue, measure distances, examine lighting, and draw detailed diagrams.
- Study potential exhibits.
- Carefully study [each summary of State witness testimony].
- Investigate the witness's background for evidence of bias, motive or interest. Focus on aspects of the witness's experiences and circumstances for evidence of ability to perceive, remember, understand, and communicate the facts about which the witness may be asked to testify.
- Review the evidence in the light of [what you know and think happened].
- Anticipate the examination-in-chief.
- Establish a goal for the cross-examination. Select the two or three most important issues on which the witness may advance your case.

- Determine what type of witness you will be questioning. [Aggressive questioning may be called for if the witness is a criminal accomplice but this sort of questioning would be entirely inappropriate for a gentle, dignified, elderly witness.
- Determine whether you intend to cross-examine the witness at all. Some witnesses are so good that it is best to let them alone.

### *Re-examination*

After a witness has been cross-examined, the party originally calling him may put further questions to him. There are, however, strict limits to the type of questions which may be put and the magistrate must ensure that these limits are not exceeded by the questioner. Only questions relating to matters raised in cross-examination may be put; leading questions may not be put. New matters may only be introduced if the magistrate grants leave to do so.

### *Questioning by court*

The judicial officer's role is to try to ascertain the truth. He is therefore entitled, indeed duty bound, to ask questions of both State and defence witnesses in order to clarify points and to ascertain the facts. Where the case involves an accused who is not legally represented, the judicial officer may often have to put questions to the witnesses so that facts favourable to X emerge. The judicial officer must not, however, assume the role of prosecutor and put a barrage of questions to witnesses to try to ensure that X is convicted.

In *Denhere & Anor* S-39-91 the Supreme Court found that although the magistrate had admittedly asked many questions of the defence witnesses and none of the State witnesses, none of the questions were improper. He had explained in his judgment that he needed to resolve all contradictions and also make it clear to those witnesses that, for good reason, he did not believe them, but was giving them a chance to convince him. He was simply probing the defence to ascertain the truth. He had not approached the trial with a closed mind regarding the possible innocence of the accused.

Where the judicial officer has descended into the arena in a manner which clearly shows that he is biased in favour of the State and that he is not prepared to give proper consideration to the defence case, the defence lawyer may be obliged, tactfully and politely, to ask the judicial officer to adopt a more balanced approach. In extreme case the defence lawyer may even wish to ask the magistrate to recuse himself on the ground that he is biased and unable to conduct the proceedings impartially. The defence lawyer must, however, be very careful not to commit contempt of court by attributing bias to the judicial officer when he was simply exercising his discretion to question witnesses in order to clarify points.

See also *Wright* S-183-89 and *Hove* S-64-88.

Defence counsel should listen carefully to the judicial officer's questioning of the witness as the line of questioning often reveals how the judicial officer is thinking about the case. This questioning can thus suggest lines of questioning to defence counsel for subsequent witnesses to deal with the points raised by the judicial officer.

## Production of statements made by accused to police

### *Types of statement*

All statements made by accused persons outside the court (extra-curial statements) during investigations, including written and oral statements, confessions and statements made to the police on the way to places where indications are to be made or during the course of making these

indications are admissible only if these statements were made freely and voluntarily and without undue influence: s 256 CPEA.

A prosecutor commits a fundamental irregularity if he includes in his outline of the State case the contents of any statement made by the accused. A statement made by the accused to a person in authority may not be admitted unless the court is satisfied that it was made freely and voluntarily and without undue influence having been brought to bear. This applies not only to formal written statements, but to anything said by the accused, including chit-chat on the way to the scene of the crime. A police officer may not give evidence of any such statements unless he first satisfies the rules about admissibility: *Nkomo* 1989 (3) ZLR 117 (S).

### *Method of production*

The method of production of X's statement depends upon whether or not the statement has previously been confirmed before a magistrate.

A statement which has been confirmed by a magistrate under s 113 CPEA must be admitted by the court into evidence on its mere production by the prosecution without any further proof under s 256(2) CPEA. If X challenges the admissibility of the statement the onus is upon him to prove its inadmissibility.

If the statement has not been confirmed before a magistrate and X challenges the admissibility of that statement, a trial within a trial must be held to determine the admissibility of the statement. The statement may not be admitted into evidence until the State has proved that it is admissible.

If X denies making a statement to the police, the making of the statement becomes a factual issue. The prosecutor will have to call the police officers who recorded the statement to prove that X did indeed make the statement. X or his lawyer is entitled to cross-examine these police witnesses. (The defence is entitled to cross-examine any defence witness.)

If X admits that he made the statement, but asserts that the statement was not made freely and voluntarily, the prosecutor will have to call evidence usually the police officers who interrogated X and who recorded his statement, in order to try to prove that the statement was freely and voluntarily made.

See *The Prosecutor's Handbook* p 107.

The correct procedure for producing an unconfirmed statement is as follows:

1. When a policeman is giving evidence and is about to relate what X said to him, he should say ' The accused made a statement to me.'
2. He should then stop. If he does not stop, he should be stopped. If the prosecutor does not stop him, the magistrate should.
3. If he says, 'The accused then admitted...', he should be stopped at once, told of his error, and the magistrate should record 'the accused then made a statement' to this witness.
4. The prosecutor should then ask the witness the standard questions-
   a) Was the X in his sound and sober senses at the time?
   b) Did he make the statement freely and voluntarily?
   c) Was any undue influence brought to bear on him to make the statement?
5. The prosecutor should then say to the Court, 'The State proposes to tender this statement in evidence', or words to that effect.
6. If all the questions set out in 4. have been answered satisfactorily, the Court should then ascertain from the accused whether he wishes to challenge the admissibility of the statement, and should explain, if he is not represented, what is meant by challenging its admissibility.
7. If the accused does not challenge, the witness may then be invited to produce the written statement or recite the oral statement, as the case may be.

8. If the accused does properly challenge the admissibility of the statement, then a trial within a trial must ensue if the prosecutor still wishes to produce the statement.

See *BC & Anor* HH-255-84.and *Nkomo & Anor* 1989 (3) ZLR 117 (S). See also *The Prosecutor's Handbook* pp 104-105 which sets out the questions that the prosecutor should ask the policeman when seeking to produce an unconfirmed statement.

At a trial within a trial resulting from a challenge to an unconfirmed statement the procedure is as follows:

The prosecution first calls its evidence. The defence may cross-examine the State witnesses. The defence then calls its evidence and the State may cross-examine the defence witnesses. Counsel may then make submissions and the judicial officer makes a ruling on the admissibility of the statement. In a High Court case the assessors will not be present at the trial within a trial

## Challenge to admissibility of statements made by accused

### *Grounds for challenge*

The defence lawyer can challenge any statement or indication made to the police by his or her client on the basis that the statement was not made freely and voluntarily.

*Statements*

The same rules as to admissibility apply to all statements made by the accused, whether oral or in writing, whether constituting a confession or not, and whether inculpatory or exculpatory (or partly one or the other). These rules also apply to indications made to the police.

If X challenges the statement on the basis that the statements were extracted by duress or the indications were made as a result of duress, the presiding judicial officer must hold a trial within a trial to determine whether the statements were freely and voluntarily made and whether the statements or indications are admissible.

In terms of s 256 CPEA a statement made by X to the police, or to a person in authority over him such as an employer, is not admissible unless it was made "freely and voluntarily without his having been unduly influenced thereto." Statements are thus not admissible if they have been extracted by the use of force or by offering incentives such a release from custody. The reason why such evidence is not admissible is that a statement made in these circumstances will be unreliable.

A statement will be inadmissible on the grounds that it was not made freely, voluntarily and without undue influence where X made the statement because

- he was tortured, beaten up or physically maltreated in some other way such as by being deprived of sleep or food and drink for long periods or by being kept in the dark in solitary confinement for long periods; or
- he was threatened with death or with torture or physical brutality unless he made the statement; or
- he was told that dire consequences would befall members of his family unless he made the statement; or
- he was offered some benefit or advantage if he confessed to the crime, such as that he would be released from custody or that he would receive only a light sentence such as a fine; or
- he had been kept in solitary confinement for a long time and no one had been allowed to visit him and he could not bear this isolation any longer; or
- he had been denied access to his lawyer after requesting such access and had been pressured into making a statement in the absence of his lawyer; or
- he had been subjected to such intensive, hostile and prolonged questioning that his freedom of volition had been overborne as a result of the psychological pressure applied to him;

See *Ananias* 1963 R & N 938 (SR); *Hlupe* 1964 RLR 333 (GD); *Murandiwa* 1951 R & N 271 (SR); *Michael & Anor* 1962 R & N 374 (H); *Dube* 1965 RLR 177 (RA); *Hackwell* 1965 RLR 1 (RA); *Edward* 1966 (2) SA 359 (R); *Mfungelwa* 1967 RLR 308; *Schaube-Kuffler* 1969 (1) RLR 78 (A); *Attorney-General v Slatter & Ors* 1984 (1) ZLR 306 (S); *Mthombeni* S-80-90; *Nkomo & Ors* 1989 (3) ZLR 117 (S); *Jana* S-172-88; *Ndlovu* 1988 (2) ZLR 465 (S).

In any case where a client has allegedly been subjected to physical abuse leading to the extraction of prejudicial information, the legal practitioner should request the trial court to hold an exhaustive inquiry into the allegations. In *Makawa & Anor* 1991 (1) ZLR 142 (S), it was held that although allegations of police mistreatment are commonly made and are often found to be spurious, the frequency with which they are made justifies that a thorough investigation be made. When an accused person stands in jeopardy of a criminal conviction if a confession made as a result of mistreatment is accepted, it is incumbent on the judicial officer to investigate to the fullest extent the veracity of the allegations.

In the case of *Woods* 1993 (2) ZLR 258 (S) the Supreme Court commented upon the effect of refusal of the police to allow access by prisoners to their lawyers. It said that the court cannot condone a blatant refusal of access to their lawyers of prisoners held in police custody. Such refusal violates the fundamental right granted by s 13(3) of the Constitution and brings the administration of justice into disrepute. Where there has been a wilful and flagrant denial of access, this will warrant the exclusion of evidence in any extra-curial statement or indication made prior to the allowing of access to the lawyers.

On the other hand, confrontation by the police does not amount to duress Confrontation is a permissible element of police interrogation procedures, provided it is not improper or persistent. It is not improper to tell a suspect that his co-accused has confessed where that indeed has happened, nor is it improper for the police to tell the suspect that they know about an incident connected with the alleged crime. See *Nkomo & Anor* 1993 (2) ZLR 131 (S)

*Indications*

As regards indications made by X to the police in *Ndlovu* 1988 (2) ZLR 465 (S) the court commented upon the provision now contained in s 258(2) CPEA. This section renders admissible anything that was pointed out by the accused or any fact discovered in consequence of information given by the accused, even if the pointing out or information forms part of a confession or statement that is not admissible. The section does not, however, render admissible the statements or remarks made by the accused while he or she is pointing out the object or scene in question, nor does it cover statements he may make on the way to the scene. If the police wish to give evidence about what the accused said in these circumstances, he must be given the usual opportunity to say whether or not he made the statements freely and voluntarily and without undue influence. If he puts the matter in issue, and if the statements have not been confirmed, there must be a “trial within a trial”.

In *Mazono & Anor* 2000 (1) ZLR 347 (H) the accused stated at their trial that indications made by them to the police were made under duress. The magistrates admitted these statements and concluded that they had been made voluntarily without holding a trial within a trial. The High Court decided that the magistrate had been wrong in admitting these indications. Where there is a dispute as to whether a statement by an accused person was made freely and voluntarily a separate issue or trial within a trial must be held before such a statement can be admitted in evidence.

See also *David* HH-204-94.

However, any evidence, such as the murder weapon, discovered as a result of his indication or of information given by X is still admissible even if X did not make the indications freely and voluntarily: *Nkomo* 1989 (3) ZLR 117 (S); *Jana* S-172-88; *Ndlovu* 1988 (2) ZLR 465 (S).

## *Procedure when statements or indications challenged*

If the accused testifies that the indications made by him to the police were made under duress, the court must hold a trial within a trial

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See also *S v David* HH-204-94

## *Onus of proof when challenged*

Different rules apply depending upon whether or not the statement under challenge had previously been confirmed before a magistrate.

*Confirmed statement*

Where a statement of X has been properly confirmed in terms of s 113 CPEA, the onus is on X under s 256(2) CPEA to prove on a balance of probabilities that the statement was not made by him or that it was not made freely and voluntarily and without undue influence. It is not necessary for the court to believe his story beyond any doubt; if the court comes to the conclusion despite certain reservations, that X is telling the truth, then he has discharged the onus: *Ndlovu* 1983 (4) SA 507 (ZS); *Mthombeni* S-80-90.

*Unconfirmed statement*

Where the statement has not been confirmed in terms of s 113, the onus rests on the State to prove beyond reasonable doubt that the statement was made freely and voluntarily and without undue influence. The reasons why the statement was not confirmed must obviously be probed by the court.

In *Chatanga* HH-19-90 X alleged that he was forced to make the unconfirmed warned and cautioned statement. Without dealing with that challenge by holding a trial within a trial, the policeman who recorded the statement was called and he produced the statement as if it had not been challenged. The review court said that the magistrate should have determined whether the statement was admissible by holding a trial within a trial.

**Summary**

A confirmed statement may be introduced in evidence on mere production. If the defence challenges such a statement the onus is on it to prove on a balance of probabilities that X did not make it or did not make it freely and voluntarily.

If the defence challenges an unconfirmed statement the statement may not be produced until its admissibility has been determined at a trial within a trial. The

onus is on the State to prove that, despite X's protestations to the contrary, it was made by X and was made freely and voluntarily.

## Formal admissions by accused or prosecutor during trial

During the course of his trial X may admit to any fact relevant to the issue or, on instructions from his client, the defence lawyer may admit certain facts. The prosecutor may also make such admissions: s 314 CPEA. Any such admission "shall be sufficient evidence of that fact."

This provision only applies to admissions during the trial following upon a plea of not guilty or the entering of such a plea by the magistrate: *Dhliwayo* 1987 (1) ZLR 1 (H).

This procedure allows for admissions to be made, thereby dispensing with the need for the admitted facts to be proved. Where an undefended accused purports to make an admission of fact the court must ensure that the accused properly understands what he is admitting to and that he is competent to make the admission. The accused's legal representative may make admissions on his behalf.

Section 314(2) CPEA further provides that if the magistrate considers it desirable for the purpose of clarifying the facts in issue or obviating the production of evidence on facts which do not appear to be in dispute, he may, *on the application* of the prosecutor, ask X (or his lawyer) whether a fact relevant to the issue is admitted. Similarly, he may, on the application of X (or his lawyer) ask the prosecutor whether a particular relevant fact is admitted. Where it is proper to do so in the light of the client's instructions, the defence should be prepared to make such admissions about matters not in dispute. Non-cooperation and obstructionist tactics over such matters create a negative impression.

## Departure from statements by State witnesses

The prosecutor stands in a special relation to the court, and where there is a serious discrepancy between the statement of a State witness taken during investigations and what he says on oath at the trial, the court has the right to expect that the prosecutor will, of his own motion, direct attention to this fact and, unless there is special and cogent reason to the contrary, that he will make the statement available to the defence for cross-examination. On the other hand, a prosecutor is fully justified in refusing to show the statement to the defence where there is no foundation for the suggestion that the witness has materially altered his story.

Where there is such a serious discrepancy the prosecutor should complete the examination of witness and say to court that in the interests of justice he is obliged to draw attention of court to the fact that the statement given by the witness in court is radically different from that which he gave to the police: *Steyn* 1953 SR 76 at 79; *Wise* 1975 (2) RLR 194 (A). But it would not be necessary for the prosecutor to mention serious discrepancies if these favour the accused. See *The Prosecutor's Handbook* pp 90-92.

## Production of exhibits

The way in which exhibits are produced is set out in Chapter 18 of the *Prosecutors Handbook*. The comments in this handbook are equally applicable to production of exhibits by the defence. Where there are several defence exhibits the defence lawyer should draw up an itemised list of these exhibits in order to assist the court.

If the size or condition of an exhibit, such as a knife, is material, the prosecutor or the defence lawyer (whoever is producing the exhibit) will ask the magistrate to examine the exhibit and note on record the result of his observations.

All exhibits produced must be properly proved by evidence on oath from witness unless there is statutory authority for handing them in from the bar, that is for the production of them by the prosecutor or by the defence. There are a number of documentary exhibits which are usually produced by handing them in from the bar. These are dealt with below.

All exhibits will be marked as they are produced in court.

## Documentary exhibits

Subject to certain exceptions dealt with below, documentary exhibits must be proved by evidence on oath from witnesses. For more details on the topics dealt with under “Documentary Exhibits” see *The Prosecutor’s Handbook*.

### *Photographs and plans*

To prove photographs and plans, the person must be called who made the indications or observations upon the basis of which the photograph was taken or the plan made: s 279 CPEA. The plan or photograph may be handed in to the court without having to call the witness to prove it if the other side consent to its production without the witness being called: s 279(2)(b) CPEA.

Defence lawyers should obtain copies of plans and photographs before the trial and examine them carefully and ask his client to comment upon these. If there are no copies available, the defence lawyer should call on the prosecutor well in advance of the trial and request that he be allowed to study these documents.

### *Notes in police notebooks*

Police witnesses may wish to refer to notes in their notebooks taken soon after the incident about which they are being asked to testify. The magistrate is entitled to examine these notes, as is the defence. The defence lawyer should always avail himself of his right to examine these notes as the notes may contain information which is favourable to his client's case.

### *Documents admissible in affidavit form*

There are statutory provisions allowing for the handing in of certain types of documentary exhibits by the State, without calling of the persons who made them to testify in court.

Section 278 CPEA allows the production of certain documents from the persons who compiled these documents provided that these are in affidavit form. These are:

### *Medical reports from doctors*

ss 278, 279 and 280 CPEA.

In cases such as assault with intent to do grievous bodily harm, culpable homicide, attempted murder, infanticide and rape the State will often want to introduce medical evidence. The defence may also wish to introduce such evidence. If the State or the defence wishes to produce that evidence in affidavit form, certain formalities must be followed.

Section 278(11) CPEA provides that the defence must be given three days’ notice of the intended production of the affidavit. An affidavit is not admissible unless the defence has been given three days’ notice of its intended production or agrees to waive its right to be given notice. The defence

may indicate in advance of the production of this evidence that it intends to apply for the doctor to be called to give oral evidence. The prosecutor may then decide to call the doctor so that he can give oral testimony.

After the affidavit has been produced, the defence may apply to the court for the medical practitioner to be called to give oral evidence where this is necessary to clarity or test the evidence. If no such application is made then the defence may be taken to have admitted to the truth and accuracy of the contents of the affidavit.

The court has a discretion in terms of s 280(8)(ii) [262(8)(ii)] CPEA to order that the doctor be summoned to give oral evidence at the trial. It may also send written questions to him to which he must reply.

It will be necessary to use the power to call the doctor to give oral testimony when the original affidavit is inadequate and thus the court will be unable to arrive at a just decision on the basis of the affidavit. If the information is very scanty or vital information is omitted or the information in the report seems to be contradictory, this power should be exercised. If the affidavit contains all the necessary information there will be no need to summon the doctor: *Anock* 1973 RLR 154; *Sibanda* A-10-72; *Melrose* 1984 (2) ZLR 217 (S).

As regards medical reports from doctors which the defence wishes to lead in evidence, the defence lawyer should try to get the prosecutor to agree to the evidence without having to call the doctor as doctors are often most reluctant to come to court and waste time. If the evidence is mere record of findings and it contains clear facts which are uncontentious, the agreement of the State to its production without having to call the doctor may well be forthcoming.

### *Affidavits from nurses, ambulance drivers and carriers*

s 278(4) and (5) CPEA.

### *Affidavits from Vehicle Inspectors*

s 278(4) CPEA.

### *Certified documents*

Under various statutes there is provision for documents to be certified so that they can be produced in court. These include documents certified under s 319 of the Companies Act [*Chapter 190*], under s 196 of the Insolvency Act [*Chapter 303*] and under s 23(6) of the Maintenance Act [*Chapter 35*].

The procedure for the production of certified copies of official and public documents are set out in ss 275-277 CPEA.

### *Bankers' books*

Sections 285-289 CPEA provide an easy method for the State (or the defence, if such a course should be necessary) to prove entries in bankers books. This special procedure is necessary because it would be impossible for banks to function efficiently if their officials had to attend the various courts in the country and produce the bank's books to prove the entries therein.

Under this procedure a copy of an extract from bank's books can be produced without having to call someone from the bank to prove that extract in court, provided an official from the bank (such as the bank's accountant) has sworn an affidavit to the effect that the the entries in question were made in the ordinary course of the business of the bank and that the copy is a true copy of the original entry.

The procedure applies in respect of commercial banks and other financial institutions registered under the Banking Act [*Chapter 188*], the Post Office Savings Bank, the Agricultural Finance Corporation and building societies. The same procedure applies in respect of foreign banks.

It can be used in relation to bankers' books and documents such as ledgers, day-books, cash books, deposit slips and letters of transfer. Reid-Rowland in *The Prosecutor's Handbook* at p 120 suggests that bank records kept in computerised form are admissible in terms of this procedure.

Under this procedure the opposing party is served with a copy of an extract from the bank's books. The papers must be served at least ten days in advance of the criminal proceedings, unless the opposing party agrees to waive this period of notice.

If the opposing party wishes to do so, it will be given the opportunity of comparing the copy with the original entries in the bank's book. In order to do so, it must make an application to the court for an order that the opposing party be permitted to inspect the relevant bank books and take copies from the books which relate to the matter in question. Three days' notice must be given to the bank should the court grant such an application.

The certified copies of the extracts are *prima facie* evidence of the matters, transactions and accounts recorded in them. They are not conclusive proof and the court may decide not to accept the documents as evidence of those transactions where, for instance, there is doubt regarding the accuracy of the entries, or where a bank official has been charged with an offence which involves the alteration of the bank's books of account.

### *Documents made in the course of business*

Sections 281-284 CPEA provide for the production of documents made during the course of business or trade.

In terms of s 282(2) CPEA, records relating to any transactions in connection with any trade, business or occupation are admissible on their mere production, provided that the facts contained in them would have been admissible as direct oral evidence. The transaction can be either inside or outside Zimbabwe. This provision provides a way for the State to overcome the difficulty of having to call the person who originally made these records.

Section 281(2) can be used by the State to produce documents such as documents made and kept by an employee or agent of the accused, as proof of the facts contained in that document, provided that those facts would have been admissible as direct oral evidence.

Section 284 deals with stamps, signatures and writing on negotiable instruments which were purportedly made by personnel in banks outside Zimbabwe. Until the contrary is proved, such marks on the instruments are deemed to have been made by such bank personnel.

Whenever the State introduces such documents in evidence and relies on particular portions of them, the defence lawyer should always ask to examine them. He should carefully scrutinise them as they may contain information beneficial to his client which has not been referred to by the State because this information does not advance the State case.

### *Documents executed outside Zimbabwe*

For a document executed outside Zimbabwe to be admissible in evidence it must be properly authenticated. This is dealt with in Rule 3 of the High Court (Authentication of Documents) Rules of 1971 (RGN 995 of 1971). This lays down that any document executed outside Zimbabwe is deemed to be sufficiently authenticated for the purpose of production in any court if it is authenticated by a notary public, a mayor or a person holding judicial office or by certain specified Zimbabwean diplomatic or consular officials (in countries which have such officials).

## Audio and video tape recordings

In *Adolfo* 1991 (2) ZLR 325 (H) the court referred with approval to two South African judgments: In *Ramgobin & Ors* 1986 (4) SA 117 (N) the court stated that for tape recordings to be admissible it

must be proved that they are the original records and that, on the evidence as a whole, there exists no reasonable possibility of 'some interference'. In *Baleka & Ors* (1) 1986 (4) SA 192 (T) evidence of tape recordings can be admitted even where the recordings were imperfect, parts were inaudible and the whole was not decipherable. The court said that when a tape has been tampered with in the sense that certain words have been erased or certain portions inserted, the remainder of the tape is still original. The interference may have the result of diminishing or destroying its evidential value, but that does not mean that it is inadmissible.

In *Tsvangirai & Ors* HH-169-2004 the court said that the case of *Ramgobin & Others* 1986 (4) SA 117 correctly reflects the law on the admissibility of audio and video tape evidence. The court went on to find that in the present case the authenticity and accuracy of the video hasd been established although suggestions have been made that it may have been interfered with. The fact that a tape is inaudible in parts is no reason to require its exclusion, particularly in a case, such as the present, where the accused accepts the accuracy of the portions that are audible. In all the circumstances therefore this court reaches the conclusion that the video tape is admissible.

## Adjournments

Judicial officers have the discretion to adjourn a case on the grounds that this is necessary or expedient. A case can be adjourned at any stage of the trial, whether or not evidence has been given. The period of adjournment must not exceed fourteen days unless X consents to a longer period. A case may be adjourned more than once for sufficient cause: s 166 [152] CPEA.

If the defence requests an adjournment, it must obviously have sound grounds for doing so.

## Court calling further evidence

Defence counsel should note that because the objective of a criminal trial is to ensure that justice is achieved and because the liberty of X is often at stake, a judicial officer has the right to call witnesses not called by either party. The judicial officer may also recall and re-examine any witness already examined. He may do these things if the evidence appears to be essential for arriving at a just decision in the case: s 232 CPEA.

The cases say, however, that his right must be sparingly exercised. In defended cases it must not be exercised so as to interfere with the discretion of counsel in their choice of evidence they wish to be placed before the court: *Zakeyu* 1963 SR 434 (FS); *Buitendag* 1976 (1) RLR 345 (A); and *Wright* S-183-89.

Section 232 can also be used when the State by oversight has failed to prove a purely formal element. In *Maringire* 1988 (2) ZLR 318 (S) it was stated that if the prosecutor at the trial fails to call the evidence necessary to prove a mere technicality or purely formal element, the magistrate himself should call the evidence acting in terms of s 232 CPEA. This provision should be sparingly used in respect of a missing element in the State case which is more than purely technical and which is of a contentious nature.

## Discharge at close of State case

X's legal representative may apply for discharge at the close of the State case.

Section 198(3) CPEA provides that the court may return a verdict of not guilty after the State has closed its case and before the defence case has commenced.

Under this provision X is entitled to be discharged if there is no evidence either -

(a) that he committed the offence charged *or* -
(b) that he committed any other offence of which it is competent to convict him on the basis of the crime charged.

Even if there is no evidence that X has committed the crime charged the court must still consider what other crimes it is competent to convict X of on the basis of crime charged and whether, in the light of the evidence produced by the State, there is evidence that X committed any of these other crimes. If there is such evidence X must be put on his defence.

When considering whether to discharge X, the judicial officer must consider whether the State has made out a *prima facie* case against X. It is not necessary at this stage that the State should have proved guilt beyond all reasonable doubt.

In *Tsvangirai & Ors* HH-119-03 the judge stated that the court shall return a verdict of not guilty if at the close of the State case the court considers that there is no evidence that the accused committed the offence charged (or any other offence with which he could be convicted on that charge). Thus, the court must discharge the accused at the close of the case for the prosecution where there is no evidence to prove an essential element of the offence; there is no evidence on which a reasonable court, acting carefully, might properly convict; the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it. Instances of the last such cases will be rare; it would only in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed.

X must obviously be discharged if the State has been unable to lead any evidence whatsoever of the commission of the crime charged. This would be a very rare situation. If the entire case against X has collapsed, one would expect the prosecutor to withdraw the charge.

Usually some evidence will have been advanced by the State. The test to be applied is whether a reasonable court might convict X on the basis of that evidence. In *Hartlebury & Anor* 1985 (1) ZLR 1 (H), MCNALLY J elaborated further on the application of this test. He said that a court may order discharge where there is no evidence on which a reasonable court may convict. It may also order discharge where the evidence adduced by the prosecution is so discredited or manifestly unreliable that no reasonable court could safely act upon it or where there is no evidence to prove an essential element of the offence. These latter two grounds for discharge seem only to be particular illustrations of where the evidence adduced would not allow a reasonable court to convict. A reasonable court could not convict where the evidence led is totally unreliable or the State has failed to prove one of the essential elements of the crime charged.

If the defence lawyer applies for discharge in circumstances where it seems clear that his client committed the crime but there is some fatal flaw in the State case, it is tactful to adopt a somewhat self-deprecatory rather than a triumphant manner.

In *Attorney-General v Bvuma* 1987 (2) ZLR 96 (S) the Supreme Court decided that if the evidence led by the State is insufficient for a reasonable court to convict, the trial could should not refuse to discharge X at the close of the State case because it thinks that if X is put to his defence he could possibly provide a missing link in the State case. In other words, the onus is on the State to prove the guilt of X. If the State fails to produce evidence upon which a reasonable court could convict, the court should discharge X. It should not speculate on the possibility that the gaps in the State case might be plugged during the course of the defence case. Similarly, where X is jointly tried together with others, the possibility that the co-accused may give convincing evidence against X is not a proper basis for refusing to discharge when the State has failed to adduce evidence upon which a reasonable court could convict.

In *Mpofu* S-192-90 two persons were jointly charged with theft of money. The State failed to prove which of the two had stolen the money. The magistrate put the two on their defence as they "were throwing stones at each other" so as to enable the State to discover through cross-examination who committed the offence and who did not. At the end of the case the magistrate then convicted one of

the two accused. The Supreme Court said this was a wrong approach. The magistrate should not have put either of the accused to their defence in the hope that he might be condemned by his co-accused.

In *Kachipare* 1998 (2) ZLR 271 (S) X and Y were jointly charged with the murder of a newly born child. The child was that of Y. Y pleaded guilty, but X denied the charge. An application was made at the end of the State case for X's discharge. There was no evidence directly linking the appellant with the offence. The trial judge refused the application, relying on the fact that there was evidence placing her close to the events and that the question of the truth of falsity of the evidence could not be determined without hearing X's version. At the end of the trial, the court having heard the evidence of both accused, Y was convicted of infanticide and X was convicted of murder. On appeal, it was argued that putting X on her defence at the close of the State case was an improper exercise of the court's discretion, in that it was designed to fill gaps in the State case. The Supreme Court decided that the wording of s 198 (3) CPEA made it clear that where, at the end of the State case, there is no evidence upon which a reasonable court might convict, the court has no discretion: it must discharge the accused. The court may not exercise its discretion against the accused if it has reason to suppose that the inadequate State evidence might be bolstered by defence evidence. The evidence in this case was purely circumstantial and was not evidence upon which a reasonable man might draw the inference suggested by the State. X should have been discharged at that stage of the trial. It went on to decide, however, that once an accused person is put on his defence, albeit wrongly, and is ultimately convicted, the refusal to discharge the accused is not in itself a sustainable ground for appeal against the ultimate conviction. At the stage the appeal is heard, the court cannot close its eyes to the evidence lead on behalf of X or a co-accused which, taken in conjunction with the State evidence, proves X's guilt conclusively. The question which the appeal court must consider is whether, on the evidence and the findings of credibility (if any), unaffected by the irregularity, there is proof of guilt beyond a reasonable doubt. If the court does so consider — and the onus is on the State to satisfy it — there is no resultant miscarriage of justice and the irregularity will be ignored.

If the court rejects the submission that no case to answer in a situation where the defence lawyer strongly feels that there were strong grounds for discharging him at the close of the State case, a decision will then have to be made as to how to proceed thereafter. James Morton *Handling Criminal Cases A guide to preparation and defence* (1986 Waterlow) says it will be extremely brave decision for the defence lawyer to simply close his case without calling his client or any defence witnesses. The State case would have to be very thin indeed to justify such action. If the defence lawyer intends to close the defence case without leading any evidence, he should consult with his client in order to advise him of the course of action he proposes to take and to obtain his authorisation to adopt this approach.

It must be noted that the accused has no right of appeal against refusal to discharge at the close of the state's case until after conviction: *Hunzvi* 2000 (1) ZLR 540 (S)

On a more general note legal practitioners should avoid what appears to be an increasing tendency to apply for discharge at the close of the State case as a matter of routine, even when it quite apparent that the State has made out a *prima facie* case. This indiscriminate and inappropriate approach has a deleterious effect and may tend induce a sceptical attitude on the part of judicial officers even in relation to genuine and well-based applications for discharge.

*Summary*

The defence can apply for discharge of X at the close of the State case if no *prima facie* case has been made out and no reasonable court could convict X of the crime charged on the basis of the evidence led by the State.

However, the court will not discharge X if the evidence led could lead to the conviction of X of some other charge which is a competent verdict for the crime charged.

## Calling of witnesses by defence

The defence is entitled to call witnesses to testify for the defence. In terms of s 229 CPEA if the defence wishes to compel the attendance of a witness it may "take out of the office prescribed by the rules of court the process of the court for that purpose". If X wishes to have any witnesses subpoenaed and he satisfies the prescribed officer of the court that he cannot afford to pay the prescribed costs and fees and that such witnesses are necessary and material for his defence, the prescribed officer will subpoena the witnesses.

Defence witnesses who give testimony may be cross-examined by the prosecutor.

X must be allowed to call his witnesses. If his witnesses are not available when he wishes to call them, the proceedings must be adjourned so that he can be given a reasonable opportunity to contact them and ensure that they are available at the resumed hearing.

It was pointed out in the case of *Nyathi* HB-90-03 that not every refusal of an adjournment or postponement of a trial to give the defence time to call a witness who is not available at court constitutes a gross irregularity. The question is whether in refusing the adjournment all the material facts were taken into consideration. In this case, the accused abandoned his intention to call his witness after two postponements failed to secure the attendance of the witness.

## Calling accused to give evidence

Defence counsel needs to decide whether X should give testimony in his own defence. Sometimes X's legal representative will decide that it would be inadvisable for X to testify and will advise him accordingly. For example, the State case may be weak and the lawyer may decide that X will make a poor witness and may only end up strengthening the State's case if he is put on the witness stand. As the prosecutor and the judicial officer are entitled to question X even if he elects not to give evidence, it is generally better if X is called to give evidence. If he declines to give evidence, the court's reaction may be to believe that he has something to hide.

If X gives evidence in his defence the prosecutor can cross-examine him and he may also be questioned by the magistrate.

## Questioning of accused by prosecutor and judicial officer

Defence counsel must bear in mind that even if the defence has decided that X will not give evidence, under s 198(9) CPEA the prosecutor and the court may still put questions to him. If he refuses to answer the questions put to him, adverse inferences may be drawn by the court from this refusal.

## Defences

### *Types of defences*

Where the acts alleged by the State are not denied, it is still possible for X to plead not guilty. The defences raised in these circumstances usually fall into two main categories, namely - (1) defences which affect the mental element of the crime and (2) defences which affect the lawfulness aspect.

Falling into the first category are defences such as mistake of fact and intoxication. With such defences the contention will be that X lacked the *mens rea* for the crime because he was mistaken

about the facts at the time of the crime or was so drunk that he did not realise what he was doing. Into the second category fall defences such as lawful authority to do the act and lawful justification or excuse in the form of such defences as self-defence or compulsion. For full details of these defences see section 3 of *A Guide to the Zimbabwean Criminal Law* 2nd Ed. by G Feltoe.

### *Onus of proof*

The defence does not usually have to prove that a particular defence applies. Once sufficient evidence has been introduced (whether by the defence or from prosecution witnesses) to put a defence in issue, the rule is that the State must disprove the defence. The only exceptions to this rule are:

- the defence of insanity, where the onus is on the defence to prove on a balance of probabilities that X was insane at the time of the crime;
- where a statutory provision provides for a defence to the statutory offence but the provision places the onus is on X to establish the existence of this defence.

See *Mapfumo* 1983 (1) ZLR 250 ( )

## Reopening of State case and evidence from State in rebuttal of a defence

It is not just and proper for the State to be allowed to re-open its case to lead evidence that was available to it from the beginning of the proceedings in order to rebut a defence which the State knew of at the beginning of the proceedings. To allow such evidence to be led after the close of the defence case was unjust to the defendant, as it gave the State an opportunity to rebuild its case: *Munyaradzi* S-74-89.

Sometimes the evidence of a defence witness may reveal a line of defence that could not have reasonably have been foreseen by the prosecutor and which was not indicated during the questions put during cross-examination of State witnesses. In such cases the prosecutor may ask the leave of the court to call evidence in rebuttal of the defence. The court has the discretion as to whether to grant leave. It should normally not grant leave if by the exercise of due diligence the prosecutor could have called the evidence before closing his case. There must have been something in the nature of a surprise or an unexpected new issue introduced by the defence.

This sort of situation should not normally arise in a case where X is legally represented as the defence outline would usually have alluded to the defence and the defence lawyer would have put the existence of the defence to the State witnesses. Thus the prosecutor can hardly claim that there was a surprise element late on in the trial. On rare occasions, however, a defence which did not emerge from his client's instructions and had not been referred to when a witness was interviewed may suddenly be alluded to by the witness when he is giving evidence, taking both the defence lawyer and the prosecutor by surprise.

## Discrepancies between testimony of State witnesses and the contents of indictment and summary of case

Where there are discrepancies between the contents of the indictment, the summary of the State case and the preamble to X's warned and cautioned statement on the one hand and the evidence given by State witnesses on the other, the court will consider whether the discrepancies are material and essential and whether X has been prejudiced in the conduct of his defence by the discrepancies. Although the summary of the State case should be an accurate summary of what is contained in the Police docket and not a figment of the imagination of the policeman who prepared the summary, it should be treated on the same basis as an Outline of Defence which has been prepared on the

instructions of X. A State witness has no control over what the policeman compiling the summary decides to include in the Summary as being relevant. Therefore the credibility of a State witness will not be destroyed simply because there are apparent conflicts between his testimony and the summary on matters which are not essential to establish the offence alleged. If, however, there are discrepancies between the summary and the evidence of a State witness on matters essential to establish the offence charged, then unless a satisfactory explanation is proffered, it cannot be said that the prosecution has proved its case beyond reasonable doubt: *Dube* S-225-92 at p 5.

However, in *Chigova* S-177-92 at p 12 it was stated that:

> ... a précis of a case by the State is not to be given equal weight with the Outline of Defence on behalf of the accused. The reason for this is simple. The complainant has no control over what a policeman may find relevant enough to include in a précis. The précis is not her word or deed. She is not to be taken as having made categorical statements on matters which, though relevant, are not essential to establish the offence alleged. The complainant's credibility is not to be assessed on apparent conflicts between her *viva voce* testimony and a summary of the case prepared by someone else.

## Addresses at conclusion of defence case

In terms of s 200 CPEA both the prosecutor and the defence have the right to address the court at the conclusion of the defence.

Where the parties wish to exercise this right to address, the prosecutor must address first and then X's lawyer will address. If the defence lawyer has raised any point of law during his address, the prosecutor then has the right to reply to this point. In other words the defence has the last word on the facts and prosecutor has the last word on the law.

The defence address should be clear, concise and well ordered. A long, rambling, disorganised and confused address will not assist the defence case. The aim should be to give a lucid review of the case, stressing the strong points of the defence and the weak points in the State case. The defence lawyer must have a clear appreciation of main points advanced by the State against his client so that he can set out to defeat or counteract these points in argument. He must also have a proper understanding of what are the essential elements of the crime charged against his client, so that if the State has failed to prove any of these elements, he can point this out to the court in his concluding address.

All factors which cast doubt upon the reliability of the testimony of the witnesses called by the State must be highlighted. Matters such as -

(a) the poor demeanour of State witnesses; and
(b) contradictions in the testimony of State witnesses; and
(c) contradictions between the testimony of the various State witnesses;

must be commented upon. If the State case rests upon identification evidence, any factors tending to make that identification suspect must be stressed. If the State case rests upon the uncorroborated evidence of an accomplice or a witness whose testimony requires special scrutiny such as a child witness or on the evidence of a single witness, the defence must draw the court's attention to the dangers of placing reliance upon such testimony, citing relevant case law where appropriate. (See Section 6 Rules of Evidence for the case law in this regard.)

In the final analysis, the defence will be seeking to persuade the court that the State has failed to prove its case beyond a reasonable doubt. Remember that the burden rests upon the State to prove its case beyond reasonable doubt. If reasonable doubt remains at the end of the case, X is entitled to be acquitted. (However, with some statutory offences, the onus is shifted to X to prove certain facets on a balance of probabilities in order to escape liability.)

Some of the more typical defence arguments are these:

- The State has failed to prove that X was involved in the crime at all because, for instance, it has not disproved his alibi or the identification evidence is completely unreliable.
- The State has failed to prove one or more of the essential elements of the crime charged. With crimes which require proof of subjective intention, the defence will often argue that the State has failed to prove that X had the necessary intention because, for example, he was very drunk and/ or was seriously provoked. If the crime is one requiring proof of negligence, such as culpable homicide, the defence may argue that X was not negligent because, in the particular circumstances of the case, the death was not reasonably foreseeable or that the accident was unforeseeable.
- That although X intentionally did an act which resulted in harm, one of the recognised defences applies, such as self-defence or legal authority to act in that way.

It may be necessary to cite relevant case law in order to bolster these arguments.

If there are any legal points which need to be argued, reference to relevant legal authorities should be made.

The stronger the defence case, the more confidently it can be advanced. However, even if the State case is strong and the defence case is weak, the defence lawyer should try not adopt an approach which reveals to the court that he is simply going through the motions of addressing and that he has no faith whatsoever in the argument he is advancing. James Morton *Handling of Criminal Cases* has this to say:

> Try not to ramble even *in extremis*. Try to end your speech on an uplifting note, rather than shuffle your papers and say "I don't think there is anything more I can help you with." Try above all to be positive. Believe in what you say. You are, after all, legitimately selling a point of view. If it looks as though you are unconvinced and uncaring, it is almost an invitation to convict.

Morton also cautions against the magistrate who nods and smiles during the defence lawyer's address. He says that you may think that he is nodding in agreement. This may not be the case.

The court will normally require the parties to address immediately after the defence case is closed. However, in very complicated cases, where the evidence is contradictory or where there are complex points of law, the parties may request an adjournment to prepare their addresses properly. Such requests for adjournment should normally be granted.

## Change of plea before verdict

Where X applies to withdraw a plea of guilty before verdict, the presumption of innocence still applies. X must give an explanation as to why he initially pleaded guilty and why he now wishes to change his plea. Once he gives an explanation, however, it will suffice; there is no onus on him to convince the court of the veracity of his explanation. If he fails altogether to give an explanation for the withdrawal of the original plea the court is entitled to hold him to his plea: *Haruperi* 1984 (1) ZLR 258 (H).

Even though X's explanation may be improbable the court is not entitled to refuse the application unless it is satisfied that explanation is not only improbable but false beyond reasonable doubt.

If the applications is one to which s 272 CPEA applies (procedure where there is doubt in relation to plea of guilty), the question of onus cannot arise: *Nyathi & Anor* 1988 (1) ZLR 221 (H).

If X alleges that his plea of guilty was the result of improper conduct by those in authority over him, the court must stop the proceedings and investigate this allegation.

## Change of plea after conviction

What should a defence lawyer do if his client wishes to change his plea after conviction. The answer was provided in the case of *Jackson* HH-201-02 X, together with a colleague, stole a car in Chinhoyi. While driving it away, the accused lost control. His companion was killed; the vehicle was badly damaged. At his trial in a regional magistrates court, X pleaded guilty and was convicted. The matter was referred to the High Court for sentence. Before the hearing, X's legal representative indicated that the accused wished to change his plea to one of not guilty. The reason given was threats by the police. The question was whether the High Court could remit the matter to the lower court for the accused to change his plea. The court held the application to change the plea should be directed to the trial court. Although there is no onus on the accused – all he must do is offer a reasonable explanation for having pleaded guilty – less is required of him when he applies to the High Court for remittal to change his plea. All he must show is that he has an explanation which *prima facie* shows that he has a reasonable explanation for a change of plea to give to the trial court. Sections 227 and 271(2)(b) CPE apply in this regard.

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# SECTION 6 – RULES OF EVIDENCE

## Introduction

The defence lawyer must be fully conversant with the rules of evidence. Most criminal cases turn on the facts and the inferences to be drawn from those facts, rather than on points of law. The facts are therefore of key importance. The rules of evidence are also of primary importance as they lay down such things as which facts may be admitted, which persons are competent to give testimony, how the facts may be proved, when affidavit evidence may be introduced, when confessions are admissible and so on.

What follows in this section is a summary of the main rules of evidence which may be of assistance when a lawyer is defending clients in criminal cases. These rules are first described from the standpoint of how they are applied by the courts. They are then examined from the perspective of how they can be used in favour of persons charged with various crimes.

## Proof beyond reasonable doubt

The State is required to prove the guilt of the accused beyond reasonable doubt. Proof beyond reasonable doubt requires more than proof on a balance of probabilities. It is not, however, proof to an absolute degree of certainty or beyond a shadow of a doubt. Where there is proof beyond reasonable doubt no **reasonable** doubt will remain as to the guilt of the accused. If a reasonable person would still entertain a reasonable doubt as to whether the accused is guilty, the accused is entitled to be acquitted. Fanciful or remote possibilities do not introduce a reasonable doubt: *Isolano* 1985 (1) ZLR 62 at 64-65.

## Corroboration

The evidence of certain classes of witnesses is insufficient, standing alone, as proof the facts deposed to. Such witnesses- for example, accomplices, young children and complainants in sexual cases - must usually be corroborated.

By corroboration is meant evidence other than that of the witness which is consistent with the witness's version of the facts and which tends to show the guilt of the accused.

To be of evidential weight the fact or facts corroborated must be material ones. Corroboration of insignificant facts will not usually help to strengthen the State case.

From the standpoint of the State what is important is for there to be "implicatory corroboration". By this is meant evidence that implicates the accused in the commission of the offence.

The corroboration can come from the evidence of another witness or from the evidence of the accused. The confession of an accused can be used as evidence corroborating other evidence. Even the failure of the accused to tell the truth can sometimes be corroborative of other evidence: *Katerere* S-55-91.

In certain situations dealt with below, a “cautionary rule” applies. In these situations, the courts have to be aware of the dangers which arise from accepting certain types of evidence, especially if that evidence is uncorroborated. It is not enough that the court should warn itself on a token basis of the dangers of accepting these types of evidence. This warning must be put into practice by the court exercising great caution before accepting the evidence. In these situations, where there is a basis for doing so, the defence lawyer will obviously stress the dangers of reliance on the testimony.

## Single witness evidence

### *Approach of courts*

Where there is only a single witness to the crime certain special evidential rules apply.

A single witness may or may not also be a "suspect witness". If the single witness is also a "suspect witness" then the court must apply the special rules pertaining to single "suspect witnesses". These rules relating to single "suspect witnesses" are dealt with later.

The entire State case against the accused may rest upon the evidence given by a single State witness. This may be because the State has been able to produce only one witness against the accused. Alternatively, the State may have called more than one witness but the only evidence on which the guilt of the accused is going to depend is that of one witness alone. This situation has been referred to as a "boxing ring" situation because the outcome of the "contest" hinges on which of the two contestants is believed, namely the State witness or the accused.

With crimes other than perjury and treason, the court may convict an accused to convict an accused on the basis of the uncorroborated evidence of a single competent and credible State witness: s 269 CPEA.

There is obviously a risk which attaches to convicting the accused on the basis of the uncorroborated testimony of a single witness. There is a scarcity of evidence in the case and the testimony of the witness is the sole proof of the accused's guilt. In this situation the danger arises of poor observation, faulty recollection, reconstruction of evidence after the event, bias and any other risk that the circumstances of the case suggest. Before the court relies on such evidence it must be satisfied that the quality of evidence must make up for the lack of quantity.

In *Mokoena* 1956 (3) SA 81 (A) at 85-86 it was laid down that the uncorroborated evidence of a single witness should only be relied upon if the evidence was clear and satisfactory in every material respect. Slight imperfections would not rule out reliance on that evidence but material imperfections would. The court stated that single witness evidence should not be relied upon where, for example, the witness had an interest adverse to the accused, has made a previous inconsistent statement, has given contradictory evidence or had no proper opportunity for observation. However, in the later case of *Sauls & Ors* 1981 (3) SA 172 (A) the Appellate Division stated that there was no rule of thumb to

be applied when deciding upon the credibility of single witness testimony. The court must simply weigh his evidence and consider its merits and demerits. It must then decide whether it is satisfied that it is truthful, despite any shortcomings, defects or contradictions in that testimony. The approach adopted in the *Sauls* case was followed in the case of *Nyabvure* S-23-88. See also *Worswick* S-27-88, *Mukonda* HH-15-87, *Nemachera* S-89-86 and *Corbett* 1990(1) ZLR 205 (S).

Beck JA in his article in 1986 Vol 1 No 1 *Prosecutors Bulletin* at p 18 says that in assessing the quality of the single witness' evidence, to decide whether the accused should be convicted on the basis of this evidence, the court should be most attentive to the nature of the witness, looking at his apparent character, his intelligence, his capacity for observation, his powers of recall, his objectivity and things like that. The evidence should be carefully weighed against the objective probabilities of the case, and against all the other evidence which is at variance with it. The court must have rational grounds to conclude that the evidence of the single witness is reliable and trustworthy and is a safe basis for convicting the accused.

Thus although an accused can be convicted on the basis of the uncorroborated testimony of a single competent and credible State witness, the court must assess very carefully the credibility and reliability of such a witness to see whether it is safe to convict on the basis of his testimony alone.

The courts have pointed out that proper investigation of criminal cases will usually uncover corroborating evidence and that it is seldom necessary to rest the entire State case upon single uncorroborated testimony. The courts have exhorted police officers and prosecutors not to be content with the production of evidence from a single witness. However, where it appears to a court that there are other witnesses who may be called, it has the power to call these witnesses itself in appropriate cases.

In *Musonza & Ors* S-217-88 the Supreme Court stated that as a general rule it is undesirable to rely solely and entirely on the evidence of the complainant, particularly in assault cases and more particularly where there are counter allegations of provocation, self-defence or justification in one form or another. The complainant in such cases has a clear bias and a reason to place himself in a favourable light and the accused in an unfavourable light.

In *Tamba* S-81-91 the Court stated that in assault cases, where there are other witnesses to the incident in addition to the complainant, these witnesses should be called and the case against the accused should not be left to rest upon the testimony of the complainant alone. It is wrong to deal with such cases as if they were a "boxing match" between the complainant and the accused. These two protagonists should not, as it were, be thrown into the ring with the magistrate as referee who, at the end of the bout, having awarded points for demeanour and probability, would name the winner (who would usually be the complainant). It was even worse if the magistrate is, as often seemed to be the case, a biased referee who worked on the unspoken assumption that the police would not have charged the accused if he was not the guilty one. This approach, said the Supreme Court, was dangerous, especially in assault cases where almost invariably the parties give conflicting versions of what was the cause of the fight and often both versions are partially untrue or exaggerated. Without evidence from bystanders, it was almost impossible to determine which version of the facts was the true one.

In *Zimbowora* S-7-92 the appellant had been convicted of three counts of contravening the Labour Relations Act. The State case had rested entirely on the evidence of the complainant. On appeal, the Supreme Court said that although the trial court was entitled to convict the appellant on the single evidence of the complainant, it was necessary for such evidence to be clear and satisfactory in every material respect. As the complainant was a witness with an interest to serve, the trial court was not only required to approach her evidence with caution but should also have sought corroboration of her evidence. The conviction was set aside by the Supreme Court as the complainant's evidence was not satisfactory in all material respects and no evidence was led to corroborate her assertions.

In *Nduna & Anor* HB-48-03 it was held that where a conviction relies on the evidence of a single witness, discrepancies in the witness' s evidence are not necessarily fatal. The discrepancies must be

of such magnitude and value that it goes to the root of the matter to such an extent that their presence would no doubt give a different complexion of the matter altogether. The fact that the single witness is himself guilty of some unlawful conduct does not make him an accomplice in the crime which is charged. Where the accused, who were policemen, arrested and robbed a person who was crossing the border illegally, that person was not an accomplice.

### *Approach of defence lawyer*

As the court is permitted to convict an accused to convict an accused on the basis of the uncorroborated evidence of a single competent and credible State witness, the cross-examination of the single witness by the defence lawyer must be aimed at establishing that the witness is not credible and reliable. If there are major or material aspects of the testimony of that witness are unsatisfactory, this must be indicated in the defence address. Defence counsel should then submit that in the light of these unsatisfactory features, it would not be proper to convict the accused on the basis of the witness's testimony. It is not enough simply to point to a few very minor defects or slight imperfections in the testimony, such as minor contradictions; despite these imperfections the court may still decide that overall the witness was a credible witness whose testimony is to be believed.

Where the testimony of the single witness was not corroborated by any other testimony, this point should be brought to the attention of the court, especially in assault cases involving so-called "boxing ring" type situations. The dangers of conviction on the basis solely of the uncorroborated testimony of the single witness should be emphasised.

## Complainant evidence in sexual cases

### *Approach of courts*

In rape and other cases of a sexual nature, such as aggravated indecent assault, indecent assault and sexual relations with a person under the age of 16, the courts used to adopt the approach that because of the danger of false incrimination in such cases, a cautionary rule applies. Essentially this cautionary rule meant that in sexual cases the court had not only to believe the complainant, but in addition it had to be satisfied, by an application of the cautionary rule, whether it might still not have been deceived by a plausible witness. It therefore must seek corroboration or evidence tending to exclude the danger of false incrimination. This was laid down in a series of cases: *Mupfudza* 1982 (1) ZLR 271 (S); *Chitiyo* 1989 (2) ZLR 144 (S); *Chigova* 1992 (2) ZLR 206 (S); *Makanyanga* 1996 (2) ZLR 231 (H); *Zaranyika* 1997 (1) ZLR 539 (H).

However, in the case of *Banana* 2000 (1) ZLR 607 (S) the Supreme Court ruled that the cautionary rule in sexual cases is based on an irrational and outdated perception, and has outlived its usefulness. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. There were no convincing reasons for its continued application. It exemplified a rule of practice that placed an additional burden on victims in sexual cases which could lead to grave injustice to the victims involved. It is no longer warranted to rely on the cautionary rule of practice in sexual cases. Despite the abandonment of the cautionary rule, however, the courts must still consider carefully the nature and circumstances of alleged sexual offences.

In the context of sexual cases, usually the strongest evidence which the State will be able to lead will be medical evidence. If the accused has admitted that he had sexual relations with the complainant but maintains that the complainant was a consenting party, medical evidence of injuries consistent with forced sexual relations will be cogent evidence of the complainant's allegation of rape. Where, on the other hand, the accused denies sexual relations, medical evidence indicating that the complainant was raped or at least that the complainant has had sexual relations with someone does not prove the identification of the accused as the culprit

In *Musasa* HH-52-02 the judge deals with the evidence of child complainants. He states that while the evidence of child witnesses must be approached with caution, such caution must be creative or positive caution, where a judicial officer uses knowledge of psychology or other relevant disciplines in order to maximise the value of such testimony. Psychological research has established that young children do not fantasize about being raped and other unusual, horrific occurrences but that their fantasies and play are characterized by their daily experiences.

### *Approach of defence*

In defending a person who is accused of rape and who denies the allegation, The first line of defence in a rape case (or a case involving some other sexual offence) is to see whether doubt can be cast upon the credibility of the complainant. If the court finds that the complainant is not a credible witness the accused will be acquitted. The objective in the cross-examination of the complainant must therefore be to throw up unsatisfactory features of her testimony, which will lead the court to find that she is not a credible witness.

If the complainant gives evidence in such a manner that it is likely that the court will find that she is a credible witness, the defence lawyer should nonetheless probe during cross-examination to see whether she has some reason for falsely incriminating the accused. Where there is a basis for doing so, in summing up the defence lawyer should point out to the court that, although apparently the witness was plausible and credible, in the particular circumstances, there was a distinct danger that the complainant may have falsely implicated the accused in order to protect her lover or for some other reason (which should be stated).

Finally, where the complainant is an apparently credible witness and there seems to be no evident reason why she would falsely implicate the accused, the defence lawyer should carefully analyse the nature of her testimony and the other evidence advanced by the State and draw the attention of the court to any weaknesses and contradictions in that evidence.

## Evidence from children

### *Approach of courts*

Children often have vivid imaginations and have a tendency to fantasize. They may believe their fantasies and relate them as reality because they believe them. Immature children are also susceptible to suggestions made by others. In cases of sexual molestation of children parents may jump to wrong conclusions about the culprits and may prompt or intimidate their children into implicating the wrong persons. Alternatively, the persons prompting children may want maliciously to get other people into trouble. These risks are set out by Beck JA in his *Legal Forum* article at p 16.

In *Musasa* HH-52-02 the judge pointed out that while the evidence of child witnesses must be approached with caution, such caution must be creative or positive caution, where a judicial officer uses knowledge of psychology or other relevant disciplines in order to maximise the value of such testimony. Psychological research has established that young children do not fantasize about being raped and other unusual, horrific occurrences but that their fantasies and play are characterized by their daily experiences.

The child's mental development and maturity must be assessed very carefully. One has to be careful in applying the normal tests of credibility, such as demeanour, consistency and probabilities, to child witnesses. A seven year old cannot be expected to behave in the same rational way as an adult. When assessing the probabilities the court should take into account the child witness' age and maturity.

To overcome the dangers which are inherent in testimony from children, such as the danger arising out of their tendency to fantasize, the court is required to see whether from the evidence the events related by the child really did happen.

The courts will look to see if there is corroboration of the child's evidence implicating the accused. The existence of corroborative evidence is seen as being the safest assurance against wrong conviction. There is, however, no rigid requirement that a child's evidence must be corroborated. The court can convict on the basis of the uncorroborated testimony of a child witness, provided it is satisfied that the dangers inherent in founding a conviction on the child's uncorroborated evidence have been eliminated: *Ponder* 1989 (1) ZLR 255 (S); *J* 1958 (3) SA 699 (SR); *Sikulite* 1964(3) SA 151 (SR).

The court has the duty of ensuring that there is no unfair questioning aimed at overbearing, overpowering or confusing the child or trying to prompt the child unduly. The child should be allowed to respond naturally and spontaneously. When cross-examining a child witness the defence lawyer should display tact and sensitivity. If the defence lawyer tries to be savage in his questioning of such a witness, he is likely to be told to desist and will probably engender sympathy for the child which may impair the ability of the judicial officer critically to examine the nature of the child's testimony.

### *Approach of defence*

When the State case hinges on the evidence of a child witness, the defence must carefully cross-examine that witness in order to try to discredit his or her testimony. The defence lawyer will not be permitted to engage in badgering and aggressive questioning of a witness of tender age. The defence lawyer is duty bound to probe and test the testimony of such a witness, but he must do so in a tactful and non-threatening manner. In any event, reducing a child witness to tears may well be counterproductive as this may simply to elicit sympathy for the witness from the judicial officer and may make the judicial officer less critical in his analysis of the testimony of this witness.

The vulnerable witnesses provisions may be invoked in respect of a child witness, particularly where a young child is the complainant in respect of an alleged sexual assault. When this happens the child may either give evidence through an intermediary or through a video link. This will obviously effect the nature of the cross-examination of the witness by the defence lawyer.

All the defects in the testimony of the testimony of the child witness must be highlighted in the summing up by the defence lawyer. If the testimony of the child witness is uncorroborated, the defence lawyer must emphasise the considerable dangers of reliance on the testimony of a young child, such as the tendency of children to fantasise and to believe their fantasies. If there is reason to suspect that the child has been influenced in his testimony by a parent or other adult, submissions dealing with this point should be made. Finally, based on these various factors, the defence lawyer will often have a very good basis for submitting that it would be completely unsafe to place reliance upon such testimony in order to convict the accused.

## Accomplice evidence

### *Approach of courts*

For a number of very cogent reasons the courts approach accomplice evidence with considerable caution.

### *What are accomplices?*

An accomplice is a person who has participated or assisted in the commission of a crime, other than the perpetrator(s) and other than an accessory after the fact.. However, for the purposes of the law of evidence, the word has a wider meaning. It means any person who has committed an offence in

connection with the same criminal transaction which forms the subject-matter of the charge; it can also mean a person who appears to know a good deal about the offence and has some reason of his own to serve in giving evidence. The reasons why the evidence of such a person is regarded with caution are set out below. The matter is dealt with in greater detail in Hoffman and Zeffertt *South African Law of Evidence* 4 ed at pp 575-6.

An accomplice who is testifying against others may or may not be on trial himself. A person who is jointly charged with others may deny that he was involved in the crime at all. He may testify that he witnessed one or more of the other accused commit the crime. He may admit that he was involved but claim that his involvement was minor and that the major role was played by his fellow criminals. The other type of case is where an accomplice testifies after the authorities have dropped charges against him in return for his giving evidence against his fellow criminals.

## *Dangers of reliance on accomplice evidence*

The reasons why the evidence of accomplices (in the wide sense of the term) are approached with caution are as follows:

Firstly, an accomplice is a person who is himself guilty of criminal conduct and might easily be a person of bad character who does not have a high regard for the truth.

Secondly, the accomplice may tell lies against another person in the hope that he will secure an indemnity from prosecution, that he will receive a lighter sentence or, if he has already been sentenced, that he will receive clemency if he testifies against the other person. He may have received promises from the police that they will go easy on him provided that he testifies against another person.

Thirdly, the accomplice may wish to implicate one person falsely to shield someone else. He may do this, for instance, because he is afraid of the real culprit or he may greatly exaggerate the role played by a fellow criminal in order to minimise his own role in the crime.

Lastly, the inside knowledge of the accomplice of how, when and where and by whom the offence was committed gives him a golden opportunity to engage in convincing deception when giving evidence. The only thing he has to change in what is otherwise an entirely true version of the facts is the identity of his accomplice. His inside knowledge puts him in a position where he is peculiarly equipped to convince the unwary that his lies are the truth.

However, it should be noted that there are varying types of accomplices. Some are more culpable than others and thus are more dangerous to believe than others. In *Moyo* S-170-90, on the other hand, the Supreme Court found that the accomplice was simply a person caught up in an evil system and was not trying to shift the blame from his shoulders and therefore there was no danger in relying upon his testimony.

Because of these dangers of false incrimination, the courts must approach the evidence of accomplices with extreme caution. They must be satisfied that the evidence in question can safely be relied on and that the dangers of false incrimination have been eliminated.

## *Single accomplice evidence*

Where the case against the accused rests on the evidence of a single accomplice s 270 [254] of CPE applies. This says that a court may convict the accused provided there is competent evidence other than the single and unconfirmed evidence of the accomplice which proves to the satisfaction of the court that the crime was actually committed.

The courts have interpreted this provision to mean that even where there is no proof *aliunde* of the commission of the offence the accused can still be convicted if there is corroboration in a material

respect of the evidence of the accomplice. In *Mubaiwa* 1980 ZLR 477 (A) at 479H-480A this is stated as follows:

> The purpose of this section is that the court must be satisfied that the crime to which the accomplice testifies has, in fact, been committed. If not, there can be no conviction at all. Even where there is no proof *aliunde* that the crime has been committed, the statutory requirement can still be satisfied if there is corroboration in a material respect which convinces the court that the accomplice can safely be relied on when he says the crime was committed, though it need not directly implicate the accused. In such a case the requirement is satisfied because, despite the lack of proof *aliunde* of the commission of the offence, the accomplice is no longer 'single and unconfirmed'.

In *Lawrence & Anor* 1989 (1) ZLR 29 (S) the Supreme Court laid down that with single accomplice testimony there should be a two pronged enquiry. The court must first satisfy itself that the offence with which the accused is charged has been committed. Secondly, the court must look for corroboration, for if there is no evidence *aliunde* proving the commission of the offence, then there can still be a conviction if the court is satisfied that there is corroboration of the evidence of the accomplice sufficient to satisfy the court that the witness is to be believed.

See also *Moyo* 1989 (3) ZLR 250 (S)

Thus, if the evidence of the accomplice is single *and unconfirmed*, there must be proof *aliunde* of the commission of the offence. If, on the other hand, there is material corroboration of the testimony of the accomplice, the evidence is no longer single and unconfirmed and there need not be proof *aliunde* of the commission of the offence.

### *Co-accused implicating one another*

Where two or more persons are jointly charged with an offence and each gives evidence blaming the other for the offence, the evidence of each is admissible against the other, but the court must approach the evidence with care, since there is a risk that either or both may be seeking to protect himself by telling lies: *Sambo* S-22-90.

### *Warning to accomplices*

It is obligatory for judges and magistrates to warn accomplices who are testifying in conformity with the direction given in *Simakonda* 1956 R & N 463 (SR) at 465B-C. See also *Ncube & Anor* 1975 (2) RLR 150 (A) at 151H-152A and *Ngara* 1987(1) ZLR 91 (S) at 96G.The court should warn the accomplice that what is expected of him is to tell the truth.

The warning that the accused must answer questions "to the satisfaction of the court" can be misleading when translated into the vernacular as it may give the impression to the accomplice witness that the evidence required of him to “satisfy” the court is evidence which incriminates the accused, even if this evidence is not the truth. The judicial officer, in warning the accomplice, must emphasise that the court is interested only in the truth, whether it incriminates or exculpates the accused.

As regards the accomplice who has already been convicted and who is presently serving his sentence, he should be advised that exaggerating the part allegedly played by the accused or minimising his own role will not affect the sentence in any way.

As regards the unconvicted accomplice, in terms of s 267 CPEA, he must be advised that:

- he is not obliged to give evidence;
- if he testifies, questions may be put to him which might incriminate him in regard to the specified offence;

- he will be obliged to answer any question that may be put to him despite the fact that the answer might incriminate him in respect of the specified offence (or some other offence for which he could be found guilty on the basis of the charge relating to the specified offence);
- if he answers frankly and honestly all questions put to him he will be discharged from prosecution in respect of the specified offence (or from any other offence for which he could be found guilty on the basis of that charge.)

See Hoffman and Zeffertt *South African Law of Evidence* 4th Ed p 239.

## *Reducing dangers*

The safest way to eliminate the risk of false incrimination of another by an accomplice is to look for corroborative evidence implicating the accused.

The evidence of one accomplice can corroborate the evidence of another. The court, however, must be satisfied that the testimony of both accomplices is credible and that there has not been an opportunity for the accomplices to conspire together before testifying in order to concoct a false story to implicate the accused.

In *Zata* S-64-91 a visitor to Zimbabwe alleged that he had paid a bribe on demand to a junior customs officer who had handed it over to the appellant. The junior officer confirmed his story. As the visitor was a stranger to the customs official and they did not have the same interests to serve, their evidence could be given credence and could be used to corroborate each other's testimony.

It is usually dangerous to convict without corroboration of the accomplice's evidence. Thus in *Machakata* S-106-89 there was no corroboration and the court quashed the conviction. The appellant had been found guilty of stock theft. It was alleged that he had instructed two of his employees to go and steal cattle for him. One of these employees, P, gave evidence for the State and the entire State case rested on his testimony, which was not corroborated. The appellant denied that he had given such an instruction to the two employees and another of his employees, E, corroborated his testimony. The Supreme Court found that the trial court had only paid lip service to the cautionary rule. P's evidence had not been rigorously examined to ascertain whether or not he may have falsely implicated appellant. P's uncorroborated evidence was open to question.

Sometimes, however, even without corroborative evidence, the court can convict a person on the basis of the evidence of a single accomplice if the circumstances are such that the court can properly be quite satisfied that the accomplice is telling the truth. For example, if the accomplice gives convincing evidence against the accused and the accused adamantly refuses to give evidence and maintains his right to silence, there is a reduced risk of relying on the evidence of the accomplice in convicting the accused. If the accused were innocent one would have expected him to have vigorously denied the false testimony against him. So, too, there is a reduced risk of reliance on testimony by an accomplice against a person with whom he has a very close relationship and with whom he has been on good terms previously, because here it would be unlikely that the accomplice would implicate him falsely.

## *Imperfections in evidence of accomplice*

Where there are imperfections in an accomplice's evidence and there is no corroboration of his evidence implicating the accused, the court must still consider whether there are other features which reduce the danger of false incrimination and, if there are, whether they reduce it to the point where there is no reasonable possibility that the accused has been falsely incriminated: *Juwaki & Anor* 1964 RLR 604 (A).

In *Lawrence & Anor* 1989 (1) ZLR 29 (S), it was held that, despite the imperfections in the accomplice's evidence, there was sufficient corroboration to eliminate the danger of false incrimination.

### *Disclosure of inducements to testify*

In *Lawrence & Anor*, the Supreme Court stated that it is desirable that the court be informed of any inducement or promise made to an accomplice when the accomplice is called upon to testify, because the danger of the false incrimination is greater when an accomplice has been promised a pardon or remission. It further pointed out that is the court, not the Attorney-General, which should decide whether or not the accomplice has given satisfactory evidence justifying fulfilment of the undertaking to recommend remission.


Summary

The courts are obliged to approach accomplice evidence with extreme caution because of the dangers of false incrimination by the accomplice. Although it is not essential that the accomplice evidence be corroborated, the presence of corroborative evidence is usually the best safeguard against false incrimination. Slight imperfections in the accomplice's evidence do not necessarily discredit it, especially if the material portions of that evidence are corroborated. The evidence of one accomplice can corroborate the evidence of another, provided that the court is satisfied that the accomplices did not conspire together to give an agreed false story against the accused.
Where the evidence of a single accomplice is relied on, the judicial officer is obliged to consider whether there is material corroboration for the witness' testimony. If there is such corroboration, the court may convict even if there is no proof *aliunde* of commission of crime. If there is not, it may convict the accused only if there is evidence *aliunde* that the crime was committed.


### *Approach of defence*

At the start of the testimony of an accomplice who is testifying against his client, the defence lawyer should ensure that the court has warned the witness in the terms required by the law. If the court omits to do this, the defence lawyer should ask it to do so before the witness starts to testify.

All State witnesses who are accomplices must be vigorously cross-examined to expose shortcomings in their evidence. If the accomplice giving evidence has been promised immunity from prosecution in return for testifying on a satisfactory basis against the accused, he should be closely questioned as to whether he is telling lies against the accused or exaggerating the role played by the accused in order to please those who offered him immunity and thereby receive such immunity. He should also be closely questioned as to whether he has received any instructions as to what he should say in his testimony. If the accomplice has already been tried and sentenced before he testifies against the accused, the defence lawyer should carefully probe what incentives have been made to him to testify and whether this may have led him to distort his evidence against the accused.

In his address the defence lawyer will obviously lay emphasis on the dangers of reliance on the evidence of the accomplice, especially if there has been no corroboration of his testimony. He will seek to persuade the court that it is not safe to rely upon the accomplice evidence in question and that the dangers of false incrimination have not been eliminated.

Where the State case rests on the evidence of a single accomplice and the State has produced neither any evidence which materially corroborates the evidence of the single accomplice nor any evidence which provides proof *aliunde* of the commission of the crime, then the defence must point these things out to the court and call upon the court to place no reliance on the accomplice’s evidence.

## Lies by accused corroborating State case

The person you are defending may have told lies to the police during investigations. Under cross-examination by the prosecutor he may relate a story which is obviously false. The prosecutor may argue that these lies can corroborate the evidence given by State witnesses. The courts have laid down that for such a lie to be capable of amounting to corroboration of the testimony of a State witness:

- The lie must be deliberate;
- It must relate to a material issue;
- The motive for the lie must be a realisation of guilt and a fear of the truth;
- The statement must be clearly shown to be a lie by evidence other than that of the witness who is to be corroborated.

It has been stated that too much weight should not be attached to lies told by the accused. The court must guard against drawing an inference of the accused's guilt solely on the basis of lies told by him: *Nyoni* S-118-90.

## Similar fact evidence

### *General rule*

Similar fact evidence is evidence of similar acts done previously by the accused. Similar fact evidence is not admissible if its only relevance is to show that the accused is of bad character and is therefore likely to have committed the offence. It is, however, admissible if it is relevant and is of sufficient probative force to warrant its reception despite its apparently prejudicial nature.

Previously the approach of the courts was that the similar facts had to bear a striking resemblance to the case in hand. See *Mutsinziri* 1997 (1) ZLR 6 (H); *Ngara* 1987 (1) ZLR 91 (S). However, in *Banana* 2000 (1) ZLR 607 (S) the Supreme Court said that the test for the admissibility of similar fact evidence used to be whether the similar facts were of such a striking similarity that it would be an affront to common sense to assume that the similarity was explicable on the basis of coincidence. However, the courts have moved away from this test. Striking similarity is not a pre-requisite to admissibility. What has to be assessed is the probative force of the evidence in question; there is no single manner in which this can be achieved. Like corroboration, this is a matter of logic and common sense.

This is in contrast to the position in South Africa. In the South African case of *M & Ors* 1995 (1) SACR 667 (BA) contains an exhaustive review of the authorities on the admissibility of similar fact evidence. In the course of its review, the court agreed with authorities which held that for such evidence to be admissible, the similar facts must bear a striking similarity to the evidence adduced in relation to the offence charged: “The use of the word ‘striking’ — strengthens the concept that the admission of similar fact evidence requires a ‘strong degree of probative force’, bearing in mind the basic principle that its admission is out of the ordinary and unusual.

In *Mutsinziri* 1997 (1) ZLR 6 (H) the court pointed out that where there are multiple counts, the fact that each one must be looked at separately does not prevent material which could be admissible under the rules relating to similar fact evidence from being received. Even evidence on one count which ultimately leads to an acquittal may be used, but for such evidence to be receivable and acted upon by a court of law, those discreditable acts of the accused must share with the discreditable conduct in issue features of such an unusual nature and striking similarity that it would be an offence to common sense to assert that the similarity was explicable on the basis of coincidence. Similar fact evidence may be admitted on one count in order to bolster evidence on another count, where there is an issue as to identity.

In *Mupah* 1989 (1) ZLR 279 (S) the court said that evidence of a previous offence is admissible to rebut a defence of accident or innocent intent and to show a systematic course of conduct by X. This is so whether or not X has been convicted of that offence. There must not only be similarity between the previous acts and those in issue, but such a concurrence of common features that the various

acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. The discreditable acts of X must share with the discreditable conduct in issue features of such an unusual nature and striking similarity that it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence. Where X has been acquitted in one case, it would be wrong, in order to obtain a conviction in a later case, to seek to show that X was guilty in the first case. This does not mean that evidence relating to the first case may not be called to show what X's intent was in the second; it means that it is impermissible, in the second case, to rely on X's guilt in the first if he has been acquitted in the first case.

### *Examples*

In *Mupah* 1989 (1) ZLR 299 (S) the Supreme Court set out some situations where similar fact evidence was admissible. It stated that

- Evidence as to previous conduct is admissible to prove that the acts alleged to constitute the crime charged were intentional or part of a systematic course of conduct or to rebut a defence of accident or innocent intent.
- The conduct must demonstrate such an underlying unity or such a concurrence of common features that it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence.
- The accused person need not have been convicted of an offence in relation to the previous conduct before it becomes admissible as similar fact evidence.
- On the other hand, if the accused person has been acquitted of an offence in relation to the previous conduct, evidence as to that conduct is not admissible as similar fact evidence as its admission would require the court to assume that the accused was guilty of the offence of which he was acquitted; such evidence may be admissible, however, to show, for example, what the accused person's intent was in relation to his subsequent conduct.

There are numerous other examples. See Hoffman & Zeffertt *South African Law of Evidence* 4 ed at pp 55-82.

## Expert evidence

In order for a person to give expert evidence his special expertise must first be established. His professional qualifications and experience must be established: *Makuni* HH-75-84. If the prosecutor intends to dispute the qualifications and expertise of an expert witness for the defence, the defence should ensure that its expert comes to court armed with documentary proof of his qualifications and expertise.

## Identification evidence

### *Visual identification of persons*

Human observation is very fallible and experience has shown that genuine errors can easily be made by witnesses who have identified culprits. In a number of cases in Britain and elsewhere it was later clearly established that the accused were wrongly convicted on the basis of mistaken identification evidence.

Whenever the State case depends wholly or mainly on evidence of visual identification, the courts are supposed to exercise special caution, especially if there is only a single witness who has made the visual identification. Even if the court decides that the witness is entirely honest and truthful in his testimony and he has asserted that he is completely certain that he has identified the correct person as the culprit, it must nonetheless ask itself whether there is a danger that the witness was mistaken: *Mutters & Anor* S-66-89 and *Makoni & Ors* S-67-89.

Defence counsel must particularly guard against the prosecutor asking leading questions in relation to identification. Defence counsel should be quick to object to any such questions.

Ordinary members of the public are not trained in accurate observation in the way policemen should be. The ability of different people to observe carefully and recollect later varies widely. Memories fade over time; accurate identification long after the event is difficult.

The defence lawyer who is cross-examining a State witness who is claiming that he saw the accused commit the crime must minutely probe the circumstances in which the identification was made. Questions which should be asked of the eye witness include these:

- For what amount of time did the witness have the accused under observation?
- What was the distance between the witness and the accused at the time of observation?
- What were the lighting conditions at the time?
- Were there were any objects in the way which would have prevented or obscured observation?
- Does the witness have good or poor eyesight? Does he wear glasses and did he have them on at the time?
- Did the witness see clearly the accused's face or only the rest of his body?
- Had the witness known the accused previously and, if he had, how well had he known him;
- If the accused has no distinctive facial or other features, how can the witness be certain of the identification?
- Whether the person identified belonged to a different ethnic group to the witness because if he did there may be doubt that the witness was able to distinguish accurately between different persons in that other ethnic group.

See *Mutters & Anor* S-66-89.

In *Nkomo & Anor* 1989 (3) ZLR 117 (S) it was stated that broadly speaking, good identification does not need corroboration or support, but poor identification does. Examples of good identification include cases where the witness has observed the accused over a lengthy period or many times or where the accused was well-known to the witness. The identification will be unreliable if, for instance, the witness caught only a fleeting glimpse of a person from a considerable distance in poor light. The identification in these circumstances would be dubious, whether or not the person was a person he had known previously. On the other hand, close range observation for a reasonable period of time in good lighting conditions where the witness clearly saw and carefully studied the person's facial features will be far more reliable, particularly if the person was well known to the witness or had some very distinctive features which made him easy to identify.

The bald assertion by the witness that he is certain that he has identified the right person should not be accepted at face value. The objective basis of his identification must be properly probed. Witnesses should be asked by what features they made their identification. The witness should be questioned as to the height, build, complexion and apparel of the person observed. Where the accused is undefended, the court should carefully examine the circumstances of the identification and test its reliability.

Identification is obviously stronger if several witnesses independently identify the accused.

In *Madziwa* S-191-90 it was pointed out that weak evidence of identification is not made any more reliable by the mere fact that appellant was in the vicinity at the time and lied about this fact, as even an innocent person can lie out a sense of panic.

To sum up, as identification evidence can be very unreliable, the defence lawyer must carefully probe the details of the identification and highlight all factors which would make the identification unreliable in the circumstances.

## *Identification in court*

In *Mutsinziri* 1997 (1) ZLR 6 (H) the court pointed out that a "dock identification", where a witness is asked whether the person in the dock is the offender, suffers from considerable disadvantages. Everything about the atmosphere of the court proceedings points to the accused, and to him alone, as the person who is to be identified by the witness. These circumstances are inevitable unless one insists that any dock identification take the form of an identity parade. The manner in which a dock identification is elicited from witnesses by the prosecutor can be done the right way or the wrong way. The wrong way is one which makes it virtually impossible for the witness to say anything other than that the accused is the culprit. This way constitutes an irregularity. The better way is to get the witness to recount all the events without reference to the accused in the dock, and only when the witness has said all he has to say about the events should he be asked whether any person in the court is recognised. This form of identification still carries the defective feature of a dock identification, that the accused is obviously the person who is suspected of committing the offence, but it avoids leading questions and putting the identification into the witness's mouth.

In the South African case of *Maradu* 1994 (2) SACR 410 (W) the court held that the danger of a dock identification is the same as that created by a leading question in examination-in-chief: it suggests the answer desired. As the latter type of question is inadmissible, there is no reason why a dock identification should also not be inadmissible, save in special circumstances. (The court found that the witness's dock identification of the appellant was unreliable for a number of reasons.)

## *Identification from photographs*

The police may sometimes ask a witness who saw the crime being committed to examine a set of photographs to see if the witness can pick out the culprit. The reliability of such an identification depends, firstly, upon whether the witness was able accurately to observe the face of the culprit at the time of the crime and to recall it accurately subsequently. Secondly, it depends upon whether the exercise to select the culprit from photographs was fairly conducted. The courts have said that for the identification process to be fair:

- The witness should be asked to look at a reasonable number of photographs and should not be shown only one photograph and asked whether this is the culprit;
- The names of the persons photographed should not be on the photographs and the photograph of a person whom the police already suspect should not be ringed or specially marked and that photograph should not be of an entirely different size from all the others;
- The police should allow the witness to make his own independent selection and should not prompt the witness in the direction of selecting one particular photograph;
- Only photographs of reasonable quality should be shown because there is an increased danger of wrong identification from poor quality photographs.
- The identification process will not, however, be vitiated simply because the witness sees a label on cover of the album indicating that the photographs in the album are of persons convicted of crimes similar to those for which the culprit is presently being sought.

The State may want to produce the album to show that the identification process was a fair one and that the witness was asked to go through a large number of photographs. Because of the way in which the album is labelled its production to the court may have the effect of revealing that the accused has at least one previous conviction for the crime. If this is the case it cannot be produced because this would be prejudicial to the accused. Defence counsel can ask to see the album in advance of the trial in order to decide whether to ask for its production during the trial.

If, however, the defence alleges that the process was unfairly conducted, then the State is at liberty to produce the album to prove the fairness of the process. See 1978 *Criminal Law Review* 343.

See *Nkomo & Anor* 1989 (3) ZLR 117(S).

The courts have said that if the police intend to proceed on the basis of identification evidence, it is best to hold an identification parade to see whether the witness will pick out the same person originally identified from photographs: *Nkomo* 1989(3) ZLR 117(S).

If no such identification parade was held the defence lawyer should ask why it was not held.

The State is supposed always to disclose if the witness previously identified the culprit from police photograph, because this will have a bearing on the reliability of the witness' subsequent identification of the culprit at a parade or in court: *Ndlovu* S-3-88.

In *Mutsinziri* 1997 (1) ZLR 6 (H) the court said that where identity is in issue and X is identified by means of a photograph of him in the possession of the police, it is not inevitable in all cases that the witness would thereby conclude that X is known to the police and has a known or suspected criminal record. The police may come by photographs of the suspect in perfectly innocent circumstances and it is not necessarily harmful to X, where a policeman does no more than say that he was able to identify the accused from a photograph or to say that he tried to locate X by distributing photographs.

*Summary*
The reliability of evidence of identification from photographs can be attacked either on the basis that the witness' identification is unreliable or on the basis that the photographic identification exercise was unfairly conducted.

## *Identity parades*

To produce reliable evidence an identification parade must be carried out fairly. They must be carefully carried out to obviate errors. These are the basic requirements for a fair parade:

- It must be conducted by an officer who has had nothing to do with the investigations into the case;
- The officer conducting the parade should not call the witness to the parade;
- A sufficient number of persons, say ten, should form the parade;
- The persons on the parade must be approximately the same build, height and complexion and they should all wear clothing similar to one another's and, preferably, similar to that worn when the crime was committed;
- The accused must be allowed to choose his own position at the parade and must not be forced by the police to stand in a particular place;
- The witness must not have been allowed to see the prisoner and have been told he is the suspect between the time of the arrest and the time of the parade;
- The witness must be kept some place where he cannot see the prisoner being guarded by police officers or the parade being assembled.
- The witness should not be told that the suspect is on the parade but should only be asked if the person he saw commit that crime is on the parade;
- The witness must be left to pick out the person he saw commit the crime, if he can, without out any form of assistance or prompting;
- The police should not attempt to point out or suggest someone either before or during the parade. Especially where the suspect is a person who had previous convictions, the police must not show the witness a photograph of the suspect before the witness is called upon to see if he can pick the suspect out from the identity parade. (It is a worthwhile safeguard for the defence lawyer to ask the witness under cross examination whether he was shown any photographs before he attended the identity parade);
- If there is more than one witness, the witnesses who have already made their identification should not be allowed to confer with those who have not. They must not be returned to the same room.

See *Ndhlovu & Ors* 1985 (2) ZLR 261 (S).

It is also important that the identification parade be held as soon after the commission of the crime as possible to avoid memory impairment occurring with the passage of time: *Mavunga* 1982 (1) ZLR 63 (S).

*Summary*

The defence lawyer should probe the reliability of the evidence derived from identification of a suspect at an identification parade. He should find out about how the parade was conducted.

## *Fingerprints and handprints*

Where the State case rests exclusively or substantially on evidence that the prints found at the scene of the crime matched those taken from the accused, an expert must testify as to the basis upon which he reached his conclusion that the prints belonged to one and the same person.

In *Mutsinziri* 1997 (1) ZLR 6 (H) the court said that where fingerprint evidence is given by an expert, the court ought not insist on its own ability to make a fingerprint identification by study of a comparison chart between the latent print (that found at the scene) and the inked print (that recorded from the suspect). Nevertheless, the court is still faced with a decision as to whether or not to accept the expert's evidence when he purports to find sufficient points of identity between the latent and the inked print. The court must take into account the witness's experience and the apparent weight and reliability of his opinion. The court may, if it considers it necessary, insist on a study of the comparison chart; and where the court is in a position to make its own examination of the comparison, it may, to the extent which it considers proper, attempt of its own accord to confirm the validity of the expert's opinion. In an appropriate case it may depart from the expert's opinion, if it is unable to find on the chart the points of similarity which so impressed the expert.

## *Footprints and shoeprints*

When dealing with the issue of identification, it is permissible for the court to rely on evidence relating to bare footprints (spoor, as opposed to footprints taken by the police). However, a number of precautions have to be observed before such evidence can be accepted. It is certainly not enough for a witness to make a bald assertion that the footprints were those of the accused, even if he says he had lived together with the accused in the same area for some time and he knew those prints well. The witness must be asked by what characteristics or peculiarities, marks or indications he recognised the footprints as being those of the accused. The ability to give a precise and detailed description and point to features of unique distinction will point in the direction of reliable identification.

In cases in which the identity of the footprints of the suspect forms a vital part of the State case, the police should, wherever possible, take a cast or other impression of the footprint at the scene of the crime and a comparative footprint from the accused. These should then be produced in court as exhibits so that comparisons can be made.

In respect of bare footprints, an expert in handprints may also have the expertise to conduct an expert comparison between the two sets of footprints.

Reliance on shoeprints is obviously fraught with considerable danger, especially where the shoeprint is from a type of footwear which is in widespread use: *Mavunga* 1982 (1) ZLR 63 (S).

## *Tyre marks and tool marks*

Casts and photographic evidence should be produced and a scientific expert must testify as to the common features.

### *Voice identification*

There is obviously substantial risk of error if identification is made on the basis of testimony that the voice of the suspect is the same as that of the culprit. This sort of evidence would need to be probed extremely carefully. The court should approach it in the same sort of way as it does visual identification evidence. Questions such as the following must be put to the witness:

- What was there about the voice heard which made the witness sure that it was a particular person's voice?
- Did the voice have a timbre or quality that set it apart from the voice of others and, if so, what was this quality?
- Was the speaker speaking with a distinctive accent or did he have some sort of speech impediment?
- Were the words spoken when the crime was committed spoken in a soft or loud voice and for how long did the culprit speak?
- How good is the witness's hearing?
- Were there other background noises at the time which would have made it difficult to hear the voice properly?
- Did the witness know the accused previously and was he familiar with his voice?
- In what language were the words spoken?

See *Chitake* 1966 RLR 251 (A); 1966 (2) SA 690 (RA).

### *Matching of blood, DNA, bodily secretions and hair fibres*

Expert medical and scientific evidence is obviously required and non-expert evidence should not be accepted.

In *Jesse v AG & Ors* 1994 (2) ZLR 416 (H) the court pointed out that blood samples are valuable aids to criminal investigation. However, in terms of s 45(3) of CPEA the process of extracting a blood sample can only be instituted by the submission, by a police officer of or above the rank of superintendent, of a written request to a medical practitioner. The test had to be performed by a medical practitioner; the police were expressly excluded from doing so. The suspect has the right to be informed of who was to take the sample, where and when it was to be done and the purpose for which it was required. Where the taking of a blood sample is lawful, then reasonable force could be used to obtain it. The police can thus use reasonable force to compel a suspect to submit to the taking. Only the officials mentioned in s 45(3) are authorised to take blood sample, although they could delegate their duties to other persons. The accused cannot insist that other persons take the sample.

### *Identification of property*

When assessing the reliability of a person's identification of property, the court does not look at each feature or point of identification in isolation but has regard to the cumulative effect of the various features by which the person has identified the property: *Nyamaro & Anor* 1987 (2) ZLR 222 (S).

## Handwriting evidence

There is provision for handwriting evidence to be given in terms of s 246 CPE. A non-expert may identify handwriting familiar to him, but when two samples of handwriting are not known to the witness, an expert must give evidence. The expert usually called to give evidence is the Questioned Documents Examiner of the Police Forensic Science Laboratory. The expert will testify as to the results of the comparison between the handwriting on the questioned document and that of the accused.

It is desirable that the handwriting expert should produce photographs supporting his evidence to show points of similarity between the accused's handwriting and the handwriting on the questioned document. The expert should point out the similarities and their significance.

The vital question is whether the similarities are so strong as to exclude any reasonable possibility that the questioned handwriting is that of any one other than the accused.

It is the duty of the court to satisfy itself that the handwritings are those of the same person, the accused. In doing this, the court is entitled to take account of its own observations regarding the similarities and dissimilarities between the handwritings.

See *Chidota* 1966 RLR 178 (A), *Chibi v Minister of Internal Affairs (GD)* 1970 (1) RLR 88, *Mayhele* 1968 (1) RLR 133 (A), *Sibanda (2)* 1963 R & N 601 (SR). See also "Questioned Documents Examiners Evidence in Court" by E. Dzvairo in 1988 Vol 1 No 1 *Legal Forum* 16; Hoffman & Zeffertt *South African Law of Evidence* 4 ed pp 104-106.

### Ballistics and tool marks

In 1987 Vol 1 No 3 *Prosecutors Bulletin* 12 there is a useful article by Chief Inspector Haley of the Police Forensic Firearms Identification Office entitled "Ballistics Evidence in Court". This article deals with the procedure for obtaining a ballistics report and also with the problems encountered when presenting ballistics evidence in a criminal case. The evidence is led to establish that only a particular weapon could have fired a bullet or that only a particular tool could have made the marks found at the scene of a crime. The reliability of such evidence has not been conclusively accepted by our courts. See *Nyamayaro* 1967 RLR 228(A); 1967(4) SA 263 (RA). See also Hoffman & Zeffertt *South African Law of Evidence* p 109.

## Circumstantial evidence

In the Commonwealth Magistrates Book this advice is to be found on circumstantial evidence:

> Means, motive and opportunity are all examples of what is called circumstantial evidence. Where direct evidence of a particular act or state of affairs is not available, one may, and indeed must, have resort to indirect means of establishing the facts... Since the direct evidence of a witness is open to all the weaknesses of observation and recollection, ... evidence of a circumstantial kind may be less contestable and more easily relied on. To show that a defendant had the means, a motive and the opportunity may go some way towards convincing us of his guilt. It may raise a *prima facie* case against him which he is called upon to answer.

Where the conviction of an accused depends upon circumstantial evidence and the drawing of inferences from all the established facts, then the inference sought to be drawn must be consistent with all the proved facts and the facts should be such that they exclude every reasonable inference from them, save the one sought to be drawn: *Blom* 1939 AD 288; *Edwards* 1949 SR 30; *Marange & Ors* 1991 (1) ZLR 244 (S).

A person can be convicted of murder even if no body is found, on the basis of circumstantial evidence if that evidence is consistent with no other reasonable inference than that the victim is dead and was murdered by the accused. See *Shonhiwa* 1987 (1) ZLR 215 (S) and *Masawi & Anor* 1996 (2) ZLR 472 (S).

## Hearsay evidence

Hearsay evidence is testimony not of what the witness himself saw, heard or otherwise observed, but what he heard others say about the matter under investigation. The general rule is that hearsay evidence is not admissible to prove the truth of the matters stated. The reason for this is it is not the best evidence, in that the actual observer is not giving the evidence and therefore the credibility of his evidence cannot be tested by cross-examination. There is also the risk that a second hand report of what the actual observer said may be garbled or inaccurate.

There are many exceptions to the rule against hearsay and the relevant textbooks should be consulted if there is a dispute as to whether the case falls within a particular exception. Exceptions include statements made in the course of duty, dying declarations and statements made in the presence of accused. As regards statements made in the course of duty this is provided for in s 253 CPEA. The provision applies where the person who made the statement is dead or unfit to give evidence due to bodily injury or mental condition or he cannot, with reasonable diligence, be identified or found or brought to court and the person made the statement in the ordinary course of duty, contemporaneously with the facts stated and without motive to misrepresent.

See Hoffman & Zeffertt *South African Law of Evidence* 4th ed pp 623-649, "Hearsay Evidence in Outline" by W.A. Hope in 1961 R & N LJ 130.

## Drawing adverse inferences from accused's silence

### *Adverse inferences*

In terms of the Criminal Procedure and Evidence Act the court may draw certain adverse inferences from the accused's silence at different stages. On the basis of such inferences, the accused's silence may be treated as evidence corroborating any other evidence given against the accused.

### *Confirmation proceedings*

Adverse inferences can be draw at the trial if, at proceedings to confirm a statement allegedly made by the accused to the police, the accused remains silent and does not mention any fact which, in the circumstances, he could reasonably have been expected to have mentioned. If at his trial he challenges the statement on the basis that he did not in fact make it or he did not make it freely and voluntarily, the court may draw adverse inferences from his earlier failure to mention the facts: s 115 CPEA.

### *Defence outline*

Adverse inferences can be drawn if the accused pleads not guilty (or the magistrate enters a plea of not guilty because the accused refuses to plead) and, upon being called upon to give his defence outline, he fails to mention any fact relevant to his defence which, in the circumstances existing at the time, he could reasonably have been expected to have mentioned. Such adverse inferences can be drawn by the court from this earlier failure to mention these facts when it determines his guilt for the offence charged or any other crime which he may be convicted of on that charge: s 189(2) CPEA.

### *Giving evidence*

If the accused gives evidence in his defence and refuses to answer any questions put to him without any just cause for his refusal (such as on the grounds of privilege), adverse inferences may be drawn by the court from his failure to answer the questions: s 199 CPEA.

### *Questions put by prosecutor or court*

Even if the accused has declined to give evidence in his defence, he can be questioned by the prosecutor or the court. If, without just cause, he refuses to answer such questions adverse inferences may be drawn by the court from the failure to answer the questions: s 199 CPEA.

Note that in no case does the court *have* to draw an adverse inference. The accused's failure to mention particular facts may be quite explicable.

## Previous inconsistent statements by State witnesses

### *Hostile witness*

A State witness may have made a statement to the police which was against the accused. However, when the case gets to court, because of his relationship to the accused or for some other reason, he may depart from his statement and give evidence favourable to the accused and become a hostile witness against the State case. A defence witness may also become hostile in this fashion.

### *Impeachment of witness*

When a witness has become hostile the party calling the witness has the option to apply to impeach this witness in terms of s 316 CPEA. The object of impeachment is not to persuade the judicial officer to accept the evidence he gave in the original statement, but to destroy his reliability as a witness for either side. To have one's own witness impeached by the court the correct procedure is as follows:

- The party calling the witness must first produce the previous apparently conflicting statement from the witness and the prosecutor should give the witness sufficient particulars of the statement to identify the occasion on which it was allegedly made.
- The witness must then be asked whether he made the alleged statement. If the statement is signed, he may be asked to admit to the signature.
- If the witness admits to having made the statement on the specified occasion, the statement should be put to him and he should be asked to admit or deny using the words alleged.
- If the witness denies using the words alleged, the party calling the witness may apply to adjourn the case so that he can call witnesses to prove that the statement was made by this witness.(Where the statement has been interpreted, the interpreter must be called.)
- If the witness admits using the words alleged, the statement may be used without further proof.

The witness must then be asked to explain the discrepancies between the statement on the occasion specified and his present testimony and what the truth of the matter really is.

See *Muhlaba & Ors* 1973 (1) RLR 178, *Chari* 1989(1) ZLR 231(S), C. Goredema "Procedural aspects relating to the impeachment of witnesses" 1989 Vol 1 No 6 *Legal Forum* 8 and *The Prosecutor's Handbook* pp 93-95.

The witness' explanation of the apparent conflict may be entirely acceptable. If it is not, it may be appropriate to impeach him in terms of s 316 CPEA. In *Chari* 1989 (1) ZLR 231 (S), after a State witness had given evidence inconsistent with a previous sworn statement, the prosecutor had produced his statement as an exhibit. Without further ado the magistrate summarily dismissed the witness and excused him from further attendance. The Supreme Court held this amounted to a gross irregularity. The prosecution should have laid a proper foundation for the impeachment and the defence should have had an opportunity to cross-examine the witness.

If the party calling a witness applies to have the witness declared hostile and the magistrate declares him to be adverse, the party can then proceed to cross-examine the witness. It is an irregularity for the party calling the witness to be permitted to cross-examine his own witness before the court has declared the witness to be hostile. Before the witness has been declared hostile the party may not go

beyond putting the discrepancies and eliciting an explanation from the witness; he may not proceed with full blooded cross-examination of the witness.

Although the object of cross-examination of his own witness by the prosecutor may be to discredit all aspects of his testimony, the witness may say some things under cross-examination which in fact implicate the accused. As seen below, the State can then seek to rely on those portions of the testimony of this hostile witness which assist the State case.

### *Reliance on portion of evidence of impeached witness*

Where a witness has been impeached after departing from his statement to the police and it is obvious that the witness is favourably inclined towards the accused, it is permissible to accept and rely on that part of his evidence that tends to incriminate the accused: *Miller* 1971 RLR 159 (A) and *Mpofu and Anor* S-150-89. In *Miller* at 160 it is stated that "it is quite illogical to say that, because the witness is trying to help the accused to the utmost extent, he must not be believed when he gives evidence which does not help the accused, but which tends to incriminate him... There is no ground in law... for rejecting out of hand those portions of evidence... which implicate him."

### *Inconsistent statements at another trial*

In *Mutters & Anor* S-66-89 defence counsel had been allowed to put to State witnesses previous inconsistent statements they were alleged to have made in a previous trial. However, the magistrate had refused to admit as evidence the record of the previous trial. The Supreme Court held that by refusing to admit the record as evidence, the magistrate had precluded the defence from proving inconsistencies in the testimony of the witnesses, and had disabled himself from adjudicating on their credibility. The record was perfectly admissible and should have been admitted in evidence.

**Summary**

If a witness makes a statement which is apparently inconsistent with a previous statement made during investigations before trial, the party calling the witness may ask his witness if he made the previous statement and whether he had any explanation for the inconsistency.
The party calling a witness can only cross-examine its own witness if the court has on application first declared him to be hostile.

The entire testimony of an impeached witness does not have to be disregarded. The State may ask the court to take into account portions of the testimony which are prejudicial to the accused.

## Previous consistent statements to police

A statement made by a State witness in a criminal case to the police, whether as an affidavit or otherwise, is not normally admissible in evidence unless he departs from it in a material respect and is impeached. A witness, as a rule, is not permitted to confirm or strengthen his evidence by testifying that he had made a similar statement on a previous occasion.

There are, however some exceptions to this rule.

- If the accused puts to the witness under cross-examination that his story is a recent fabrication, the witness' previous statement becomes admissible in order to show that he had made a previous consistent statement at a time sufficiently early to be inconsistent with the suggestion that the present account was a recent invention.
- Complaints in sexual cases are admissible to show consistency and to negative a defence of consent, but not to prove its content or to corroborate the evidence of the complainant;

- Other previous statements which are admissible are statements forming part of the *res gestae*, statements relating to previous identification, to show consistency in the identification and previous statements by accused persons .

(The *res gestae* consists of the facts constituting and immediately accompanying the matter which is in issue. It includes facts leading up to, explaining and following continuously from the facts in issue. Thus evidence by a hearer of what the victim shouted when assaulted is admissible as part of the *res gestae*.)

## Incompetent witnesses

Certain witnesses are not competent to give evidence according to the rules of evidence. For example, under s 246 CPE, "no person appearing or proved to be afflicted with a mental disorder or defect or labouring under any imbecility of mind arising from intoxication or otherwise, shall be competent to give evidence while under the influence of any such malady or disability".

Where an allegation that a witness is mentally disordered is made during a criminal trial and the witness appears to be mentally disordered, the court must properly investigate whether the witness is incompetent in terms of this provision.

In *Ndiweni* S-149-89 the court failed to probe an assertion by the defence that a State witness was labouring under some mental disorder. The State did not challenge this assertion. The appeal court said that this was an irregularity.

## Pre-conviction disclosure of previous convictions of accused and evidence of bad character

Normally it is totally impermissible for the State to prove the previous convictions of the accused before he has been convicted of the offence with which he is being charged. The prosecutor may not refer to the previous convictions of the accused prior to the accused being found guilty of the charge. Nor may the prosecutor ask the accused when he is testifying whether he has previous convictions: s 324 CPEA. The reason for this is obvious. The judicial officer should be solely concerned with whether the accused has committed the present offence. If he knows that the accused has a string of previous convictions, this might mean that the judicial officer will be biased against him and will find him guilty on the basis of his previous criminal tendencies rather than because his guilt on the current offence has been proved beyond reasonable doubt. For this reason, if the previous convictions are disclosed before the accused has been found guilty, this will constitute a gross irregularity which will lead to the proceedings being set aside.

It is also impermissible for the State to refer to the fact that the accused has been charged with a criminal offence on a previous occasion and was acquitted on a technicality.

There are, however, some exceptions to this general rule that evidence of previous convictions must not be introduced before the accused has been convicted. These are:

### *Where accused charged with receiving stolen property.*

If the accused is charged with this offence, in terms of ss 305 and 307 CPEA the State is permitted at any time during the trial to lead evidence that the person was found in possession of stolen property within the period of twelve months preceding the time when the person was first charged with the current offence or and evidence that within the preceding five years he has been convicted of an offence involving fraud or dishonesty. The accused must be given three days written notice before such evidence is introduced.

This evidence can then be taken into account by the court by the court in deciding whether or not the accused knew that the property he had in possession on the present occasion was in fact stolen.

### *Evidence of bad character*

Although evidence of previous convictions or bad character of the accused may not normally be introduced before conviction, in terms of s 290 CPEA such evidence can be introduced before conviction if

- the accused has given evidence of his own good character or he or his lawyer has asked a witness questions to try to establish his good character;
- aspersions are cast upon the character of the prosecutor or State witnesses by the defence;
- The accused has given evidence against another person charged with the same offence.

In *Jesse v Pratt & Anor* 2001 (1) ZLR 48 (H) it was held that the magistrate had permitted a serious irregularity to take place, the adduction of evidence of the X's bad character, even though X's cross-examination of the complainant had not even exposed himself to cross-examination as to his character. Although s 290 CPEA allows the accused to be cross-examined as to his character, the scope of the section is limited. X must have some latitude to examine on credibility without exposing himself to the extremely damaging prospect of being examined on his character. He should only be vulnerable to such an attack where he has attacked the credibility of a State witness, by attempting to impeach character, on an issue not being an essential element of the charge or offence, and to a degree not adjudged warranted, and where the court in its discretion permits such an attack upon the accused.

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# SECTION 7 – CRIMINAL LAW CODE

The Criminal Law (Codification and Reform) Act brings together in one single statute all the major aspects of the Criminal Law. It codifies all the major aspects of the common law Criminal Law and incorporates many of the offences that were previously contained in various statutes. It does not, however, codify statutory offences that are integral to the statutes in which they are contained such as the offences in the Road Traffic Act.

The Code however does not simply incorporate the existing law; it also effects many changes which are intended to improve and reform the existing law.

The Code also codifies the various defences that can be raised to criminal liability. From the standpoint of criminal defence lawyers, these provisions are of major importance.

It should be noted that although the Code does not eliminate case law precedents. Zimbabwean case law remains relevant in relation to offences and defences that have simply been incorporated into the Code without change. South African case law remains persuasive authority.

Defence lawyers need to familiarise themselves with this Code. In this regard they should refer to the Feltoe Commentary on the Code published by the Legal Resources Foundation.

Some of the important changes to the existing law are these:

**Culpable homicide** (s 49)

This crime has been extended to cover situations where there is 'conscious negligence'

**Inciting or assisting suicide** (s 50)

A new crime has been created which consists of inciting another to commit suicide or assisting a person to commit suicide.

**Rape** (s 65)

The crime has been extended to cover a situation where a male has non-consensual anal intercourse with a female.

**Aggravated indecent assault** (s 66)

This new crime covers cases where a male or female commits an indecent assault involving non-consensual penetration with indecent intent.

**Sodomy** (s 73)

This crime now includes acts of physical contact between males that would be regarded by a reasonable person as an indecent act.

**Incest** (s 75)

The crime now incorporates customary law notions of incest.

**Assault** (s 89)

There is no longer a distinction between common assault and assault with intent to do grievous bodily harm with seriousness only affecting sentence. Administration of noxious substances is now treated as a species of assault.

**Negligent assault** (s 90)

This new crime covers situations were harm has been negligently inflicted.

**Pledging a female person** (s 94)

This crime now prohibits the customary practice of handing over a female person to settle a debt.

**Witchcraft and witch finding** (ss 97 162)

The Code recognises the distinction between witchcraft and witch finding. Witch finding is only criminalised in certain circumstances where this practice socially disruptive or result in an injustice.

**Unauthorised borrowing** (s 116)

This new crime outlaws the borrowing or use of someone's property without their authorisation.

**Making off without payment** (s 117)

This new crime covers situations where services rather than goods are stolen. It also covers situations were there has been consumption of goods but payment has been refused.

**Computer related crimes** (ss 162 – 168)

A whole range of ‘cyber-crimes’ has been created.

**Threatening to commit specified crimes** (s 184)

This covers the new crime of threatening to commit a serious crime, such as threatening to murder or rape

**Malicious damage to property** (s 140)

The common law crimes of arson and malicious injury to property have been merged.

**Unlawful entry into premises** (s 131 )

This crime reformulates this crime to do away with the artificial requirements of this offence.

There are a number of other new crimes:

Corruptly concealing from principal a personal interest in a transaction (s 173)

Obstructing a Public official (s 178)

Impersonating a police officer, peace officer or public official (s 179)

Deliberately supplying false information to a public authority (s 180)

Negligently causing serious damage to property (s 141)

Some crimes have been merged into other crimes or are now charged as other crimes:

The crimes of theft by false pretences and uttering are now simply treated as species of fraud.

Subornation of perjury is now treated as incitement to perjury or, if the perjury is committed as a result of the incitement, then the person who incited is charged as an accomplice to perjury. (Fifth Schedule)

Commenting upon a pending court case is now charged as defeating or obstructing the course of justice and no longer is charged as contempt of court. (s184(1))

The Code in drastically changes the common law by providing that theft or stock theft continues to be committed regardless of whether the thief has lost possession of the stolen property (s121).

Section 189 extends circumstances upon which an attempt could be said to occur. The accused is now guilty of an attempt if he/she does or omits to do anything intending to commit the crime (or realising that there is a real risk that the crime may be committed) with the proviso that what the xaccused has done or omitted to do can be said to have reached at least the commencement of the execution of the crime.

As relates participation or assistance, every joint or co-perpetrator is liable as if he/she was the actual perpetrator.

Another important development is highlighted in s 54(2). The High Court now has the power to order the removal of a person from a life support system. This species of euthanasia is now part of our law.

As regards defences, the one major change is to the defence of voluntary intoxications. Previously voluntary intoxication could be a partial defence having the effect of reducing the crime charged with to a lesser one e.g. murder to culpable homicide. There has now been created a new strict liability crime of 'Voluntary Intoxication leading to unlawful conduct'. This allows the court to find an accused guilty of this crime instead of the one originally charged and sentence the accused to the same punishment to which the accused would have been liable if he/she had been found guilty of the crime originally charged and intoxication had been assessed as a mitigatory circumstance (s 222)

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# SECTION 8 – VERDICT

## Verdicts

The court will acquit X if it decides that he or she is not guilty.

If X is charged in the alternative, the court may acquit X on the main charge but find X guilty on the alternate charge. Where alternative charges have been brought against an accused and the evidence establishes that the two or more alternative charges have been committed, the judicial is at liberty to convict the accused of the most appropriate charge, which will usually be the most serious charge levelled against him: *Mtandwa* HH-233-87.

The court may also acquit X of the crime charged but find him or her guilty of a crime that is a competent verdict in the crime originally charged. Thus for instance it could acquit a person charged with murder but find him or her guilty instead of culpable homicide.

If the court finds that X was mentally disordered at the time he or she committed the act that led to the charge so as not to be responsible at law for his or her actions, the court will return the special verdict that X is not guilty by reason of insanity. In special verdict under Mental Health Act [*Chapter 15:12*]

A person suffering from temporary psychotic episode at the time of offence is entitled to a special verdict and, if no longer mentally disordered, to be released. In *Machona* HH-14-02 the medical evidence was that X, who was charged with attempted murder, had suffered a brief "reactive psychosis" or "psychotic episode" which was unlikely to recur. It was held that the appellant was mentally disordered at the time and should have been found not guilty by reason of insanity. Because he was no longer mentally disordered, he was entitled to be released from custody.

## Competent verdicts

Criminal Law (Codification and Reform) Act Chapter XV deals with the issue of permissible verdicts (i.e. competent verdicts).

A person charged with a crime may be found guilty if the facts proved establish this of —

- threatening, inciting, conspiring to commit or attempting to commit that crime or any other crime of which the person might be convicted on the charge; or
- assisting a perpetrator of that crime or of any other crime of which the person might be convicted on the charge.
  [s 273]

If X is found not guilty of the crime charged, and the essential elements of the crime charged include the essential elements of some other crime, X may be found guilty of such other crime, if such are the facts proved. [s 274]

A person charged with an offence listed in the first column of the Fourth Schedule can be found guilty of any of the offences listed alongside that crime in the second column in the Fourth Schedule. [s 275]

A person charged with threatening, inciting, conspiring or assisting the perpetrator to commit an offence listed in the first column of the Fourth Schedule can be found guilty of any of the offences listed alongside that crime in the second column in the Fourth Schedule. [s 275]

276 Sentence imposable where person found guilty on competent verdict
Where a person charged with a crime is found guilty of another crime in terms of this Chapter, the sentence imposed upon that person shall not exceed the maximum sentence applicable to the crime of which he or she is convicted.

Section 207 CPEA provides that where a court finds that part but not all of the facts of an offence charged have been proved, it shall nevertheless convict the accused of that offence if the facts that are proved disclose all the essential elements of that offence.

## Conviction of other charge without amendment of charge

A court cannot convict a person of a charge other than that with which she was charged without the charge first being amended. In *Moyo* 1994 (2) ZLR 24 (H) X had been charged with contravening s 2 of the Concealment of Birth Act. She was, however, convicted of infanticide without the charge being amended. The court ruled that the magistrate had misdirected himself. There was no evidence that the accused had killed the child. The accused should have been convicted of the crime with which she had been charged.

## Failure to give reasons for judgment

Unless reasons are given for a judgment it is impossible to determine how the ultimate conclusion was reached and whether it was reached on a proper reasoned basis. Merely to state a conclusion, without giving reasons, creates the impression that the decision was an arbitrary one; it could have been reached on the basis of caprice or whim. By giving reasons the magistrate shows that his decision is a reasoned one. He gives proof that he has taken into account the evidence and arguments on both sides: *Makombe & Ors* HH-120-86.

Thus it has been repeatedly laid down that judgments must be reasoned and that the reasons for reaching the conclusion on verdict must be stated.

However, in the magistrates court, the Magistrates Court (Criminal) Rules RGN 871 of 1966 simply provide that "where appropriate" the magistrate presiding at the trial shall deliver a judgment giving reasons for conviction and stating shortly any special features which he has taken into account in assessing sentence. (Rule 1 of Order IV). It is further provided in Rule 2 of Order IV that where the sentence imposed exceeds twelve months' imprisonment with hard labour, with or without the option of a fine, the judgment must be reduced to writing and shall become part of the record.

Without reasons for judgment it is impossible to decide on appeal whether the accused was properly convicted. In two appeal cases the Supreme Court stressed the need for reasons to be given. In *Makawa & Anor* 1991 (1) ZLR 142 (S) it stated that the trial magistrate must record what he considered and give reasons for his decision otherwise there will be a gross irregularity. In *Marevesa*

S-108-91 it said that the judgment must contain a brief summary of the facts found proved and the trial court's appraisal of the credibility of each witness, stating what evidence was accepted or rejected and giving its reasons for its decision. In both these cases the Supreme Court stated that if the judgment is inadequate, the appeal may have to be allowed as it may not be possible from that record for the appeal court to be satisfied that the convictions were warranted.

In the absence of reasons the review court will have difficulty in deciding whether the proceedings were in accordance with substantial justice. The absence of reasons will be an irregularity. However, it may not be a fatal irregularity and a conviction may still be upheld on review if the evidence on the record supports it: *Rusero* HH-151-86.

A full and comprehensive judgment will be more than just a recitation of the State and defence cases. It will include findings of fact, with comments on the credibility and demeanour of witnesses. It will include an analysis of the evidence and will deal with the probabilities. This will then lead up to the finding of whether the guilt of the accused was proved beyond reasonable doubt.

## Public announcement of judgment

In terms of s 334(1) CPEA all judgments in criminal proceedings against persons aged 18 or above shall be pronounced in open court.

## Alteration of judgment

Section 201(2) CPEA provides that if by mistake a wrong judgment was delivered, the judgment may be altered before or **immediately after** it is recorded. Not every mistake can be corrected under this provision. There must have been a genuine mistake in delivering the judgment, either in the sense that the magistrate said something different from what he intended to say or that he did something in his judgment which was legally incompetent. For example, a judgment may be corrected if the magistrate intended to acquit the accused and by mistake gave a judgment convicting him. It would seem that ambiguous and obscure aspects of a judgment may be clarified immediately after the judgment is recorded: *Sikumbuzo* 1967 (4) SA 602 (RA).

In *Masundulwane* HB-22-06 where in passing sentence on a charge of theft, a magistrate sentenced the accused to one month's imprisonment, wholly suspended on appropriate conditions, plus a fine or in default a period of imprisonment. After sentence was passed the accused asked to magistrate to consider community service because he could not afford the fine, whereupon the magistrate purported to "convert" the fine to a period of community service. This he did by amending the sentence to delete the fine and impose a further 30 days' imprisonment suspended on condition that the accused undertake community service. It was held that the trial court does not have authority to pass two sentences for one offence. Section 358(2) of the Criminal Procedure and Evidence Act does not enable the trial court to impose two sentences for one offence. The sentence for the offence remains one, which is either wholly or partially suspended on appropriate conditions. A magistrate is not entitled to alter either his verdict or his sentence after is has been pronounced. The only exception is provided for in s 201(2) of the Criminal Procedure and Evidence Act, which allows the court to amend a wrong verdict or sentence delivered "by mistake". That implies a misunderstanding or an inadvertency resulting in an order not intended, or a wrong calculation. A verdict or sentence, however, much open to criticism, cannot be altered if it was deliberately given or imposed. The correction must be done immediately on the same day preferably before the magistrate leaves the bench. *In casu*, the sentence was not delivered by mistake: it was deliberately imposed.

## Change of plea after verdict but before sentence

Where an accused applies to withdraw a plea of guilty after he has been convicted but before sentence is passed there is no longer a presumption of innocence. The onus is on the accused to show on a balance of probabilities that his plea was not made knowingly, voluntarily, or correctly. In some cases it may be possible to discharge this onus if the accused's legal representative makes a statement from the bar. In other cases, *viva voce* evidence by or on behalf of the accused may be necessary. In such cases the judicial officer should conduct the "trial within a trial" procedure, giving the accused and the State the opportunity to adduce evidence. Where an application is made to change the plea to not guilty because the accused now claims innocence, it is permissible for the court to have regard to his statements in order to decide his guilt or innocence: *Haruperi* 1984 (1) ZLR 258 (H).

Where the accused seeks to withdraw his plea at this stage, the court has the discretion to allow the withdrawal of the plea. This discretion will be exercised very sparingly and only in clear cases.

Sometimes a defence lawyer may have been engaged to represent the accused where he has already pleaded guilty and been found guilty but where sentence has not yet been delivered. In some of these cases the accused may wish to change his plea because the accused alleges that the police forced him to plead guilty because of threats or induced him to plead guilty by falsely informing that he would receive only a light fine if he pleaded guilty. In such cases the lawyer will have to apply for the plea of guilty to be changed to one of not guilty and, if the application is successful, the case would have to start again and the State would be put to the proof of its case. In *Jackson* HH-201-02 X, together with a colleague, stole a car in Chinhoyi. While driving it away, the accused lost control. His companion was killed; the vehicle was badly damaged. At his trial in a regional magistrates court, X pleaded guilty and was convicted. The matter was referred to the High Court for sentence. Before the hearing, X's legal representative indicated that X wished to change his plea to one of not guilty. The reason given was threats by the police. The question was whether the High Court could remit the matter to the lower court for X to change his plea. It was held that the application to change the plea should be directed to the trial court. Although there is no onus on X – all he must do is offer a reasonable explanation for having pleaded guilty – less is required of him when he applies to the High Court for remittal to change his plea. All he must show is that he has an explanation which *prima facie* shows that he has a reasonable explanation for a change of plea to give to the trial court.

## Subsequent facts establishing innocence

Occasionally, after the accused has been convicted but before sentence is imposed, evidence comes to light which proves conclusively that he did not commit the offence, such as that he was in prison when the offence was committed. The magistrate may discover a superior court decision which reveals conclusively that he misconstrued the law and wrongly convicted the accused. In such a situation the proceedings may be sent for review to the High Court before the case is completed, for it is clearly undesirable that an accused should be sentenced if inevitably the conviction will later be quashed.

If after sentencing the accused facts come to the attention of the magistrate which indicate that the accused did not commit the offence and the case has not yet been reviewed, the magistrate should ensure that the case is immediately reviewed by a judge and that the judge is apprised of these new facts. If it has already been reviewed and the proceedings have been confirmed, the new facts should immediately be brought to the attention of the High Court in order for the confirmation certificate to be withdrawn and the conviction to be quashed.

## Retrieval of bail after acquittal

If the accused is acquitted, he is entitled to recover the bail which he paid to ensure that he stood trial on that charge.

## Retrieval of bail after acquittal

The Attorney General may not use review proceedings to have an acquittal set aside. The correct procedure according to *Bassopo & Anor*1993 (2) ZLR 374 (H) is for formal proceedings to be instituted and due notice thereof is given to the accused who were acquitted. For the court to consider this matter without notice to the accused would be to breach the fundamental principles of natural justice. Where an accused is acquitted at the close of the state case, s 188(3a) of the Criminal Procedure and Evidence Act allows the Attorney-General to appeal from a decision to acquit at the end of the State case, but that right is limited to seeking an authoritative pronouncement from the Supreme Court on a point of law, without in any way affecting finality of the lower court's judgment. A similar right is provided by s 69(a) of the Magistrates Court Act and s 44(6) of the High Court of Zimbabwe Act, but this right does not cover verdicts given at the close of the State case and is also limited to appeals on points of law without affecting the finality of the judgment. See *Attorney-General v Howman* 1988 (2) ZLR 402 (S)

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# SECTION 9 – SENTENCE

## General factors

Defence counsel should obviously be aware of the sort of factors that the court will take into account when determining sentence. These have been set out in a number of cases. For instance, *Moyo & Ors* HB-114-06 the judge stated that the sentence imposed on an accused should be shaped and determined by the following factors amongst others:

- the degree of premeditation by the offender;
- the circumstances surrounding the conviction of the accused;
- the gravity of the crime committed, in some instances in regard to which the maximum punishment provided by statute is an indication;
- the attitude of the offender after the commission of the conviction of the crime, as this serves to indicate the degree of criminality involved and throws some light on the character of the participant; the previous criminal record, if any, of the offender;
- the age, mode of life, climate and personality of the offender;
- any recommendation presented to the court as a pre-sentencing report from an official designated to assist in assessing the accused; and
- case authorities in relation to similar offences.

## Proof of previous convictions

After conviction the prosecutor will state whether the person convicted has any previous convictions. If he has, the onus is on the State to prove these. It is the responsibility of the prosecutor to produce the record of any previous convictions. The prosecutor will read out these previous convictions to X. The court will then ask if X admits these previous convictions. If X denies any or all of the previous convictions the prosecutor has the right to request a remand so that he can bring evidence to prove them: s 327 CPEA.

The onus lies with the State to prove X's previous convictions: *Mc Cormick* HB-56-90. As regards the type of evidence which can be produced to establish previous convictions see ss 328-329 CPEA.

Note that in a murder case the previous convictions of X must not be revealed by the State to the court until the court has made a finding on extenuating circumstances: *Namatimba* S-27-91.

In *Mutume* 1985 (2) ZLR 94 (S) the court said it will not normally attach much weight to very old convictions.

## Evidence on sentence

Section 334(3) CPEA sets out the types of evidence and information which the court may receive for the purpose of informing itself as to the proper sentence to be passed. This includes evidence on oath from X and his witnesses or from State witnesses, **including hearsay evidence**, an unsworn statement from X, written statements from the prosecutor, X or his legal representative and affidavits and written reports tendered by the prosecutor, X or his legal representative. Hearsay evidence may only be tendered by one side if the other side consents. The court can decide to call to give oral evidence the person who made any affidavit or written report submitted in evidence.

Accused persons and witnesses who testify in relation to sentence are liable to cross-examination.

## Mitigation

### *General*

X's defence counsel has a right to present evidence and to address in mitigation of sentence. The defence will be given considerable latitude in adducing such evidence (*Adolfo* 1991 (2) ZLR 325 (H), but the case law lays down that the prosecutor is duty bound to dispute facts advanced in mitigation which he knows to be incorrect or which are highly improbable or absurd.

In preparation for his address in mitigation, the defence lawyer must extract all salient information from his client. He will need to find out such things as his financial circumstances and what he has in the way of savings (this is important when a fine could possibly be imposed), his family circumstances, his work record and whether he is likely to lose his job if convicted of the present offence, whether he has any previous convictions, whether there are persons who will be prepared to come to court and testify to his previously good character, whether he is in a poor state of health and, if so, how a prison sentence will affect his health; and so on.

For a commentary on the factors which our courts have accepted may be mitigatory see Chapter 5 *A Guide to Sentencing in Zimbabwe* by G Feltoe. Depending on the circumstances these factors may serve to mitigate the sentence:

- various defences which do not amount to full defences in law in the circumstances, such as claim of right, compulsion and intimidation, protection of property, provocation, self-defence, ignorance or mistake of law, intoxication, diminished mental responsibility, emotional stress, trapping of the offender;
- good motive;
- non-payment of wages due where X has stolen from employer;
- poverty;

- temptation;
- assistance to police after crime committed [See *Buka* 1995 (2) ZLR 130 (S) and *Dube & Anor* 1995 (2) ZLR 321 (S) for the weight that will be attached to this factor];
- compensation and restitution [See, for instance, *Malume* 1998 (2) ZLR 508 (H)]
- delay in bringing the case to trial or hearing of appeal [See, for instance, *Corbett* 1990 (1) ZLR 205 (S); but is not necessarily a ground for reduction of sentence, *Gujral* 1990 (1) ZLR 320 (H)];
- X in employment and has dependants (See, for instance, *Katsaura*1997 (2) ZLR 102 (H))
- good behaviour after conviction and before appeal;
- good character;
- grave physical injury to X at time of crime;
- ill-health;
- ill-treatment while in custody;
- imprisonment before trial [See, for instance, *Mutakwa & Anor* 2000 (1) ZLR 393 (H); *Aitken* 1995 (2) ZLR 395 (S) and *Dube & Anor* 1995 (2) ZLR 321 (S)];
- meritorious past conduct;
- pregnancy;
- remorse and guilty plea [See, for instance, *Dhliwayo* 1999 (1) ZLR 229 (H) and *Katsaura* 1997 (2) ZLR 102 (H) on weight to be given to guilty plea.] If there are multiple accused persons, the approach to be adopted where guilt is evenly apportioned, is to treat the accused persons the same: *Muleya & Ors*1988 (1) ZLR 359 (S), accordingly counsel ought to make submissions in that direction;
- failure of Government to explain and consult with traders concerning price controls: *Delta Consolidated (Pvt) Ltd & Ors* 1991 (2) ZLR 234 (S)

Note that in terms of s 12(4)(a) of the Supreme Court Act and s 38(4)(a) of the High Court Act the Supreme Court and the High Court, respectively, may have regard in criminal appeals to all the circumstances, including events which have occurred **after the date of conviction**. [See *Aitken* 1995 (2) ZLR 395 (S)]

The legal representative of X must be given the opportunity to lead mitigatory evidence and to address the court in mitigation of sentence. Without calling evidence, the legal representative may simply set out what he considers to be the salient mitigatory factors in the case: *Furisayi* 1981 ZLR 56 (A) at p 58. The prosecutor may either accept these facts or dispute them. However, as regards factors such as contrition, the court is likely to attach less weight to what a legal representative has said regarding his client's penitence than to a personal and credible expression of regret and repentance by X himself. The legal representative will often make submissions as to the appropriate sentence in the case, drawing the court's attention to salient case law.

There are some pleas in mitigation where the personal testimony of X will assist, such as where the crime was committed because of extreme hardship or destitution or because of a benevolent motive, such as to assist someone else. X should be called to testify in such circumstances, if his defence lawyer believes that he will give convincing testimony.

One factor which may be important is the attitude of the complainant. In *Kelly* HH-33-04 the court took the view that the attitude of the complainant in a criminal case is relevant to sentence. Where the complainant indicates that it is not his desire to have the accused incarcerated, a sentencing authority ought to attach weight to the expressions of the complainant, as such a factor has an impact on the form of sentence imposed.

## *Onus of proof and evidence*

In *Chinyani* 1969 (2) RLR 42 (A) the court stated that there are no rigid rules governing the burden of proof or the degree of proof in relation to evidence or statements in mitigation of sentence. A high degree of flexibility must exist in considering the variety of factors which are relevant to sentence. There need not always be proof of an assertion of fact before it is accepted for the purposes of sentence. If there is any doubt at the stage of sentence as to the existence of any relevant fact, the

trial court must reach its own conclusions, as it thinks right, and is entitled to disregard any such fact for the purposes of sentence if it not satisfied as to the existence thereof.

In *Adolpho* 1991 (2) ZLR 325 (H) the court pointed out that when a court considers submissions in mitigation the rules of admissibility of evidence are relaxed.

## Extenuation in murder cases

### *Persons upon whom will be imposed*

In Zimbabwe, unless X is a pregnant woman or is under sixteen, the court must impose the death sentence upon a person found guilty of murder where there are no extenuating circumstances. It is therefore vitally important for defence lawyers to be conversant with what factors are likely to constitute extenuating circumstances. These factors are dealt with in detail in an article entitled "Extenuating Circumstances: A Life and Death Issue" in 1986 Volume 4 *Zimbabwe Law Review* 60. Particular note should be made of the fact that diminished mental responsibility, which falls short of constituting a mental disorder attracting a special verdict, may still constitute an extenuating circumstance.

### *By whom decision is made*

In *Jaure* 2001 (2) ZLR 393 (H) the court pointed out that a murder trial concludes with the decision on whether or not there are extenuating circumstances. That question must be decided by the majority view of the court, that is to say the judge and the assessors, even if the judge is in the minority. The death sentence may still be imposed after the judge and assessors have found that extenuating circumstances exist, if the judge concludes that the extenuating circumstances are far outweighed by the aggravating features; that is a matter for the judge alone though the assessors may give informal opinions on the issue to the judge.

### *Onus of proof*

In *Jaure* 2001 (2) ZLR 393 (H) it was observed that although the onus of proof of extenuating circumstances is said to be on the accused, counsel for the State can and should assist the court in arriving at an informed decision on extenuation. The court should examine all the evidence and consider whether extenuating circumstances are shown on a balance of probabilities, regardless of who produced the evidence.

### *Cumulative effect of all factors*

In deciding whether there are extenuating circumstances, the court must consider the cumulative effect of all possible extenuating circumstances and must not consider and dismiss each factor in isolation: *Sigwahla* 1967 (4) SA 566 (A) at 571 and *Jaure* 2001 (2) ZLR 393 (H)

### *Two approaches*

In *Jaure* 2001 (2) ZLR 393 (H) the court pointed out that there are two approaches for determining whether or not a murder was committed with extenuation. Either approach is permissible and the end result should be the same. The court stated that these two approaches were captured in Reid Rowland *Criminal Procedure in Zimbabwe* at pp 25-36 as follows:
“The first approach is to consider, first, all those factors which reduce the moral blameworthiness of the accused. If, in the opinion of the court, the facts so warrant, it should find that extenuating circumstances exist. The approach at this stage is largely subjective and aggravating features, many of which may be of an objective character, are not considered. The second stage is then to decide on sentence. At this stage, all aggravating features, including the brutality of the crime and all those objective factors which would assist in the determination of the sentence, are considered. The court may well then decide that, despite the existence of extenuating circumstances, they are outweighed by the aggravating circumstances and the accused should be sentenced to death.

The second approach is for the court to consider all the usual factors which may be regarded as extenuating and weigh them against the aggravating features. If the court considers that the aggravating features outweigh those which reduce the accused's moral blameworthiness, the court will find that extenuating circumstances do not exist. If the court is of the opinion that aggravating features do not outweigh those which reduce the accused's moral blameworthiness, it will find that extenuating circumstances do exist."

### *Whether death penalty imposable if extenuating circumstances found*

In *Jaure* 2001 (2) ZLR 393 (H) the court pointed out that he death sentence may still be imposed after the judge and assessors have found that extenuating circumstances exist, if the judge concludes that the extenuating circumstances are far outweighed by the aggravating features

### *Mental instability short of insanity*

If there are indications of mental instability on the part of X, this matter should be investigated. Odd, inexplicable and bizarre behaviour before, during or after the killing or from the way in which X instructs his lawyer or the way in which he behaves cannot be ignored, as it may provide the basis for establishing that there was at least diminished responsibility to an extent which constitutes extenuation. The defence lawyer has a duty to pursue this matter and to ask for a psychiatric examination where appropriate. The psychiatrist who carries out this investigation must be asked not only to give an opinion as to whether X was mentally irresponsible to an extent that a special verdict is justified, but also if X was suffering was suffering from diminished responsibility. See *Chitiyo*1987 (1) ZLR 235 (S), *Taanorwa* 1987 (1) ZLR 62 (S), *Chin'ono* 1990 (1) ZLR 244 (H) and *Mukombe* 1991 (1) ZLR 138 (S). Where the killing is apparently motiveless, this should alert the defence lawyer to the possibility that X may have been suffering from some form of mental instability when he committed the murder. Where the conduct of X was strange, the defence counsel would be well-advised to interview members of X's family, his friends, co-workers and former employers to ascertain whether he had any history of strange behaviour.

The case of *Stephen* HH-40-92 is of considerable importance in relation to the issue of mental disturbance and extenuation in murder cases. In this case a man had killed one of his sons and had attempted to kill his second son and his wife. He had committed these acts whilst in a state of hysterical dissociation with only a very minimal degree of self-control. The court found that a person who is capable of some degree of self-control becomes capable of forming the *mens rea* for murder. Although he was suffering from a mental disorder or disability at the time he committed the crimes, he was still responsible at law for his actions and therefore a special verdict in terms of s 28 of the Mental Health Act, was not returnable. Instead, the court found that he was guilty of murder, but with extenuating circumstances because of diminished responsibility. In the particular circumstances of this case the guilty verdict amounted really to a technicality. No moral blameworthiness attached to X. The court sentenced X to imprisonment until the court rose.

In *Dube* 1997 (1) ZLR 229 (H) X, aide to President Banana shot and killed a police officer, D, at a sports stadium D had remonstrated with X for urinating in public place. X said he was very intoxicated and had been provoked as D had referred to him as "Banana's wife". X said Banana had committed homosexual acts on him against his will. X said he had violently reacted to D's comment.
According to the psychiatric evidence X was suffering from post-traumatic stress disorder as result of these acts. However, there was a conflict between the evidence of two psychiatrists. One said the combination of this disorder and drunkenness amounted to mental disorder such that X was not responsible according to law for his actions. The other psychiatrist said that the disorder would not have prevented X from appreciating what doing or the consequences of actions. The court decided that although post-traumatic stress disorder could fall within wide definition of mental disorder in the Mental Health Act, on facts found proved, it was not a disorder that prevented X from being aware of what he was doing or of consequences of his actions. The combination of alcohol, drugs and stress disorder would, however, have meant that X was suffering from diminished responsibility.

Defence counsel should explore a second or third line of defence in apparently motiveless murders, such as intoxication, provocation or insanity. Although the State is not obliged to establish a motive

for the murder, the absence of a motive "should always set alarm signals ringing in the mind of defence counsel": McNally JA 1988 Vol 1 No 2 *Legal Forum* 6. In determining the issue of extenuating circumstances, everything which influenced the mind or emotions of the murderer must be taken into account: *Fundakubi* 1948 (3) SA 810 (A).

### *Youthfulness*

Youthfulness on its own or together with other factors can constitute an extenuating circumstance. Youthfulness connotes immaturity, lack of experience of life, thoughtlessness and a mental condition of susceptibility to external influences, especially those emanating from adult persons: *Chininga* S-79-02.

### *Constructive intent*

In *Siluli* S-146-04 the court ruled that where, on a charge or murder, only a constructive intent to kill is proved, the court need not necessarily find that this is a circumstance of extenuation, but the court should examine the other features of the case very carefully indeed before rejecting a plea that the offence was committed in extenuating circumstances. A constructive intent to kill is a factor which must be put in the credit side in the accused's favour in that weighing-up process.

### *Repentance and efforts to assist victim*

Repentance and endeavours by the accused to assist his victim before the victim's death cannot, standing alone, amount to extenuating circumstances: *Jaure* 2001 (2) ZLR 393 (H)

The fact that the murder weapon was taken from the victim does not constitute a factor of extenuation see; *Mubaiwa & Anor* 1992 (2) ZLR 362 (S).

### *Proof of murder conviction*

The fact that there is an ongoing murder trial must not be referred to when extenuation is being considered: *Mubaiwa & Anor* 1992 (2) ZLR 362 (S). Proof of a murder conviction should not be adduced if the court finds no extenuating circumstances: *Mlambo* 1992 (2) ZLR 156 (S). In the same light,

## Aggravating features

If the prosecutor wishes to do so, he may address the court to draw attention to the aggravating features of the case and to make submissions as to the appropriate sentence in the case and to refer to any relevant case law in this regard.

For commentary on the factors which may aggravate sentence see Chapter 7 of *A Guide to Sentencing in Zimbabwe* by G. Feltoe. See also *Mangena & Ors* HB-22-05. These factors must be weighed against factors such as the age and personal circumstances of the accused. The sentencing court has a duty to enquire into the subjective elements in order to individualise the punishment.

As regards the factor of prevalence of a particular crime it was noted in *Sibanda* HB-102-06 that while the prevalence of an offence is a relevant factor in sentencing, it is not the overriding factor. It is not the function of the court to try to control crime by imprisoning people accused of crimes which the legislature, in its wisdom, considers trifling. While the courts should never be seen by the public to be trivialising serious offences, courts are equally enjoined not to make trivial cases serious. Either scenario is as much unjust as the other.

## Particular aspects of sentencing

When difficult specific issues on sentencing arise reference should be made to *A Guide to Sentencing in Zimbabwe* by G. Feltoe published by the Legal Resources Foundation in 1990. This section will only deal with a few selected points of sentencing which have caused difficulty in the past.

The following things are legally impermissible:

- antedating a prison sentence: *Chahora* HH-349-84.
- imposing a prison sentence of less than four days: s 357 CPEA.
- imposing two sentences for one offence: *Chipxere* HH-314-83 (Magistrate wrongly imposing for one offence a prison term plus another prison term, wholly suspended on condition that X made restitution), *Sibanda* HB-36-86 (Magistrate wrongly imposing two separate prison sentences, subject to conditions, for same offence).
- making of fines run concurrently or a fine run concurrently with a prison sentence: *Kambuzuma* HH-60-86, *Gororo* HH-145-86.
- suspending a sentence of a fine where the fine is mandatory or giving the X time to pay such fine. In terms of s 356(2) as read with Sixth Schedule CPEA the court has no power to suspend any portion of a mandatory sentence of a fixed minimum fine. Nor may such a fine be postponed: *De Montille* 1979 RLR 105, *Kudavaranda* 1988 (2) ZLR 367 (H).
- suspending or postponing of a mandatory prison sentence. But where the legislature lays down that a mandatory prison sentence of a fixed term or of a length to be determined by the court must be imposed, the court may suspend all or a portion of the prison sentence: *Patel* S-63-87; *Muzambe* HH-121-90. However, in *Horowitz* 1976 (1) RLR 238 at 241D it is stated that the court will not lightly suspend the whole of a mandatory prison sentence; it will only do so when the mitigatory circumstances clearly make such a course desirable.
  It must be carefully noted that in terms of s 356(2) as read with paragraph 3 of the Sixth Schedule [s 337(1) as read with paragraph 3 of the Seventh Schedule] CPEA the court may not suspend or postpone the prison sentence where the statute in question not only prescribes a mandatory period of imprisonment for without the option of a fine but prescribes a minimum period of such imprisonment.
- imposing a standard sentence for the particular crime without considering the individual circumstances and the moral blameworthiness of X. As far as possible there is a need for individualised sentencing: *David & Anor* 1964 RLR 2 and *Mugwenhe & Anor* 1991 (2) ZLR 66 (S).

## Useful cases on sentence

The following cases are useful for defence lawyers when arguing on the matter of sentence:

### *Fine*

A fine must be a real option and not be excessive: *Kunesu & Ors* 1993 (2) ZLR 253 (H). The fine must be tailored to the means of X and, where necessary, X must be given time to pay or to pay in instalments: *Peti & Ors* 1966 RLR 591 at 593F; *Mamwere* 1978 RLR 374 (GD); *Mutandwa* HH-35-88; *Dlamini* HB-3-90.

In *Gumede* HB-40-03 the court stated that to impose a fine, alternatively imprisonment, when it is clear that accused is not in a position to pay a fine and will end up serving the prison sentence is wrong. If the court intends to keep an accused out of custody then the sentence should be clearly focused towards that goal and not depend on the hope of someone else coming to his rescue unless there is clear evidence that a third party has volunteered to do so. The courts should regard community service as their first port of call when it comes to sentencing.

The failure by the Minister to lay before Parliament a statutory instrument setting out levels of fines has the effect of rendering any imposition of fines incompetent under the circumstances: *Chandafira* HH-137-02.

## *Imprisonment*

Imprisonment is a severe punishment which must only be imposed as a last resort *Mpofu* (2)1985 (1) ZLR 285 (H). There is thus need to push for community service in appropriate cases: *Manyevere* HB-38-03; *Shariwa* HB-37-03.

It is the duty of the court to consider imposing community service where court decides that effective sentence of 24 months or less is appropriate, *Mabhena* 1996 (1) ZLR 134 (H) If the view is taken that the offence is not serious, consideration should be given to community service *Mutukura* HH-39-02.

Young offenders should be kept out of prison wherever possible: *Marachera* A-151-68; *Mantwana* S-20-82; *Mayberry* HH-248-86; *Ncube* HB-153-86; *Mudekwe & Anor* HH-7-86; *Munyariwa* HB-14-87; *Chadyamunda* HH-228-89; *Chitanda* HH-215-89; *Kanoyerera* HH-167-89; *Van Jaarsveld* HB-110-90; *Shariwa* HB-37-03. In *Munukwa* HH-35-02 the court said that offenders in the age group of 18 to 21 years are young offenders who, depending on the offence of which they are convicted and the circumstances thereof, must generally be treated differently from adult offenders. In this country there are advanced, modern and appropriate provisions for the treatment of young offenders. Judicial officers are unfortunately behind in their treatment of young offenders and have not acclimatised to these alternative methods of treating youthful offenders. The routine imprisonment of such offenders should be avoided.

In *Shariwa* HB-37-03 the judge said that first offenders, especially young ones, should as far as possible be kept out of prison.

The court should consider suspending portion of prison sentence imposed on first offender, although there is no rule that must suspend portion: *Manaiwa & Anor* HB-72-90; *Mazowe* HB-36-91; *Gumba* S-50-91.

Female first offenders are generally treated more leniently than males, for three reasons:

- males commit more offences;
- recidivism is commoner among males;
- women often have young children to care for.

*Harvey* 1967 RLR 203 (A); *Malunga* 1990 (1) ZLR 124 (H)

However, in some cases, though, these factors may be absent or of lesser importance and there may be circumstances where there is no reason to discriminate in favour of the woman: *Malunga* 1991 (1) ZLR 124 (H); *Gwatidzo* HH-271-90. However, in *Malunga* 1990 (1) ZLR 124 (H) the court reiterated that a sharp distinction should be made between male and female offenders is still apposite and that the tendency in certain subsequent cases to innovate by adopting a more uniform approach between the sexes is premature.

The court should consider suspending portion of prison sentence imposed on first offender, although there is no rule that must suspend portion: *Manaiwa & Anor* HB-72-90; *Mazowe* HB-36-91; *Gumba* S-50-91.

## *Corporal punishment*

The courts have observed that corporal punishment is a very severe form of punishment which should not be resorted to where other sentencing options are available: *Tototai* HH-5-02. It is particularly brutal and barbaric where the child is too immature to understand it, *F* (a juvenile)1988 (1) ZLR 327 (H). The maximum number of cuts should be reserved for serious manifestations of juvenile criminal delinquency, *Butau* 1994 (1) ZLR 240 (H)

### *Community service*

Community service is an available alternative to imprisonment. Defence counsel should be conversant with the sort of situations where the court will be likely to impose community service and seek to persuade the court to impose this sentence upon their clients instead of sending them to prison.

Defence counsel should familiarize themselves with the Community Service Guidelines. (See Appendix) See also *Dullabh* 1994 (2) ZLR 129 (H) and *Zhou* 1995 (1) ZLR 329 (H) for the offences for which community service is appropriate.

Counsel must be alive to the information which must be available before court may consider imposing community service: *Chiweshe* 1996 (1) ZLR 425 (H)

In *Banda* HB-72-04 it was stated that community service officers are trained officers of the court whose main function is to assess the suitability of a candidate for community service. Their recommendations should not be disregarded without good cause. Where there is such a recommendation, defence counsel should refer to this case and submit to the court that the recommendation should be followed.

It is also vitally important that defence counsel asks to the court to take into account the particular circumstances of the accused in relation to times of availability especially if the accused is employed or is a student. *In Sithole & Anor* HH-101-03 it was observed that where a person is in employment or is a full-time student, a court imposing a community service order must allow community service to be carried out over week-ends or after working hours, by arrangement with the institution concerned. The number of hours should be reduced from what it might otherwise have been. Where the hours fixed by the court become inconvenient either to the institution or to the accused, then the court must be approached to vary the conditions imposed in the order.

On whether a direct sentence of community service may be suspended see *Maramba & Anor* 2000 (2) ZLR 69 (H)

On whether further suspended term of imprisonment may be imposed in addition see *Mhlanga & Anor* 2000 (2) ZLR 73 (H).

### *Attempts by accused to rehabilitate himself between trial and hearing of appeal*

In *Nyajena* 1991 (1) ZLR 175 (S) the court took into account that during the lengthy interval between the arraignment of the appellant and the conclusion of the appeal, the appellant had obtained an undergraduate degree and was in the process of obtaining a Master's degree and that appellant had since the noting of his appeal pestered the Clerk of Court about the preparation of his record.

### *Attempts by accused to right the wrong done*

In *Allegrucci* HB-37-02 X made a fraudulent claim against an insurance company, but when the fraud was discovered he admitted it, co-operated fully with the insurer, and made full restitution plus interest and paid certain other expenses. It was held that there is no rule which states that where the amount of money involved is large, X must necessarily get a custodial sentence. Each case must be decided on its merits. Even where the amount is large, if X has, on his own initiative and accord prior to conviction and sentence made good his damage by paying full restitution and in circumstances that clearly indicate that he is contrite, repentant and certainly reformed, a fine may be appropriate.

## Mandatory minimum sentence - special circumstances and reasons

Sometimes the legislature sees fit to prescribe minimum sentences for particular offences. It will do this in respect of crimes which are prevalent and are causing serious economic or social harm. The legislature prescribes such sentences where it believes that stern deterrent punishments are required

and that it is not enough simply to lay down high maximum sentences for these offences and to hope that the courts will impose stiff sentences as a deterrent. By prescribing mandatory minimum sentences, the legislature is interfering with the normal sentencing discretion of judicial officers to decide upon an appropriate level of sentence based upon the particular circumstances of the offence and the offender and the various mitigating and aggravating factors in the case. With mandatory sentences, the sentence is no longer individualised. At least the mandatory minimum sentence must be imposed. Research has shown that where a minimum term of imprisonment is made mandatory sentences imposed are considerably longer than would normally be imposed for the crime in question.

However, in order to temper the potential harshness that would follow if the mandatory sentence had to be imposed in all cases, the legislature has added the rider that the minimum sentence does not have to be imposed if there are "special reasons" for not imposing the sentence or "special circumstances" which justify the imposition of sentence less than the minimum. This is a legislative device whereby rigours of a particularly severe prescribed sentence may be avoided **in exceptional cases**; it is a sort of a safety valve.

The Supreme Court has held that such mandatory sentences are constitutional where the court is allowed to find special circumstances and impose a lesser sentence: Arab 1990 (1) ZLR 253 (SC) and *Chichera* v *A-G* S-98-04.

## *Circumstances and reasons the same*

It has been judicially recognized that there is no difference between "reasons" and "circumstances" in this context: *Chisiwa* 1981 ZLR 666 (H) at 670C. If the legislature simply says that the mandatory sentence must be imposed unless there are special reasons for not doing so or unless there are special circumstances justifying it not doing so, then the court is entitled to take into account both the circumstances surrounding the commission of the offence and circumstances, facts and conditions affecting and peculiar to the offender. However, sometimes the legislature defines special circumstances more narrowly, as in s 49 of the Road Traffic Act [*Chapter13:11*]. Here, special circumstances are defined so as to include only circumstances surrounding the commission of the offence and to exclude circumstances peculiar to the offender.

## *"Special" means "extraordinary"*

Special reasons or special circumstances are reasons or circumstances which are **out of the ordinary**, either in their nature or extent: *Moyo* 1988 (2) ZLR 1 (S). Not all factors which would be mitigatory in ordinary criminal cases will be "special" in this sense. Deciding which factors are special in this sense involves a value judgment and is a matter of degree. In *Mbewe & Ors* 1988 (1) ZLR 7 (HC) it was stated that mitigating factors, such as good character or particular hardship stemming from the sentence, cannot be taken as special circumstances, nor can contrition or co-operation on the part of the offender. In *Siziba* 1990 (2) ZLR 87 (H), the court stated that special circumstances must mean more than the natural consequences which flow from the imposition of the punishment prescribed. On the facts of *Siziba*, the court held that any hardship that would be suffered by the woman and her family if she were unable to pay the fine and had to serve the alternative prison sentence would be no more or less than that which always occurred when a wage earner and supporter of a family is sent to gaol. This factor did not therefore constitute special circumstances.

But where, for example, X was *bona fide* ignorant of the statutory provision concerned or was, as a result of a trap, tempted into committing a crime which he would not otherwise have committed or was compelled by circumstances to commit the offence, these factors may constitute not only mitigatory factors but also special circumstances (see cases below).

## *Combination of factors*

The cumulative effect of a number of factors can constitute special reasons or special circumstances. Again, this involves the making of a value judgment: *Gumbo* HB-48-89; *Chidembo* S-118-89.

### *Attempts, conspiracies and incitements*

The mandatory sentence does not apply to attempts, conspiracies and incitements: *Mutengwa* HH-116-90; *Takavarasha* HH-18-92.

### *Torture*

Torture and ill-treatment at the hands of the authorities can constitute "special circumstances" for not imposing mandatory minimum sentence also includes torture and other ill-treatment at the hands of authorities: *Blanchard & Ors* 1999 (2) ZLR 168 (H)

### *Lengthy delay in bringing to trial*

This can amount to a special circumstance: *Moyo* 1988 (2) ZLR 79 (H)

### *Finding of special circumstances*

If magistrate finds special circumstances, he is obliged to record the special circumstances of the case which justify the imposition of the lesser penalty.

### *Suspension of mandatory sentence impermissible*

Where the court decides that the mandatory **minimum** term of imprisonment or fine prescribed by the legislature has to be imposed, it may not suspend all or even a portion of the mandatory minimum prison sentence or fine. See s 337(1) as read with paragraph 3 of the Sixth Schedule CPEA, as read with *De Montille* 1979 RLR 105; *Kudavaranda* 1988 (2) ZLR 367 (H).

On the other hand, where the legislature lays down that it is mandatory for the court to impose imprisonment for a particular type of offence but that the term of imprisonment is to be determined by the court, the court may suspend all or a part of the prison term: *Patel* S-63-87. However, in *Horowitz* 1976 (1) RLR 238 at 241D, it was stated that the court will not lightly suspend the whole of the sentence where imprisonment has been made mandatory for an offence.

### *Cases in which special reasons/ circumstances existed*

In most of the cases which follow the trial court or appeal court found that special circumstances or reasons existed for not imposing the mandatory sentence. A few cases are mentioned which point out factors which do **not** amount to special reasons or circumstances.

*Exchange Control Act*

Impossibility

In *Telecel Zimbabwe (Pvt) Ltd* HH-55-06 The appellant company was charged with a number of offences under the exchange control regulations. It had bought foreign currency on the unofficial, "parallel", market in order to service its debts outside the country, to pay for capital equipment and make other payments essential to keep the company in business. The *court a quo* found no special reasons in the particular case which would result in the imposition of a fine of not less than the value of the currency involved. It was held save in those situations where the legislation in question contains a definition of "special reasons" or "special circumstances" and that definition specifically confines the determination of such reasons or circumstances to the commission of the offence to the exclusion of the offender, the broad approach is preferable, which allows the court to consider the triad of the offender, the offence and the interests of society, the factors which any sentencer must

always bear in mind, to arrive at an appropriate sentence. The appellant had two choices: either it had to behave in an ethical manner and search for foreign currency on the official market, where it was unavailable, and thereby commit corporate suicide or it had to enter the parallel market and survive. It chose life instead of death. It was necessary for its survival to purchase foreign currency from unauthorised dealers without Exchange Control authority at parallel market rates. Special reasons therefore existed not to impose the minimum sentence.

Remorse and righting of wrong:

*Holmes* 1982 (2) ZLR 267 (H): X intended to export from Zimbabwe two cheques expressed in foreign currency which he had bought. He changed his mind and deposited the cheques instead at a local bank. The genuine remorse and early and voluntary determination to right the wrong he had committed were special reasons.

Foolish action not causing prejudice:

*McGregor* HB-26-91: for reasons which were not investigated X took about Z$7500 out of country concealed in his car but he then brought this money back the next day. No one was prejudiced and his actions were foolish rather than wicked. The offences of rather technical nature. Special reasons were found to exist.

On the other hand, the absence of prejudice to the country was held not to amount to special reasons in *Patel* S-63-87 because "it was no thanks to the appellant that the foreign currency did not leave the country."

Ignorance of law

*Ndekete* 1978 RLR 377: an unemployed tribesman had received a request for assistance from a sick relative in South Africa. He had sent Zimbabwean currency through the post to him, but the letter containing this currency had been intercepted by the authorities. He was probably unaware that what he was doing was unlawful. The court found that there were special reasons, in that this was an unconscious contravention and moral guilt was virtually absent.

*Chisiwa* 1981 ZLR 666 (H): the court stated that in appropriate circumstances a *bona fide* mistake of law would amount to special reasons.

See also *Musa* HH-144-89; *Mutengwa* HH-116-90; *Smith* S-182-90; *Trinder* HB-52-91.

*Firearms Act*

Purpose of possession

*Mhiripiri* HH-163-88: X had a .22 rifle for purpose of protecting crops and wild animals. Although his possession of the weapon was illegal, the court held that the purpose for which he possessed it amounted to special reasons.

Age of X and purpose of possession

*Mutowo* HH-458-88: X was 18 year old in form I who found an automatic pistol while visiting Moçambique and intended to use it for shooting birds. The age of X and the purpose of possession constituted special reasons.

Negligent possession of dismantled rifle

*Robertson* S-75-88: X possessed a dismantled FN rifle. He had kept it hidden for ten years at business premises where he worked. He had no intention to use for political purpose or to commit a crime. It was found when he left his employment. This was a case not so much of defiance of law but of considerable negligence. The combination of these factors constituted special reasons.

Finding unloaded and non-functional weapon

*Chidembo* S-118-89: a farm manager found an unloaded and non-functional revolver lying on ground. The fact that he found the weapon by chance and that it was unloaded and non-functional constituted in combination special reasons.

Purpose of possession and attempts to renew firearms certificates

*Rudolph* 1990 (1) ZLR 45 (S): X had three weapons to shoot vermin. He had firearms certificates for the weapons. He had applied for renewal of these certificates but had received no response despite giving a reminder. The fact that he had not kept these weapons for a sinister purpose and that the firearms authority was partly to blame because of its failure to respond to his application constituted special reasons.
See also *Rusike* HH-31-89 (unlawful possession of firearm); *Kaja* S-129-89 (unlawful possession of firearm).

*Parks and Wildlife Act*

Single, isolated act of possession

In *Mbewe & Ors* 1988 (1) ZLR 7 (H) the court pointed out that a single isolated act of unlawful possession of unregistered raw ivory or horn, whether or not the possession is for the purposes of trade, can make an offender liable to mandatory minimum sentence in absence of special circumstances.

Killing of animal and possession of its horns

*Kudavaranda* HH-450-88: X killed a rhino and was in possession of the horns taken from this animal. He was sentenced to a mandatory minimum fine on each count. Because the two offences were completely interlinked, the killing of the animal being in consequence of X's desire to possess its horns, there were special circumstances in relation to X's possession of the horns, justifying the court in not imposing the mandatory minimum sentence for that offence.

Technical breach of the law

*Hill* HB-106-89: the appellant had bought a rhino horn and two elephant tusks in 1957 and had kept them ever since as ornaments. He was ignorant that his possession had become unlawful in 1975. The court found that this was a technical breach of the law and the trial court should have found that there were special circumstances.

Disparity in sentence

*Ncube & Anor* HB-143-91: the second accused was an unsophisticated communal dweller who found the bit of ivory in the bush and picked it up simply to give it to a witchdoctor. The first accused was a city dweller who persuaded his co-accused to sell the piece of ivory and took it for that purpose. Both accused were sentence by the trial court to the mandatory 5 year jail term.

The review court found that there were special circumstances in respect of the second X and reduced his sentence to 6 months' imprisonment. The court found that although the mandatory minimum sentence is aimed at poachers and dealers, there were no special circumstances for the first X other than the disparity in sentence between him and his co-accused, which was not justified by the difference in their moral blameworthiness. This unjustified disparity was itself a special circumstance in the case. It therefore altered the sentence imposed on the first accused.

See also *Chaerera* 1988(2) ZLR 226 (S); *Siziba* HB-61-88; *Botha* HH-183-88; *Dube & Ors* 1988 (2) ZLR 385 (S); *Mangando & Anor* HH-277-90.

*Precious Stones Trade Act*

Stones of minimal value

*Mugangavari* 1984 (1) ZLR 80 (S): the fact that the stones are of minimal value does not *per se* constitute a special reason for non-imposition of the mandatory sentence.

Woman holding stones for husband

*Anand* 1988 (2) ZLR 414 (S): a woman was convicted of possessing uncut emeralds worth $150 which had been hidden in her bedroom. She accepted sole blame because her husband was a sick man. The court held that the fact that she probably possessed emeralds on behalf of husband and that he had decided to sacrifice his wife by shifting responsibility on her constituted special reasons for not imposing the mandatory minimum penalty.

Delay in bringing to trial

*Moyo* 1988 (2) ZLR 79 (H): through no fault of his, X was not brought to trial for nearly 4 years after possessing precious emeralds, and in the mean time he had nearly completed a prison sentence imposed on him for a subsequent offence. It was held that the delay in bringing to trial amounted to a special reason for not imposing the mandatory sentence.

Police trap

*Kamtande* 1983 (1) ZLR 302 (HB): where X is trapped into committing the offence by the police, the fact that the police trap had promoted the commission of the offence by someone who would not otherwise have committed it may be regarded as special reason.

Negligible value

*Gumbo* HB-48-89: X was in possession of an uncut emerald worth $3. He was a hotelier who had been given the stone as a keepsake by a guest many years ago. The cumulative effect of the following factors constituted special reasons: the negligible value of the stone, that it was acquired as a gift before the Act provided for the minimum penalty, that it had been kept for ten years and that there was no question of financial gain for X.

Woman keeping stones of no commercial value

*Moyo* HB-6-90: the court found that there were special reasons because of the cumulative effect of these factors: the emeralds had no commercial value, the woman possessing them was keeping them for another, she was a first offender and she had two sick children.

See also *Takavarasha* HH-18-92.

*Road Traffic Act*

Mandatory prison sentences:

Under s 40 the Road Traffic Act a person must be imprisoned up to the specified maximum term for driving whilst prohibited from doing so unless there are special circumstances justifying the imposition of the lesser sentence of a fine. Special circumstances are not restrictively defined and thus include special circumstances relating to the crime and to the offender.

Mandatory prohibition from driving:

It is mandatory for the court to prohibit a person from driving when he has been found guilty of certain offences unless there are special circumstances surrounding the commission of the offence (not circumstances peculiar to the offender). The offences in this category are:

s 53 reckless driving;

s 54 driving with prohibited concentration of alcohol in blood (but the prohibition is mandatory only if there is a previous conviction for a similar offence or if the vehicle being driven was a bus);

s 55 driving under the influence of alcohol;

s 78 (read with s 77(6)) refusal to undergo breath test.

*Garwe* HH-249-89: mandatory prohibition for drunken driving.
*Erasmus* S-84-91: special reasons for not imposing mandatory prohibition from driving in a hit and run case.

*Criminal Law (Codification and Reform) Act*

The Criminal Law Code also provides for a number of mandatory sentences.

- s 80 provides for a mandatory prison sentence of at least 10 years to be imposed upon a person who was infected with HIV when he or she commits certain sexual crimes. The crimes concerned are rape; aggravated indecent assault; indecent assault; sexual intercourse with a

young person; and an indecent act with a young person involving penetration of the body which involves a risk of transmission of HIV.

- s 114(2)(e) provides for a minimum mandatory sentence of 9 years for stock theft involving any bovine or equine animal stolen in circumstances were there are no special circumstances to be found in the accused person's favour.
- s 156(1)(e)(i) provides a mandatory sentence of imprisonement of 15 years in relation to the crime of unlawful dealing in dangerous drugs, where special circumstances cannot be found.

**Mandatory penalties not to be applied retrospectively**

What happens where minimum mandatory sentence is introduced for a crime but X committed the crime before the mandatory sentence came into operation but he was convicted after the mandatory sentence came into operation? This question arose and was answered in *Mzanywa & Ors* HB-9-06. The court held that the mandatory penalty may not be imposed for that crime because s 18(5) of the Constitution provides that "no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence *at the time when it was committed*". See also *Ndlovu & Anor* HH-70-06.

**Summary**

Not all mitigatory factors amount singly or in combination to special circumstances or reasons. Special circumstances or reasons are mitigatory factors which are out of the run of the mill considered singly or in combination.

## Effect on sentence of delay in trial or hearing appeal

### *Delay in bringing to trial*

*In Dube & Anor* 1989 (3) ZLR 245 (S) the court said that for justice to be seen to be done, the machinery of justice, as it grinds through police stations, the Attorney-General's Department and the courts of justice, must move expeditiously. In this case, where the accused spent over 4 years out of prison awaiting trial and the hearing of their appeals, it was held not to be in the interests of justice to send them to prison.

In *Ruzario* 1990 (1) ZLR 359 (S) X a police officer had been convicted of culpable homicide and sentenced to four months imprisonment with labour for killing three persons while driving negligently and under the influence of alcohol. There had been a delay of 4 years in bringing the case for trial. The appeal court declined to interfere with the prison sentence. Once it was apparent that the State was dragging its feet he ought to have taken appropriate steps to have asserted his right to have the matter dealt with within a reasonable period of time. He had not done so. In any event it was evident from the magistrate's judgment that he took into account the four year delay in his assessment of punishment and were it not for that feature, would have ordered the appellant to serve a far longer period of imprisonment. The appeal was dismissed.

In the case of *Chakwinya* 1997 (1) ZLR 109 (H) the court held that every person, deserving or otherwise, was entitled to the protection of s 18 of the Constitution, which includes the right to a fair trial within a reasonable time. The delay in this case had been extreme and the reason for it was inexcusable. The prejudice to the accused was such that had he been convicted and sentenced when he should have been, he would more than likely have been released by now. To impose the sentence that would normally be expected would be unconscionably prejudicial. It further held that it would be most inappropriate to hold against an unrepresented accused a failure to take assiduous steps to enforce his freedom. The accused was an unemployed communal land dweller who had never been advised of his rights. He was at the mercy of the system, and the system failed him. Elementary administrative checks would have revealed the accused's plight.

In *Kundishora* 1990 (2) ZLR 245 (S) X was sentenced a prison term for fraud He appealed. The trial took place 3½ years after the discovery of the offence and the appeal was heard 10 months later. Dismissing the appeal against conviction and sentence, the court held that the delay in this matter should not be regarded as a mitigating factor in sentence because X did nothing to assert his right to be tried within a reasonable period and part of the delay was due to the appellant putting up a thoroughly dishonest defence, which had no prospects of success.

See also *Kamusana* S-110-89; *Makoni* S-9-90; *Mlambo* S-221-91.

### *Delay in hearing appeal*

In *Dzvaka* S-47-92 almost four years had elapsed from the date when the appellant was sentenced to the day on which his appeal was held. This delay occurred because a substantial portion of the record of the proceedings went missing, necessitating postponements of hearings. The Supreme Court decided that the blame for the inordinate delay could not be attributed to the appellant. He could hardly consent to the appeal being heard with the record of the evidence incomplete. There was nothing he could have done to expedite the appeal. Even when the appeal was eventually argued many of the exhibits were unavailable, having apparently been destroyed by the police. Some reduction of the punishment imposed by the trial court was therefore warranted.

*In the case of In Re Ndimande: Attorney-General v Ndimande* 1992 (2) ZLR 259 (S) the facts were that in 1986 X had been convicted of theft by conversion and theft by false pretences. He was sentenced to a term of imprisonment. He served part of this sentence before being released on bail pending appeal. In 1989 the accused successfully applied to have the convictions and sentence set aside so that the case could be remitted for the adduction of further evidence. The Attorney-General consented to this application. The order remitting it for the hearing of further evidence could not be complied with, however, as the trial magistrate had left the service. The trial could thus not be resumed but could only start afresh. The court held that in view of the delay in the case it would be unfair to order that the trial start afresh. An order staying further proceedings in this matter was ordered by consent.

See also *Makuyana* HB-117-89; *Gonese* HH-218-89; *Kaschula* HH-220-89; *Guvava* HH-110-89; *Kuzvarwa* HH-12-90; *Corbett* S-33-90; *Chilimanzi* 1990 (1) ZLR 150 (H); *Tagwireyi* S-10-90; *Mudadi* S-125-90; *Badze* 1990 (1) ZLR 369 (S); *Gujiral* 1990 (1) ZLR 320 (H).

In *Nyambo* S-24-05 the appellant was sentenced to death for murder in October 1994, nearly a year after the coming into effect of the 13th amendment to the Constitution. This amendment provided that any delay in carrying out sentence of death should not be treated as a violation of the convicted person's right under s 15 of the Constitution (which prohibits inhuman or degrading punishment or treatment). He noted an appeal on the appropriate prison documents, but for reasons unexplained the documents did not reach the court for another 10 years. It was argued that the delay amounted to a violation of the appellant's fundamental rights under s 15(1) of the Constitution and that the sentence should be altered to life imprisonment. It was held that in view of the provisions of the amending Act, which came into effect before the appellant was sentenced, he was not entitled to the relief he was seeking.

## Suspended sentences

The courts have repeatedly pointed out that the condition on which sentence is suspended must be reasonably capable of fulfilment otherwise it is incompetent and provides a basis for attack before a superior court: *Mukura & Ors* HH-20-03.

If the court proposes to suspend a sentence of imprisonment – for example, on condition that the accused makes restitution – there must be a real likelihood that the condition is reasonably capable of fulfilment; for otherwise the object of the condition, namely, to keep the accused out of prison or to reduce the length of the prison term imposed and to compensate the complainant, could be defeated.

The offender will then serve imprisonment on account of his poverty and not because of any *mala fides* or negligence on his part. If the offender is unlikely to be able to meet the condition, then the condition should not be imposed: *: Mukura & Ors* HH-20-03.

## Forfeiture of items used in connection with crimes

In terms of s 62 CPEA the court is given the discretion to order the forfeiture of certain items which have been used in connection with criminal activity. This discretion lies with the court and its exercise does not depend on prior application for forfeiture by the prosecution.

In summary, a court can order forfeiture:

- in respect of any crimes: of weapons, instruments and articles used in the commission of crimes can be declared forfeit to the State;
- in respect of theft and related crimes: vehicles used to transport stolen goods;
- in respect of statutory offences relating to possession, conveyance or supply of habit-forming drugs or harmful liquids, possession of or dealing in precious metals or stones, theft under common law or statute and housebreaking with intent to commit a common law or statutory offence: vehicles, containers and articles used in the commission of these offences

In *Zendera* HH-157-04 the court decided that an article "by means whereof" the offence is committed is one which enables the offender to commit the offence or assists or aids the offender in committing the offence.

The factors which should be taken into account when deciding whether to order forfeiture are set out in *Ndhlovu(1)*1980 ZLR 96 (GD). These are:

- the nature of the article;
- what its role was in the commission of the offence;
- what possibility there is of the article being used again to commit similar offences;
- the effect of the forfeiture on the person or persons affected by it;
- whether, in the light of the value of the article, its forfeiture will lead to the imposition of a penalty which is disproportionate to the gravity of the offence committed;
- where the article is of considerable value, such as a motor-vehicle, whether that article has previously been used for a similar criminal purpose.

Forfeiture is part of the punishment and the value of the goods which may be declared to be forfeit must be taken into account. Especially where these may be of substantial value, the courts should make some inquiry to determine their value: *Poswell* 1969(4) SA 194 (R); *Barclay* 1969 (4) SA 195 (RA); *Pretorius* 1969 (4) SA 198 (R); *Kurimwi* 1985 (2) ZLR 63 (S) (forfeiture of motor vehicle inappropriate where used for smuggling only small amount of goods); *Mutasa* 1988(2) ZLR 4 (S) (forfeiture of ungraded meat illegally offered for sale).

There are also specific forfeiture provisions in a number of other pieces of legislation. Some of the more important of these are:

s 209 of the Customs and Excise Act [*Chapter 23:02*]
pertaining to forfeiture of smuggled items and things used in the commission of smuggling such as cars, ships and aircraft. See *Mahomed* 1977 (2) RLR 207 (GD);

s 7 of the Exchange Control Act [*Chapter 22:05*]
laying down that when the court convicts for certain offences under this Act involving gold, currency, goods or other property it may order forfeiture of these items, unless the convicted person satisfies the court that there are special reasons for not ordering forfeiture;

s 106 of the Parks and Wildlife Act [Chapter 20:14] empowering the court to order forfeiture of the spoils of offences under this Act, such as trophies and animal carcasses and of items used in connection with offences under this Act such as weapons, explosives, tents, vehicles and aircraft.

s 31 of the Firearms Act [*Chapter 10:09*]
empowering the court convicting for offences under this Act to order forfeiture of items such as firearms and ammunition.

## Passing sentence

The sentencing process should be a rational and objective process and judicial officers are not expected to allow their emotions to cloud their judgment as to what is a suitable sentence. If they allow themselves to get carried away by their emotions, they may end up exaggerating the seriousness of the offence and imposing a disproportionate penalty for the offence. See *Harington* 1988 (2) ZLR 344 (S).

Before passing sentence the judicial officer is expected to give careful thought and consideration to what is the appropriate sentence in the circumstances and he should give full reasons for imposing the sentence which he has decided upon. Sentencing requires a rational process in which the court weighs all the relevant factors and decides what sentence is fair and appropriate. If the sentencer simply announces the sentence without giving reasons this may give the impression that sentencing is an arbitrary and unreasoned process. There must be a rational basis for the choice of one form of punishment rather than another Choice of one form of punishment rather than another. The sentencer should give reasons for this decision: *Antonio & Ors*1998 (2) ZLR 64 (H)

If the sentencer simply announces the sentence without giving reasons this may give the impression that sentencing is an arbitrary and unreasoned process. The court noted in *Shariwa* HB-37-03 that there is no room in our system for an “instinctive” approach to sentencing. Sentencing should be a rational process. The sentencing court must always strive to find a punishment which will fit both the crime and the offender. Whatever the gravity of the crime and the interests of society, the most important factors in determining the sentence are the person, and the character and circumstances of the crime. The determination of an equitable quantum of punishment must chiefly bear a relationship to the moral blameworthiness of the offender. However, there can be no injustice where in the weighing of offence, offender and the interests of society, more weight is attached to one or another of these, unless there is over-emphasis of one which leads to disregard of the other. The court should not be over-influenced by the seriousness of the type of the offence and fail to pay sufficient attention to other factors which are of no less importance in the actual case before the court. The over-emphasis of a wrongdoer’s crimes and the under-estimation of his person constitute a misdirection which justifies the substitution of the sentence. Justice should also be tempered with mercy.
See also *Ngulube* HH-48-02; *Manyevere* HB-38-03.

## Reasons for sentence

Reasons should be given for the penalty which is imposed. These reasons should be recorded in writing at the time sentence is pronounced. Full written reasons should be given even if the judicial officer thinks that the reasons for the sentence are obvious. It is particularly important that a magistrate records his reasons for departing from any general policy which has been laid down by the higher courts in respect of sentence. The imposition of an inappropriate sentence is an injustice and the review or appeal court can only determine the appropriateness of a sentence if the reasons for the sentence are given: *Duri* HH-89-91; *Nyamupanda* HH-101-91; *Ngwenya* HH--14-90.

## Public announcement of sentence

In terms of s 334(1) of CPEA all sentences in criminal proceedings against persons aged eighteen or above shall be pronounced in open court.

## Referral from magistrates court to High Court for sentence

When a magistrate is of the opinion that the appropriate sentence which is warranted in the case he is trying is beyond his sentencing jurisdiction, he can refer the case to the High Court under s 54(2) MCA. If he does this the correct procedure to adopt is as follows:

- He must submit a report to the Attorney-General, setting out why he is of the opinion that a sentence in excess of his jurisdiction is justified. The record of the proceedings must accompany the report.
- X and his lawyer are entitled to be informed on what basis the trial magistrate has decided to decline jurisdiction to sentence him and to proceed under s 54(2) MCA, since X now faces the prospect of a higher sentence. This must be done so that the defence has the opportunity to make proper submissions on sentence. The magistrate must therefore give his reasons for opting to proceed under s 54(2) MCA.
- If the Attorney-General under s 225 CPEA directs that the case be transferred to the High Court for sentence, the magistrate must then comply with s 226(b) CPEA by informing X of the Attorney-General's direction and then committing X to prison until he is sentenced by the High Court or is granted bail. He must also ensure that the record of the criminal proceedings, together with the reasons for conviction, are transmitted to the High Court. The record should include the report sent to the Attorney-General setting out why the magistrate was of the opinion that a sentence in excess of that which he could impose within his jurisdiction was called for.

The magistrate must base his or her decision to refer the matter to the High Court on all relevant factors and give reasons for invoking the section, *Dangarembizi & Anor* 1987 (2) ZLR 196 (H); *Mandizha* HH-275-90; *Julieta & Anor* 1998(1) ZLR 432 (H). Defence counsel must object to such referral if there is no proper basis for so referring it.

## Subsequent amendment of sentence

In terms of s 201(2) CPEA, when a wrong sentence is mistakenly handed down, it may be amended before or **immediately after** it has been recorded.

For example, if the judicial officer intended to impose a sentence of six weeks' imprisonment and he discovers immediately afterwards that he erroneously recorded a sentence of six months' imprisonment, he may correct the record accordingly: *Sikumbuzo* 1967 (4) SA 602 (RA); *Chikumbirike* HH-307-84; *Nyamufarira* HH-335-83.

Where the error is only discovered some time after the sentence was recorded by a magistrate, the magistrate should refer the matter to a judge for amendment: *Ncube & Ors* HB-150-88.

A judicial officer can only amend the sentence if the mistake was his own. He cannot amend the sentence if the mistake was that of the prosecutor: *Mamwere* 1978 RLR 374 (GD).

## Change of plea after verdict and sentence

If a person has been convicted and sentenced and then wishes to change his plea on the basis that he had been unduly influenced by the police to plead guilty, he should make such application on appeal.

If a matter has however, been referred to the High Court for sentence and X wishes to change his plea before sentence, such an application can only be directed towards the trial court: *Jackson* HH-201-02.

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# SECTION 10 – RECORD OF PROCEEDINGS

## Full record

Where there is no mechanical recorder for recording the evidence, the sitting judicial officer has to keep a full handwritten record of the proceedings. He must make full, clear and accurate written notes of everything that is said and everything that happens during the hearing of the case which is of any relevance in relation to the outcome of the case and the sentence.

All applications made to court must be recorded, together with the reasons why these were made. *Maniko & Ors* HH-44-91. Evidence-in-chief will normally be paraphrased except for important aspects which must be fully recorded. All cross-examination should be taken down in question-and -answer form.

The keeping of a proper record is vitally important. Where there are substantial and material deficiencies in the transcript this will constitute a gross irregularity, necessitating the quashing of the conviction as the absence of a proper record makes it impossible for a review or appeal court properly to assess the correctness or validity of the proceedings: *Davy* 1988 (1) ZLR 386 (S); *Ndebele* 1988 (2) ZLR 249 (H); *Ndlovu* HB-98-89; *Nyedziwa* HB-33-90; *Maniko & Anor* HH-44-91.

## Arrangement of record

The record of the case will be assembled in the following sequence:

1. The judgment (verdict and sentence and reasons for judgment) or, if there has been a guilty plea which was accepted, the reasons for the sentence.
2. Charge sheet or summons.
3. Details of prosecution allegation or agreed statement of facts.
4. Recorded evidence (numbered and in correct numerical sequence and stapled together).
5. Documentary exhibits, including the State and defence outlines or statement of facts.
6. Any document recording previous convictions or certifying the absence of previous convictions.
7. The warrant committing X to prison, if any.

All these papers will be secured together and placed in the case cover.

## Lost record

Although all possible care must be taken to ensure that records of cases do not go missing, from time to time records do get lost. The record may go missing prior to or subsequent to the reaching of verdict and the imposing of the sentence.

If the record goes missing whilst the trial is still taking place (i.e. before all the evidence has been heard and the magistrate has arrived at his verdict), then X is entitled to have the case proceed from the point at which it left off. Thus, with part heard cases, the clerk of court, under the direction and supervision of the presiding magistrate, must reconstruct the record from the best secondary

evidence. Affidavits should be taken from witnesses and those present. The defence lawyer must ensure that the record compiled in this way is accurate.

Where X had pleaded guilty the case can then proceed on the basis of the restored record, provided there is no prejudice to X. If, however, he has pleaded not guilty the witnesses who have previously given evidence must be recalled in order to ascertain whether they agree that the version of their testimony in the reconstructed record is correct. X's legal representative and the State must be permitted to cross-examine the witnesses relating to the correctness of the reconstructed record: *Sibanda* HH-80-91.

If the trial has been completed, the trial court is *functus officio* (has finished dealing with the matter) and the clerk of court must by affidavit state the record has been lost and proceed to reconstruct the record by obtaining affidavits from the magistrate, witnesses and others present, including X's legal representative, as to the contents of the record. Both parties must be given an opportunity to peruse the reconstructed record and to give their versions. Thereafter the record will be sent for review or appeal: *Sibanda* HH-80-91.

## Inadequate certified record

In a number of cases the Supreme Court has stressed that if the certified record is inadequate, because, for instance, it does not indicate what facts were found by the trial court or no reasons for the decision are given, the appeal court may have to set aside the conviction because it will not be possible from the record to be satisfied that the conviction was warranted: *Makawa & Anor* S-46-90; *Marevesa* S-108-91.

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# SECTION 11 – APPEALS

After a person has been convicted and sentenced by a criminal court, that person can appeal to a higher court against the decision of the trial court. An appeal is a request made to the higher court to change the decision. The court to which the appeal is made is referred to as the appeal court.

## Types of appeal

Person convicted and sentenced by a criminal court may appeal to a higher court. In some cases leave to appeal has to be obtained. There are three types of appeal

- an appeal against conviction alone;
- an appeal against sentence alone; and
- an appeal against both conviction and sentence.

The court to which the appeal will be made will depend upon which court tried the case.

## Cases decided in Magistrates Court

Appeals against conviction, or against conviction and sentence, go to the High Court. The decisions by the High Court on appeal from the magistrates court can in turn be further appealed to the Supreme Court.

## Cases decided in High Court

Appeals go to the Supreme Court in all cases, whether the appeal is against conviction or sentence or both. All cases in which the death penalty is imposed automatically go on appeal to the Supreme Court.

## Rules governing various appeals

The rules governing appeals against decisions in criminal cases in the Magistrates Court are the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979 (published in Statutory Instrument 504 of 1979). These Rules will be referred to as SC Rules SI 504/79.

The filing of heads of argument in an appeal against sentence to be heard in the High Court is regulated by the High Court (Miscellaneous Appeals and Reviews) Rules, 1975 (RGN 450 of 1975). These Rules will be referred to as HC Rules RGN 450/75.

Appeals to the Supreme Court are governed by the Rules of the Supreme Court (SRGN 380 of 1964). These Rules will be referred to as the Supreme Court Rules.

Reference will also need to be made to certain rules in the Magistrates Courts (Criminal) Rules, 1966 (RGN 871 of 1966). These Rules will be referred to as RGN 871/66.

Throughout this section on appeals a Rule will be referred to as "R" e.g. : R 25 to refer to Rule 25 and an Order will be referred to as "O".

## Appeals against decisions in magistrates court

### *General*

All criminal appeals from the magistrates court are heard by the High Court. This applies whether the appeal is against conviction or conviction and sentence or sentence

There is no requirement that an accused must obtain leave to appeal from the magistrate who convicted him before he can take the case on appeal. This applies to appeals against sentence, appeals against conviction, and to appeals against both. There is a further right of appeal to the Supreme Court against the decision of the High Court on appeal from the magistrates court.

The legal practitioner can indicate at the end of the trial in the magistrates court his intention to take the decision on appeal. He can thereafter apply for bail pending appeal.

### *Appeals against sentence only*

#### *Procedure*

Appeals against sentence by persons who are legally represented are dealt with in Part 7 SI 504/79.

Such an appeal must be noted within 5 days of the passing of sentence. This is done by lodging with the clerk of the magistrates court a notice in duplicate clearly and specifically setting out the grounds of appeal and giving an address for service: R 34(1) SI 504/79. The notice must comply with the Rules otherwise it is a nullity: *Sibanda* 2001 (2) ZLR 514 (H)

At the time of noting the appeal, or within 5 days thereafter, a deposit must be paid to the clerk of court for the estimated cost of one certified copy of the record of the trial. In place of a cash deposit

the clerk may agree to accept a written undertaking by the appellant or his lawyer that payment will be made immediately after the appeal has been determined: R 34(2) SI 504/79.

Where the case is subject to automatic review, notice can be given within 4 days of the passing of sentence, that the noting of appeal against sentence will be deferred until after the determination of the review proceedings. If this notice has been given, a decision can be made after the review has taken place as to whether to proceed with the appeal in the light of what the review judge has decided. If the decision is to proceed, the appeal must be noted against the sentence (with such alterations, if any, as have been made by the review court) within 7 days of the determination of the review proceedings: proviso to R 34(1) SI 504/79.

*Magistrate's response to noting of appeal against sentence*

If this is still necessary, given the judgment already filed, within 5 days of the noting of an appeal by a legally represented person, the magistrate must supply to the clerk of court a written statement setting out the facts he found to be proved and his reasons for the sentence and dealing with the grounds on which the appeal is based. The magistrate must deal with the grounds of appeal even though he gave a thorough and detailed judgment in the case. A copy of this statement must be sent immediately by the clerk of court to the appellant's legal practitioner: R 23 SI 504/79.

This statement does not have to be made if the magistrate is unavailable or is for some reason unable to comply with this requirement unless a judge of the Supreme Court directs otherwise: proviso to R 35(1) of SI 504/79.

*Heads of Argument in appeal against sentence*

**The filing of heads of argument is governed by R 9A RGN 450/75.**

Heads of argument have to be filed before an appeal is set down. The heads of argument must set out the main heads (the main points) of the argument, together with a list of authorities which will be cited in support of each head.

As soon as the Registrar of the High Court receives the record or the other papers relating to the case he must send written notification to the parties and must call upon the legal practitioner representing the appellant to file with the Registrar heads of argument within 15 days.

The appellant's heads must be filed within this 15-day period, which period excludes Saturdays, Sundays and public holidays, "or within such longer period as the judge may for good cause allow".

If the heads are not filed within the 15-day period, the appeal will be regarded as abandoned and will be deemed to have been dismissed.

Immediately after receiving the appellant's heads, the Registrar has to deliver a copy of the heads to the respondent.

Within 10 days of receiving the appellant's heads, the respondent’s legal practitioner has to file his heads with the Registrar. Immediately after the Registrar has received the respondent's heads he must deliver a copy of them to the appellant. This rule requiring filing of respondent's heads within 10 days is subject to the proviso that if the appeal is set down less than 15 days after the respondent receives the appellant's heads, the respondent must file his heads as soon as possible and, in any event, not later than 4 days before the hearing of the appeal.

*Set down of appeal in High Court*

In terms of R 10 RGN 450/75 the Registrar will set down the appeal. The Registrar must give at least 6 weeks' notice of the date of set-down to the parties to the appeal.

*Leave to appeal out of time*

In terms of R 47 SI 504/79, if a convicted person fails to note an appeal within the time limits prescribed, his right to appeal against conviction and sentence lapses. Time limits must be scrupulously adhered to: *A-G v Lafleur & Anor* 1998 (1) ZLR 520 (H)

However, in terms of R 48 SI 504/79, there is provision for making application to appeal out of time. Application for leave to note an appeal out of time is made to a judge of the High Court. The application must be lodged with the Registrar of the High Court. The application must be accompanied by:

- a draft notice of appeal complying with the Rules; and
- an adequate statement explaining why the appeal was not noted within the time period prescribed.

A legal practitioner's earlier ineptness is not a ground on which the court will grant condonation. *Sibanda* 2001 (2) ZLR 514 (H)

The Attorney-General must be notified of the application and may oppose it by lodging written arguments in opposition. The applicant may then lodge written arguments in reply and may request that the matter be set down for oral argument. The Supreme Court judge dealing with the matter may grant or refuse the application or order that the matter be set down for oral argument. After the oral argument, the application may then be granted or refused. When granting the application, the judge can give directions regarding the future conduct of the appeal.

Leave to appeal against sentence should not be approached on same basis as application to appeal against conviction: *McGown* 1995 (2) ZLR 81 (S)

*Renunciation of agency*

If a legal practitioner who has been engaged to argue an appeal wishes to renounce his agency, he must do so in terms of Rule 12A of the Rules of the Supreme Court, 1964 (SRGN 380 of 1964).

Agency may be renounced at any time.

In *Martin* 1988 (2) ZLR 1 (S) the Supreme Court said that any renunciation must be made in terms of this Rule and must be notified to the Registrar. The decision not to continue to act for a client should be made well before the appeal is due to be heard so that the client can be given the chance, if necessary, to make other arrangements. The client should not be told to "Go along and do the best you can". An unrepresented criminal appellant has no automatic right of audience except in certain High Court cases. Section 10(1) of the Supreme Court of Zimbabwe Act, 1981 directs that an unrepresented appellant obtain a certificate from a judge of the Supreme Court before he is entitled to prosecute an appeal. The appellant should be advised of this requirement at the time of renunciation of agency. Failure to so advise him is a breach of duty to the client on the part of lawyer. See also *Marenga* S-32-88.

In *Martin* the court also said it is highly undesirable, if not unethical, for a lawyer to disclose to the court that he was renouncing agency on the grounds that the client had insufficient funds to pay the lawyer. If the client has no more money, the lawyer must decide whether he will continue to act for the client or not.

## *Appeals against conviction or conviction and sentence*

*Procedure*

An appeal against conviction, or against both conviction and sentence, is heard by the High Court.

Appeals against conviction or conviction and sentence by persons who are legally represented are dealt with in Part5 of SI 504/79.

The appeal must be noted within 10 days of the passing of the sentence. This is done by lodging with the clerk of court a notice in duplicate, setting out clearly and specifically the grounds of appeal and giving the legal practitioner's address as the address for service: R 22(1) SI 504/79.

If the appellant wishes to appeal but a request for reasons for judgment or sentence has been made in terms of R 3(1) O 4 of the Magistrates Courts (Criminal) Rules, 1966 (RGN 871 of 1966) then the appeal must be noted within 5 days of the receipt of the judgment or statement referred to in that rule, whichever is the later. R 3(1) provides that a convicted person is entitled to make a written request to the clerk of court, within 48 hours of being sentenced, that he be supplied with a copy of the judgment or, if there was no judgment, a statement from the magistrate giving reasons for conviction and setting out any special factors which were taken into account in sentence: R 22(1) SI 504/79.

At the time of noting the appeal, or within 5 days thereafter, a deposit must be paid to the clerk of court for the estimated cost of one certified copy of the record of the trial. In place of a cash deposit the clerk may agree to accept a written undertaking by the appellant or his lawyer that payment will be made immediately after the appeal has been determined: R 22(2) SI 504/79.

Where the case is subject to automatic review, notice can be given, within 4 days of the passing of sentence, that the noting of appeal against sentence will be deferred until after the determination of the review proceedings. If this notice has been given, a decision can be made after the review has taken place as to whether to proceed with the appeal in the light of what the review judge has decided. If the decision is to proceed the appeal must be noted against conviction and sentence, with such alterations, if any, made by the review court within seven days of the determination of the review proceedings: Proviso to R 22(1) SI 504/79.

*Magistrate's response to noting of appeal against conviction*

Insofar as this is necessary given the judgment already filed, within 5 days of the noting of an appeal by a legally represented person the magistrate must supply to the clerk of court a written statement setting out the facts he found to be proved and his reasons for judgment and sentence and dealing with the grounds on which the appeal is based. This statement must be sent immediately by the clerk of court to the appellant's legal practitioner: R 23(1) SI 504/79.

This statement does not have to be made if the magistrate is unavailable or is for some reason unable to comply with this requirement unless a Supreme Court judge directs otherwise: Proviso to R 23(1) SI 504/79.

*Appeal where accused pleaded guilty*

An appeal against conviction where there has been a plea of guilty will only be entertained where from the words used by the accused in pleading to the charge it is demonstrated that the accused was raising some defence which could legitimately be raised to the charge. In the present case, the appeal was entertained because the accused in the words used when pleading was raising the defence of claim of right: *Mudzingwa* 1999 (2) ZLR 225 (H)

There is no right of appeal against an interlocutory decision in the magistrates court before the proceedings have terminated. Thus it is only after the proceedings have terminated that an appeal can be brought in which the appellant raises the issue of the correctness of the interlocutory ruling. This would include a decision by a magistrate turning down an application for him or her to recuse himself or herself. *Masedza v Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H). However, the High Court may, in exceptional circumstances, be prepared to review such a decision before the proceedings in the magistrates court have terminated.

## Appeals against decisions of High Court

These appeals are dealt with in the Rules of the Supreme Court.

### *Appealable decisions*

The following appeals against decisions of the High Court are heard by the Supreme Court:

- Appeals against conviction and sentence or conviction or sentence in cases first tried in the High Court;
- Further appeals against decisions of the High Court on appeal against sentences imposed in the magistrates courts, where the appellants are dissatisfied with the appeal decisions in the High Court.
- Appeals against decisions of the High Court in regard to applications made to the High Court to review the proceedings in the magistrates court on the grounds of irregularities. There is, however, no right of appeal against decisions taken by High Court judges on automatic review of the proceedings.

### *Leave to appeal*

In some instances the leave (permission) of the High Court to appeal is required before the case can be taken on appeal to the Supreme Court: s 44 High Court Act, 1981. Where the High Court refuses to grant leave to appeal, the appellant is entitled to apply to a Supreme Court judge for leave to appeal.

### *Leave to appeal not required*

Leave to appeal is not required if:

- the appeal is against conviction on any ground of appeal which involves a question of law alone (Where the appeal was brought on the ground of law alone but it turns out on appeal that the appeal involves a question of mixed fact and law, the Supreme Court can grant leave to the appellant to proceed without the appellant first having to obtain leave from the High Court);
- the High Court imposed the death sentence and the appeal is against conviction or sentence or both;
- where the sentence for the offence is fixed by law and the appeal is on the ground that the sentence passed was not the sentence fixed by law in respect of the offence of which the appellant was convicted.

### *Leave to appeal required*

Leave to appeal must be obtained if:

- the appeal is against conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact. (It involves a question of fact if the ground of appeal is that there was no evidence or insufficient evidence to justify a conviction);
- the appeal is against sentence (or a forfeiture order) where the sentence was not that of death and it was not fixed by law.

### *Applications to High Court for leave to appeal*

Such applications are governed by O 34 of High Court Rules, 1971.

R 262 Where leave to appeal is necessary, application for leave to appeal must be made orally immediately after sentence has been passed. The applicant's grounds for the application must be stated and these will be recorded. The presiding judge can grant or refuse the application as he thinks fit.

R 263 Where an application was not made immediately after sentence was passed, in special circumstances, an application may be filed with the Registrar of the High Court within 12 days of the date of the sentence. This application must state the reason why application was not made immediately after sentence was passed and the grounds on which it is contended that leave to appeal should be granted.

R 264 A copy of this application must be served on the Attorney-General immediately after the application has been filed with the Registrar. The Attorney-General may file with the Registrar written submissions on the application within 2 days of the date of service on him.

R 265 The application in terms of R 263 is then placed before the presiding judge in chambers, who can grant or refuse the application as he thinks fit. The judge in his discretion can require oral argument on particular points raised.

R 266 If an application for leave to appeal is not made within the 12 day period, an application can still be made for condonation of late filing of this application. Such an application must be filed with the Registrar and served forthwith on the Attorney-General and must be accompanied by an application for leave to appeal. Within 3 days of service upon the Attorney-General, he may file with the Registrar submissions on the condonation application and the application for leave to appeal. The applications will then be placed before a judge in chambers who can grant or refuse the applications.

R 267 An application for condonation may not be made more than 28 days after the passing of sentence unless the judge orders otherwise.

R 268 Where the presiding judge is not available to deal with any of these applications, they may be dealt with by another judge.

**Summary**

Immediate application
An application for leave to appeal must normally be made immediately after the passing of sentence.

Application within 12 days
Must be made within 12 days of sentence, stating reason why not made immediately.

Application between 12 and 28 days
Must be accompanied by application for condonation of late filing of application.

Application after 28 days
Only if judge prepared to order that application may still be made.

## *Withdrawal of concession by Attorney-General's representative that leave to appeal should be granted*

In the case of *Masuku* HB-114-04 when the applicant was convicted, the Attorney-General's representative (who had not himself prosecuted the case) conceded that leave to appeal should be granted. At the application for bail, the Attorney-General's representative (who had not appeared previously) sought to withdraw the concession. The court held that the Attorney General occupies a pivotal role in the criminal justice system. His opinion in applications before the court commands respect because of his experience and the responsibility of his office. A concession made by him must be an informed one; it cannot be withdrawn willy-nilly in criminal proceedings. If he seeks to withdraw a concession, this must be properly done, giving the accused an opportunity to make submissions, as the withdrawal of a concession will, in most cases, result in prejudice to the other side. There was no submission that the Attorney-General's previous representative was aware of the withdrawal that he made on behalf of the State. Even if he were aware, he would be required, as an

officer of the court, to file an affidavit in support of the withdrawal accepting blame for erroneous concession.

## *Application to Supreme Court for leave to appeal*

The procedure for applying for leave to appeal, where a High Court judge has originally refused such leave, is set out in Rule 19 of the Supreme Court Rules. The application must be on the prescribed form and accompanied by the grounds of appeal on its prescribed form. The application may be accompanied by written argument in support of the application. The application and two copies of it are lodged with the registrar of the Supreme Court and one copy is delivered to the Registrar of the High Court.

The Registrar of the Supreme Court will ask for a copy of the High Court judgment, the reasons of the judge for refusing leave to appeal and a copy of the indictment and any other relevant documents. These papers are sent to the Attorney-General. The Supreme Court judge may decide to grant leave to appeal without having a hearing or he may hold such a hearing first. A representative of the Attorney-General's office may appear at such hearing.

## *Criterion for deciding whether to grant leave to appeal*

In *Mutasa* 1988 (2) ZLR 4 (S) it was stated that the test to be applied when considering an application for leave to appeal in terms of Rule 19(8) of the Supreme Court Rules is not whether the applicant has an arguable case but whether he has a reasonable prospect of success on appeal. If he has not, then leave to appeal should be refused.

## *Noting of appeal in Supreme Court*

The legal practitioner must compile the notice of appeal and the grounds for appeal.

Documents to be delivered: Notice of appeal and grounds of appeal.

To whom to be delivered: Notice plus two copies to Registrar of High Court and one copy to registrar of Supreme Court.

Periods within which documents to be delivered:
(a) Where leave to appeal is not necessary the documents must be delivered within fourteen days of the date of conviction or sentence against which the appeal is being made.
(b) Where leave to appeal has been granted by the High Court, within four days of the granting of leave to appeal or within fourteen days of conviction or sentence, whichever is later.

Where a Supreme Court judge grants leave to appeal no notice of appeal is required.

## *Grounds of appeal*

*Detail required*

The grounds of appeal must be set out in the notice of appeal and the grounds must be in separate numbered paragraphs. Grounds of appeal against conviction must be separated from grounds of appeal against sentence.

In *Venter & Anor* S-20-88 it was pointed out that where leave to appeal is granted at the end of a trial at which X is represented *pro deo*, the *pro deo* counsel has a duty to draft a proper notice of appeal containing proper grounds of appeal.

R 22(1) SI 504/79 requires that the notice of appeal sets out **clearly and specifically** the grounds of appeal. The grounds must be precisely specified and particularised and must not be couched in vague and generalised terms.

In *Nguruve* S-191-88 the Supreme Court indicated that the court expects legal practitioners to take the utmost care in the preparation of a notice of appeal, for if the notice offends against R 22(1) it will be struck out as invalid and the appeal will be discharged from the Roll.

In *Ncube* 1990 (2) ZLR 303 (S) and *Jack* 1990 (2) ZLR 166 (S) the Supreme Court stated that, if the notice is vague and general, it is a nullity and cannot be amended by putting in a more detailed notice later; it is as if no notice at all had been given. The magistrate is perfectly within his rights to refuse to give his reasons for judgment on receipt of such a vague notice.

It was further pointed out that if the notice of appeal is a nullity and the time within which to appeal has elapsed, the right of appeal has also elapsed.

With appeals against conviction, it is not enough to provide vague and generalised grounds of appeal. Such vague and general grounds as "the conviction is against the weight of evidence" or "the evidence does not support the conviction" or "the conviction is wrong in law" or "the magistrate erred in accepting the complainant's evidence" are completely inadequate and do not constitute compliance with Rule 22(1): *Emerson & Ors* 1957 R & N 743 (H) at 748 D-E; *Ncube* 1990 (2) ZLR 303 (S).

In regard to a notice of appeal against sentence, however, it is sufficient to say that "the sentence is excessive in the circumstances": *Jack* 1990 (2) ZLR 166 (S).

Where the appeal against conviction is based on fact, a general allegation that the conviction is against the weight of the evidence is inadequate compliance with the rules, for even in the simplest of cases, it is possible for the appellant to characterise his grounds of appeal further, at least to the extent of saying whether his attack on conviction is based on the quality of the prosecution evidence or on its quantum or on both: *Emerson & Ors* 1957 R & N 743 (SR); *Viringanayi* 1969 RLR 509 (A); *Hungwet* 1956 R & N 60 (SR); *Foce* 1958 R & N 65 (SR); *Du Toit* 1958 R & N 177 (SR).

In *Hunda* S-122-89 the Supreme Court was particularly scathing about the grounds of appeal. It seems the person who drafted them did not even know under what section of the Road Traffic Act his client had been convicted as he had left blank the section number in the notice of appeal. His grounds of appeal were vague and embarrassing in the extreme. It was not even stated precisely of what offence the appellant had been convicted. The notice read as follows:

1. The Court *a quo* erred in a matter of fact in accepting the evidence of the State witnesses which seemed improbable in all the circumstances of the case.
2. The Court *a quo* erred in holding that the State had proved its case beyond reasonable doubt.
3. The learned magistrate failed to conduct the trial in a satisfactory manner.

In *Jack* 1990 (2) ZLR 166 (S) it was stated that if it is not possible for a legal practitioner to lodge a proper notice of appeal without a transcript of the proceedings, he can apply for a transcript in terms of R 3 O 4 RGN 871/66, thereby postponing the date by which the notice must be lodged.

In *Banzi & Anor* S-36-91 the Supreme Court stated that it was a flagrant breach of the Rules to note an appeal averring that the grounds "will be furnished after perusal of the court record". There is no provision for the grounds to be filed later. A notice of appeal which did not set out any grounds was fatally defective and the appeal was struck off the Roll.

In *Madhana* S-122-84 it was found that the grounds for appeal against conviction were so badly and ambiguously drawn that it was impossible to know what the grounds of appeal were and it was impossible for the trial magistrate to furnish a reply to the notice

See also *Manzinde* 1989 (1) ZLR 148 (S).

There have been occasions on which Supreme Court has exercised powers of review to assist a would-be appellant where the appeal has merit (this has usually been in cases which have not already been reviewed by the High Court and certified to be in accordance with substantial justice.)

*Multiple counts*

In an an appeal against a conviction which involved multiple counts, the grounds of appeal applicable to each count must be clearly indicated.

In *Nguruve* S-191-88 the Supreme Court pointed out that in order to comply with R 22(1) it was necessary to set out clearly and specifically, under the heading of each count, the various grounds of appeal relied upon. Where the grounds of appeal are of a general nature and relate to more than one count, they should be enumerated under the caption "In respect of all counts" or where relate only to certain of the counts the caption should indicate to which counts the grounds relate e.g. "In respect of counts 2, 5 and 7".

*Misdirection by trial court*

In *Chinandama* S-158-90 the Supreme Court emphasised that the particulars of any misdirection alleged as a ground of appeal must appear in the notice, and some indication must be given as to the nature of the misdirection alleged and whether it is one of law or fact. If some omission is complained of, the notice must state what it is alleged was omitted.

The court said that (as was said in *Emmerson & Ors* 1957 R & N 743 SR)) even in a simple case of pure fact there are always two possible broad issues. Firstly, there is the possible issue that the magistrate was wrong in accepting the State evidence at all. The second issue is that even if he was right in accepting the evidence, the evidence relied on was not sufficient to prove the offence beyond a reasonable doubt. An appellant must particularise to the extent of indicating whether his appeal is based on one or other of these grounds or both.

In *Chinandama* the court found that the following ground was unduly vague: that the trial magistrate "should have thoroughly investigated instead of merely dismissing the appellant's explanation on why the complainant could fabricate and falsely implicate the appellant".

It must, however, be borne in mind that proof of a misdirection on the part of the trial court will not *automatically* result in the appeal succeeding. In *Ruzario* 1990 (1) ZLR 359 (S) it was found that the trial court has misdirected itself by relying on inadmissible evidence. The Supreme Court said that in terms of s 11(2) of the Supreme Court Act, 1981 the court had to determine whether "a substantial miscarriage of justice has in fact resulted" from the misdirection. The approach which the court has to adopt is to consider the evidence on the record and the credibility findings, if any, unaffected by the misdirection, and decide whether, if no reliance is placed on the evidence which the trial court wrongly relied on, there is proof of guilt beyond a reasonable doubt. If it does so consider then there is no resultant miscarriage of justice. The onus is on the State to satisfy the appeal court that no substantial miscarriage of justice had resulted.

*Unavailability of record*

In *Gahamadzwe* S-17-92 the Supreme Court pointed out that it was impermissible for appellant's legal practitioner to note an appeal and set out grounds for appeal without first having had sight of the judgment or the record. It is only on the basis of the record that proper grounds of appeal can be composed. The noting of an appeal without seeing the record should not be done as a way of noting of the appeal within the prescribed period. Instead the procedures set out in R 3(1) O 4 RGN 871/66 should be followed. This allows for the expeditious method of obtaining of the record by the convicted person making a request within 48 hours of his sentence for a copy of the record.

In *Jack* 1990 (2) ZLR 166 (S) it was stated that if it is not possible for a legal practitioner to lodge a proper notice of appeal without a transcript of the proceedings he can apply for a transcript in terms of R 3 O 4 RGN 871/66 thereby postponing the date by which the notice must be lodged.

In *Mapati & Ors* S-13-91 the applicants were unrepresented at their trial. They instructed a lawyer to appeal one working day before the last day for noting an appeal. It was found that the record had been lost. When the record was found 10 days later, it was found to contain no written judgment. The

magistrate was immediately asked to write a judgment. When the judgment was still not forthcoming 2 weeks later, counsel filed a notice of appeal setting out broad grounds and applying to the magistrates court for condonation.

The Supreme Court noted that the application for leave to note appeal out of time should have been made to a judge of Supreme Court, filing a notice of application, together with a supporting affidavit from the legal practitioner and an intended notice of appeal. The irregularity in applying to the magistrates court was condoned and merits of application considered.

The Supreme Court said that it was impossible for adequate grounds to be formulated before the record was available, but thereafter it was slightly negligent of the legal practitioner to await written judgment, instead of immediately filing broad grounds based on record, knowing that judgment would take at least another week. In the circumstances the late noting of the appeal could therefore only be allowed if there was some prospect of success.

The unavailability of the record was held in the case of *Dale* S-26-90 not to be a valid excuse for failure to comply with the requirement that the notice must set out precisely the grounds of appeal. In this case, appellant's legal practitioners instituted an appeal against a decision of a court martial. The notice set out no grounds of appeal. Leave to appeal out of time was subsequently granted but nothing was done about filing the grounds of appeal. The reason given for this default was unavailability of the record of the court martial proceedings. This was not a valid excuse, the Supreme Court said, as before preparing and filing the notice of appeal, legal counsel must first request a copy of written judgment.

As relates the effect of an incomplete record see *Manera* 1989 (3) ZLR 92 (S)

*Amendment of notice of appeal*

The Supreme Court has disapproved of the practice by some legal practitioners of making applications to amend their notices of appeal on the very day the appeal is to be heard and doing so without affording the magistrate, the respondent and the Supreme Court an opportunity of having sight of the documentation outlining the basis of the application: *Kadzombe* S-165-90. In this case the Supreme Court refused the application to incorporate new grounds in the notice of appeal, having found in any event that there was no merit in the new grounds.

Where the appellant institutes the appeal himself but he subsequently obtains legal representation, the legal practitioner may, not later than seven days before the hearing of appeal, file a notice amending, altering or supplementing the grounds of appeal.

*Late noting of appeal and leave to appeal out of time*

In terms of R 47 SI 504/79, if a convicted person fails to note an appeal within the time limits prescribed, his right to appeal against conviction and sentence lapses.

However, in terms of R 48 SI 504/79, there is provision for making application to appeal out of time. Such an application is made to a judge of the Supreme Court. The application must be lodged with the Registrar of the Supreme Court and accompanied by:

- a draft notice of appeal complying with the Rules; and
- an adequate statement explaining why the appeal was not noted within the time period prescribed.

The Attorney-General must be notified of the application and may oppose it by lodging written arguments in opposition. The applicant may then lodge written arguments in reply and may request that the matter be set down for oral argument. The Supreme Court judge dealing with the matter may grant or refuse the application or order that the matter be set down for oral argument. After the oral

argument the application may then be granted or refused. When granting the application, the judge can give directions regarding the future conduct of the appeal.

In *Nemukuyu* S-146-87 the Supreme Court declined to condone the late noting of the appeal and to grant leave to appeal out of time. The notice of appeal was filed in the registry of the magistrates court outside the 14 day limit prescribed by the R 22 SI 504/79 for instituting such appeals. The explanation advanced for the late noting of the appeal was that although the applicant's legal practitioner was in court to note judgment handed down by the court, it was, at times, difficult to hear the magistrate; that the judgment was reasonably lengthy and in view of the issues involved it was considered prudent to examine the written judgment before formulating the grounds of appeal. The legal practitioner who represented X at his trial was the same person who noted judgment. He advised the magistrate of the applicant's intention to appeal and even applied for bail pending appeal. The Supreme Court observed that he must have had a fair idea of what dissatisfied him in the judgment to propel him to announce the intention to appeal and to ask for bail. This excuse was therefore weak and unsatisfactory.

In *Tangirai & Ors* S-183-90 the first appellant had lodged his notice of appeal after the expiry of the 14 day period prescribed by R 22(1) SI 504/79. There was no application for condonation of the late noting of the appeal. Three months later he had filed an application for leave to appeal out of time in terms of R 48(1) SI 504/79 but did nothing further in regard to the application and the matter appeared to have been ignored by all parties concerned.

Taking into account the fact that no explanation had been tendered for the delay in instituting the appeal, and the appellant's lack of prospects of success, the Supreme Court struck the appeal off the Roll.

In an application for leave to appeal out of time, the documents must be accompanied by an affidavit setting out why the applicant did not institute his appeal or apply for leave to appeal within the time periods prescribed.

The Attorney-General may submit affidavit in reply to that filed by applicant and, if he does, the applicant must be given opportunity to reply thereto: R 20 of Supreme Court Rules.

*Lost record*

If the record goes missing whilst the trial is still taking place (i.e. before all the evidence has been heard and the magistrate has arrived at his verdict), then the defence lawyer is entitled to have the case proceed from the point at which it left off. Thus with part-heard cases, the clerk of court under the direction and supervision of the presiding judicial officer, must reconstruct the record from the best secondary evidence. Affidavits should be taken from witnesses and those present.

Where the accused had pleaded guilty the case can then proceed on the basis of the restored record, provided there is no prejudice to the accused. However, if the accused has pleaded not guilty the witnesses who have previously given evidence must be recalled in order to ascertain whether they agree that the version of their testimony in the reconstructed record is correct. The defence lawyer and the State should be permitted to cross-examine the witnesses relating to the correctness of the reconstructed record: *Sibanda* HH-80-91.

If the trial has been completed, the trial judicial officer is *functus officio* (has finished dealing with the matter) and the clerk of court must by affidavit state that the record has been lost and proceed to reconstruct the record by obtaining affidavits from the magistrate, witnesses and others present as to the contents of the record. Both parties must be given an opportunity to peruse the reconstructed record and to give their versions. Thereafter the record will be sent for review or appeal: *Sibanda* HH-80-91.

*Rectification of record*

In *Davy* 1988 (1) ZLR 386 (S) it was pointed out that when considering an appeal, the appeal court must have regard to what appears on the record. If the appellant is not satisfied with the accuracy of the record of the trial in a magistrates court, he should apply in writing to that court, in terms of R 6 O 111 of the Magistrates Court (Civil) Rules, 1966, for the errors to be corrected. If, through no fault of his own, he is unable to obtain rectification pursuant to that procedure — and those Rules make no provision for a magistrate to grant an extension of time — he must apply to the High Court expeditiously on notice of motion for rectification, serving the notice, together with an affidavit which sets out the omitted matters he seeks to have incorporated in the record, upon the presiding magistrate and upon the Attorney-General. They must be given ample opportunity to answer the allegations. If the application is granted by the High Court, the Supreme Court will be in a position to hear the appeal on the record as amended.

The Supreme Court will not itself entertain applications for the rectification of a record; the fact that it did so in the case of *Jenkins* S-94-85, where the State did not dispute the inadequacy of the record, should not be taken as a precedent.

*Heads of argument for appeal to Supreme Court*

The filing of heads of argument in the Supreme Court is governed by R 24 as read with R 22 the Supreme Court Rules. (See also R 6C SI 504/79 as regards appeals against decisions in the magistrates courts and R 10A RGN 449/75 in respect of appeals against decisions in the High Court.)

Heads of argument have to be filed before an appeal is set down. The heads of argument must set out the main Heads (the main points) of the argument together with a list of authorities which will be cited in support of each Head.

After the Registrar of the High Court has received the record of the case, he must send it to the Registrar of the Supreme Court and the Registrar of the High Court must notify the legal practitioner of the appellant that he has sent the record to the Registrar of the Supreme Court and he must call upon the legal practitioner to file heads of argument within 15 days of such notification.

The appellant's heads must be filed on a registrar within this 15 day period, which period excludes Saturdays, Sundays and public holidays, "or within such longer period as the judge may for good cause allow". Immediately thereafter he must deliver a copy of these heads to the Attorney-General.

Late filing of heads of argument may lead to the striking of the case off the roll. It was pointed out in *Maphosa* S-12-91 that in criminal appeals to the Supreme Court, where heads are filed late, without apology or application for condonation, the Supreme Court will be justified in declining to read the papers and striking the appeal from the roll.

In *Nyereyemhuka* S-21-89 the Supreme Court warned legal practitioners that they may find that their clients' appeals will be dismissed for want of prosecution if they file heads of argument out of time.

In *Masuku* S-91-89 appellant's counsel had filed his heads only a day prior to the set down date. His excuse for doing so was that the matter had been taken over from another firm. The appeal court indicated that this was not a satisfactory and sufficient reason for condoning the late filing and, had the State counsel not made a concession in favour of the appellant's appeal, the court would not have entertained the appeal.

In the April, 1992 *Law Society Newsletter* GUBBAY CJ indicated that a formal notice of motion is not required for the purpose of applying to a judge for an extension of time within which to file heads of argument. However, the application for extension must be made by way of affidavit. A mere letter setting out the facts and requesting an extension will not be accepted as sufficient. The papers will then be considered by the judge and he will decide the matter accordingly. There will be no need for any documentation from the respondent in respect of such applications.

Within 10 days of receiving the appellant's heads, the Attorney-General has to file his heads with the Registrar. Immediately after the Registrar has received respondent's heads he must deliver a copy of these to the appellant. This rule is subject to the proviso that if the appeal is set down less than 15 days after the respondent receives the appellant's heads, the respondent must file his heads as soon as possible and, in any event, not later than 4 days before the hearing of the appeal.

*Set down of appeal in Supreme Court*

In terms of R 24 of the Supreme Court Rules, after receiving the notification that the record of the case has been sent to the Registrar of the Supreme Court, the appellant's legal practitioner must apply to a registrar in writing for a date of hearing, and must provide the registrar of the Supreme Court with an estimate of time it is envisaged the hearing will take.

After this application has been received, the Registrar of the Supreme Court must set down the appeal for hearing on a day elected by him. He must immediately notify the appellant's legal practitioner and the Attorney-General. The Registrar must select a date for the hearing which is such that the parties to the appeal are have not less than 7 days' notice of the hearing.

*Abandonment and dismissal of appeal*

In terms of R 25 of the Supreme Court Rules, if no arrangements have been made for the preparation of the record or no application has been made for a date of hearing within 6 weeks of receiving notification that the record has been sent to the Supreme Court, the appeal shall be regarded as abandoned and shall be deemed to have been dismissed.

An application can, however, be made for reinstatement of the appeal and an extension of time.

*Non-compliance with the Rules*

The Supreme Court has sometimes relied upon its review powers to assist a would-be appellant where his appeal had merit, despite the fact that due to non-compliance with the Rules of Court the case is not properly before the appeal court but see *Zvinyenge & Ors* 1987 (2) ZLR 42 (S).

*Renunciation of agency to prosecute appeal*

In terms of R 12A of the Supreme Court Rules, a legal practitioner engaged to act for the appellant may not renounce his agency less than three weeks before the hearing of the appeal. In *Makawa* S-179-91 appellant's legal practitioners had purported to renounce their agency 11 days before the day of hearing, in violation of R 12A of the Supreme Court Rules. Renunciation at that time without leave of the court or a judge was ineffective and the legal practitioners were notified by the Registrar of their obligation to appear on behalf of their client at the hearing. They briefed counsel to appear, at very short notice, and he produced heads of argument on the morning of the hearing, but did not file papers explaining the attempted breach of R 12A and applying for condonation of the late filing. Despite the merits of the appeal the Supreme Court dismissed the appeal because of breach of the Rules.

The court, however, then postponed the matter to enable the State to reconsider and, when the State withdrew its support for the conviction at the subsequent date, exercised its review powers and set aside the conviction and sentence.

If the client is unable to raise the required funds for the appeal the legal practitioner must decide well before the appeal is heard whether or not he will continue to act for the client. If he decides not to continue, he must renounce his agency in terms of R 10(3) of the Rules of the Supreme Court, and must advise the client that unrepresented appellants have to obtain a certificate from a Judge of the

Supreme Court before being entitled to prosecute an appeal in person. Failure to advise the client of this is a breach of the legal practitioner's duty to his client: *Martin* 1988 (2) ZLR 1 (S).

*Appeal against sentence*

The High Court and the Supreme Court are empowered, in cases involving appeals against the sentence imposed by the trial court, to quash the sentence and impose such other sentence as may be warranted, whether more or less severe misdirection on the part of the trial court. See s 38(4)(a) of the High Court Act, 1981 and s 11(4)(a) of the Supreme Court Act, 1981.

However, it has often been stressed that the discretion to impose sentence lies with the trial court. In an appeal against sentence the appeal court may only interfere with the sentence imposed by the trial court on limited grounds. These are: if the sentence imposed was manifestly excessive or if there was a misdirection on the part of the trial court.

In numerous other cases which have been reported including *Nhumwa* S-40-88, it was pointed out that it was not for appeal court to interfere with the discretion of the sentencing court merely on the ground that the appeal court might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severer than one which the appeal court would have imposed sitting as the court of first instance, the appeal court will not interfere with discretion of sentencing court. The appeal court aims not so much at uniformity of sentence but uniformity of approach.

In *Jackson* S-7-88 the court reiterated that sentencing involves essentially a value judgment and unless the sentence imposed by trial is glaringly inappropriate or is vitiated by some irregularity or misdirection on part of court, the appeal court will not substitute its discretion for that of the trial court.

In *Chirisa* 1989 (2) ZLR 102 (S) it was decided that failure by a magistrate to provide reasons for his sentence in terms of O 5 R 2(1)(a)(ii) RGN 871/66 amounts to a misdirection, because it effectively prevents the appeal court from determining whether he misdirected himself or not.

See also 1989 Vol 1 No 6 *Legal Forum* 29.

It must be carefully noted that in a case involving an appeal against sentence the appeal court may, if it considers that this is warranted, substitute a sentence which is more severe than that imposed by the trial court.

However, in *Honamombe* S-90-88 it was stated that it has never been doubted that an appeal court cannot impose a sentence which, at the time of the appellant's conviction, would not have been a competent sentence for the trial court to impose. That long-standing principle is not affected by s 38(4)(a) of the High Court Act, 1981; for although on an appeal against sentence the High Court may quash the sentence passed at the trial and impose one more or less severe, the sentence substituted must be one "warranted in law", and must conform with the jurisdictional restriction of the trial court.

In an appeal against sentence only, the High Court may, in appropriate circumstances, exercise its powers of review and set aside a conviction: *Jonas* HB-32-88.

In an appeal against sentence the appeal court is not bound by sentence which has previously been confirmed on automatic review: *Malunga*1990 (1) ZLR 124 (H)

*Financial dealing with client*

In *Martin* 1988 (2) ZLR 1 (S) it was pointed out that if a legal practitioner is not put in funds after having been engaged to represent a client in a criminal appeal before the Supreme Court, it is highly undesirable, if not unethical, for him to disclose this fact to the court. Instead, he must decide well before the appeal is heard whether or not he will continue to act for the client. If he decides not to

continue, he must renounce his agency in terms of R 10(3) of the Supreme Court Rules, and must advise the client that unrepresented appellants have to obtain a certificate from a Judge of the Supreme Court before being entitled to prosecute an appeal in person. Failure to advise the client of this is a breach of the legal practitioner's duty to his client.

*Postponement*

In *Manzinde* 1989 (1) ZLR 148 (S) it was stated that in an application for the postponement of the hearing of an appeal, the applicant's legal practitioner must ensure that his client's affidavit supporting the application gives a candid and comprehensible explanation of the need for postponement. He should not file an affidavit in which his client blames another legal practitioner for failing to proceed expeditiously with the appeal unless he has first checked with the other practitioner to confirm the truth of the allegation.

*New evidence emerging after trial has ended*

Usually an appeal is decided on the record and no further evidence may be led.

However, the Supreme Court has power (in terms of s 15(b) and (c) of the Supreme Court Act) and the High Court has powers (in terms of s 41(b) and (c) of the High Court Act) to call evidence when hearing appeals where this is necessary or expedient in the interests of justice. Such right is exercised only in exceptional circumstances and only if grave miscarriage of justice would result if not exercised: *Jim & Anor* 1947 (4) SA 118 (SR); *Rademeyer* 1948 (2) PH H158 (SR).

In *Craven* S-87-91 the appellant, who had been convicted of drunken driving, had challenged the reliability of the blood alcohol analysis. On appeal, his counsel sought to rely on inaccuracies in the doctor's affidavit which had not been put in evidence to establish that the analyst was careless in carrying out the analysis. The appeal court declined to take cognizance of these new facts as they were not on record and had not been placed before the appeal court by consent nor had any application been made for it to be admitted as part of the record.

Additionally, in exceptional circumstances, the Supreme Court may set aside the conviction and order the remittal of the case to trial court for hearing of further evidence under s 17(d) of the Supreme Court Act.

A proper foundation must be laid in an application by appellant's legal counsel for remittal to the trial court for hearing of further evidence. The Supreme Court must be appraised of the nature of the evidence proposed to be led and of the reasons for the failure to lead that evidence during the trial: *Ngombe* 1964 RLR 231 (A). There must be something outside the record to show that the original failure to lead evidence was due to the cause asserted by the defence: *Smit* 1958(4) SA 283 (SR). Generally, the appellant's counsel should be able to advance a reasonable explanation as to why the evidence was not led at the original trial. The court should also be satisfied that the evidence is available at the time of appeal and that that evidence is likely to be incontrovertible and decisive: *Bira* 1971 (1) RLR 263 (A); *Adams* 1952 (1) PH H14 (SR).

The case of *Zvakurumbira* S-7-90 involved an appeal against a conviction for rape. Defence counsel produced a letter purporting to have been written by the complainant in which she confessed that her testimony before the trial court was false. Counsel applied for an order setting aside the conviction and sentence and remitting the case to the trial court for the purpose of subjecting the complainant to further cross-examination. The appeal court refused to make this order. It pointed out that the correct procedure was for the defence lawyer to proceed by way of notice of motion, addressed to the Attorney-General, supported by an affidavit confirming the contents of the letter. However, it emerged that the complainant denied writing the letter and an application for postponement to allow a handwriting expert to determine whether the letter was written by the complainant was refused.

One circumstance in which the Supreme Court will remit the case is where the State failed to reveal to the defence that a State witness' testimony was materially different from the statement he made to the police: *Tapera* 1964 RLR 197 (A).

In Kuiper 2000 (1) ZLR 113 (S) the appellant was convicted of common assault. He appealed against conviction. A few days before the appeal was heard he filed an application in the Supreme Court for an order setting aside the conviction and sentence, and remitting the matter to the trial court so that the appellant could lead further evidence. The further evidence which he sought to have introduced consisted of a video recording which he said would corroborate his version of what happened. It was held that the requirements which the applicant must satisfy are well established. There must be a satisfactory explanation of why the evidence was not led at the trial; there must be a prima facie likelihood that the evidence is true; and the evidence must be materially relevant to the outcome of the trial. Where the appeal court is satisfied that those grounds exist, it may either remit the matter or hear the evidence itself and decide the matter on the basis of the new evidence. These requirements had been satisfied in the present case. There was a satisfactory explanation for not leading this evidence at the trial. The police had taken the video recorder after the incident and the prosecutor had told the appellant that the video tape had been wiped clean. It was only after the video recorder was returned to the appellant after the completion of the trial, that the appellant discovered that it had not been wiped clean. There was a prima facie likelihood that this evidence was true and the evidence was materially relevant to the outcome of the trial. The court should itself view the new evidence. On the basis of this evidence the conviction and sentence should be set aside.

*New evidence emerging after defence has closed its case*

A situation may sometimes arise where the defence may wish to lead further evidence after it has already closed the defence case. Immediately after the defence has closed its case, the court may have adjourned the case to a later date, at which stage it was intended that final addresses would be heard and judgment would then be handed down or reserved. If, during the period that the case was adjourned, new defence evidence becomes available, the defence would have to apply to the court when the case is resumed for permission to re-open the case and call this further defence evidence. In the interests of justice, the court would be expected to grant this application. However, defence counsel would also be expected to give a satisfactory explanation as to why it was not possible to lead this evidence before he closed his case.

It is also possible that new evidence could come to light after the trial court has found X guilty, but before the court has imposed sentence. After the court has pronounced its verdict, it may adjourn the case to a later date, at which stage the matter of sentence would be dealt with. If the new evidence has come to light *after* the trial court has already pronounced its verdict, it would then be necessary to take the matter on appeal and apply for the remittal of the case to the trial court for the hearing of further evidence.

**Timetable for action in appeal cases**

| | Appeals from magistrates court to High Court | Appeals from magistrates court to Supreme Court | Appeals from High Court to Supreme Court |
|---|---|---|---|
| | | | |
| | | | |
| Noting of appeal | 7 days | 14 days | 14 days |

| | | | |
|---|---|---|---|
| Leave to appeal | Not required | Not required | Required in some cases. Where required must normally be made immediately after sentence to presiding judge. But may also be made afterwards to presiding judge and, if refused, can apply to Supreme Court judge. |
| Leave to appeal out of time | Application under R 48 SI 504/79 | Application under R 48 SI 504/79 | Application under R 48 SI 504/79 |
| Applying for record | | | |
| Filing of Heads of Argument | Within 15 days of notice | Within 15 days of notice | Within 15 days of notice |
| Renunciation of agency. | | | |

**Summary**

**Magistrates court case**

Appeal to High Court against conviction or conviction and sentence or sentence

Further appeal against High Court decision on appeal from magistrates court to Supreme Court

**High Court case**

Appeal to Supreme Court against conviction, sentence or conviction and sentence

With leave where required from High Court or Supreme Court judge
Without leave where leave not required

No appeal against decision by High Court when matter on automatic review

But right of appeal to Supreme Court where case taken to High Court on review because of procedural irregularities in magistrates court.

# SECTION 12 – AUTOMATIC REVIEW AND SCRUTINY

## Review and scrutiny systems

The system of review is there to ensure "that every accused person who obtains a sentence of some severity automatically enjoys an independent investigation of his conviction and sentence by a senior

judicial officer who is enjoined to satisfy himself that the proceedings meet the requirement of being in accordance with substantial justice..." Address to Magistrates Forum by A. Gubbay

The High Court automatically reviews all criminal cases decided in the magistrates courts where X have been sentenced to terms of more than of 12 months imprisonment or fines in excess of level 6: s 57(1) of MCA.

A regional magistrate will scrutinise all decisions in the magistrates courts, except those handed down by regional magistrates, where accused have been sentenced to more than 3 months but not more than 12 months imprisonment or to a fine exceeding level 4 but not exceeding level 6: s 58 MCA.

The provisions of the Magistrates Court Act regarding the submission of the record of a case for automatic review or scrutiny are mandatory. Failure to comply could result in proceedings being interfered with on review: *Bhanke & Ors* HH-123-02.

However a case will not go for review or scrutiny where it is being taken on appeal. Also in the case of a person who was legally represented at his trial the case will only go on review if, within three days of the magistrate's determination, his lawyer requests the clerk of court to forward the case for review or for scrutiny. Such a request must be in writing and must be accompanied by a brief statement of the reasons for the request. The magistrate who decided the case is entitled, if he so wishes, to append his remarks to the record which is being forwarded for review or for scrutiny.

In *Nyathi* HB-90-03 the judge decided that, other than in exceptional cases, the accused is not allowed to use the review procedure to attack the conviction. Normally the accused must lodge an appeal if he is arguing that the conviction was wrong. In the present case X had been convicted and sentenced to a term of imprisonment. The proceedings had been confirmed on review. His legal practitioner sought to bring the matter on review again. He attacked the conviction and, in addition, submitted that the proceedings were defective. He alleged that the magistrate had not allowed the accused to secure legal representation. The accused had wished to secure the services of a particular practitioner, but the practitioner died before the trial began. It was also alleged that the magistrate had not granted a postponement to enable a defence witness to be called. The court held that the legal practitioner should have taken the matter on appeal.

If the judge decides that the proceedings before the magistrate were not in accordance with real and substantial justice, he will certify accordingly. The main powers of the judge on review are to

- alter or quash the conviction;
- reduce or set aside the sentence or order the trial court to substitute a different sentence from that imposed by the trial court;.
- set aside or correct the proceedings or give such judgment or impose such order as the trial court ought to have given, imposed or made;
- remit the case back to the trial court to hear further evidence *Mhona & Anor* HB-56-05;
- convict him of some other offence than that for which he was convicted.
- substitute imprisonment for a fine unless the enactment under which the person was convicted does not permit the imposition of a fine; or
- impose a more severe sentence than that imposed except in relation to a legally represented person or a company where the lawyer or company requested the matter to be forwarded on review.

s 29(2) HCA.

Where a magistrates court has erroneously set a lower period of community service than set out in the guidelines, a court on review may not increase the period to what it ought to have been, as that would amount to an increase in sentence: *Binga* HH-196-02.

Regional magistrates must scrutinise such cases as soon as possible after receiving them. If satisfied that the proceedings were in accordance with real and substantial justice, the regional magistrate will so endorse it. However, if he doubts that they were in accordance with real and substantial justice, he must forward the case to the registrar of the High Court who will lay it before a judge: s 63A MCA.

## Review of incomplete proceedings

In *A-G* v *Makamba* S-30-05 the Supreme Court stated that the general rule is that a superior court should intervene in uncompleted proceedings of the lower courts only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant.

In *Dombodzvuku & Anor* v *Sithole NO & Anor* HH-174-04 when arraigned on charges of corruption, the applicants excepted to the charge, claiming that they were not public officers in terms of the relevant legislation. The presiding magistrate ruled against them. The magistrate's ruling was brought on review. It was argued that the magistrate's decision was grossly unreasonable and should be set aside. It was held that an incorrect interpretation of the law cannot be grossly unreasonable merely because it does not find favour with its attacker. The person attacking it must go further and show that, on the facts before the court, the decision reached defies all logic and is completely wrong. A different opinion of the law, clearly showing how it was arrived at, cannot be said to defy logic. It may be wrong but may not necessarily be unreasonable. There was nothing irregular in the decision by the magistrate to compel the court to use its review powers at this stage of the proceedings. The magistrate's decision was arrived at after hearing argument from both counsel and it was a carefully considered decision. The decision represented the magistrate's interpretation of the law and it could only be an incorrect decision and not an irregular one. Incorrect decisions are redressed by way of appeal.

In *Attorney-General* v *Makamba* S-74-04 it was held that a refusal by a magistrate to discharge the accused at the end of the State case, where that decision is based on findings of fact, is not a gross irregularity entitling the High Court to interfere on review. The correctness of findings of fact is a matter for an appeal court.

In *Masedza v Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H) the High Court said it would have been prepared to review an interlocutory decision by a magistrate rejecting an application that he recuse himself had the application been well founded. It would have been prepared to do this despite the fact that the proceedings in the magistrate had not yet terminated.

## Accused's statement regarding sentence

Whether or not a case is subject to automatic review, there is a procedure provided in ss 63(2a) and 66(1) MCA whereunder a person convicted by a magistrate may question the severity of the sentence imposed by submitting a statement to the High Court setting out why he considers his sentence to be unduly severe. The magistrate who imposed the sentence should send a full reply to this statement to the reviewing judge. Under this procedure X may only make representations about the sentence; he may not challenge his conviction. If he wishes to challenge the conviction he must appeal: *Stockie* 1980 ZLR 280.

## Can review court take into account facts not placed before magistrate?

In *Dlamini* HB-3-90 the review court stated that it could not take into account facts which were not before the trial court when sentence was passed and which had not formally been placed before the review court by way of application to lead further evidence in regard to sentence.

The trial magistrate had imposed a sentence of imprisonment because he thought that X would be incapable of paying a fine. In this case the legal practitioner sought to place before the review judge a statement of X to the effect that at the time of his trial he was in a position to pay the maximum fine imposable under the statutory provision in question. The legal practitioner said that because of a misunderstanding, this information was only given to him after X had been sentenced. The legal practitioner requested that the sentence be reassessed in the light of this information.

On the other hand, in *Mudarikwa* HH-48-90, X had at the appeal made an offer of restitution. This offer was taken into account by the appeal court in deciding to suspend a portion of the prison sentence on condition of making restitution.

**Summary**

**Review**

Cases where more than 12 months prison or fine in excess of level 6.

No review if case going on appeal & only reviewed in case where X was legally represented at trial if his lawyer requests that case be forwarded for review.

On review High Court judge checks that proceedings in accordance with real and substantial justice. If it is not, may quash or alter conviction, set aside or correct the proceedings or give such judgment or make such order as magistrate ought to have given, imposed or made.

Noting of appeal can be deferred pending outcome of automatic review.

**Scrutiny**

Applies where between 3 months and 12 months prison or a fine between level 4 &6.

No scrutiny if going on appeal & only scrutinised in case where X legally represented at trial if lawyer requests that case be forwarded for scrutiny.

Scrutiny by regional magistrate who checks that proceedings in accordance with real and substantial justice. If has doubts that it is, will refer case to High Court.

## Bail pending review

Where a person applies for bail after conviction and his case is subject to review, a magistrate within whose area of jurisdiction he is in custody may grant him bail pending the review of the case:
s 123(1)(b)(i) CPEA. It must also be noted that the powers of a magistrate to grant bail are limited in relation to convictions for offences falling under the Third schedule. Section 123 (1) (b) (iii) proviso (iii) provides that the power to admit to bail is subject to the Attorney- General's consent.

# SECTION 13 – MISCELLANEOUS MATTERS

## Contempt of court

The power to punish summarily for contempt is essential for the court to uphold its dignity and authority, but this power is a drastic one, which should not be resorted to lightly.

Where the power is exercised, the magistrate must not act in the heat of the moment in anger. The atmosphere will be emotionally charged so he must recover his temper and act objectively. He must remind himself that in this sort of case he is acting as prosecutor, witness and judge in the same cause. He must be particularly careful in respect of situations where defence lawyers have had altercations with him during the course of the presentation of the defence case. Lawyers may sometimes direct insulting remarks towards the bench where they believe that the adjudicators have acted unfairly towards their clients. The usual response to such cases should be to warn defence counsel about their behaviour and to allow them to retract their remarks and apologise. Defence lawyers should remember that it will not do their client's case any good to embark on a course of acrimonious confrontation with the judicial officer.

In the case of *In re T D Muskwe* HH-14-92 a magistrate had fined a legal practitioner for contempt of court in contravention of s 79(1) of the Magistrates Court Act. At an earlier hearing of a criminal case presided over by the same magistrate, the practitioner had ended up renouncing his agency and walking out of court. This had followed an altercation between the magistrate and the legal practitioner over the legal practitioner's line of questioning of a witness. The magistrate decided he was guilty of contempt in that he had done an act calculated to bring the dignity of the court into disrepute. The High Court set aside this decision. It found that the magistrate had failed to give adequate reasons for her decision and, in particular, had failed to examine whether the vital element of intention was present and whether, if there had been a contempt, it had been purged by the subsequent apology by the legal practitioner.

In the case of *In re: Chinamasa* 2000 (2) ZLR 322 (S) the Supreme Court ruled that the species of contempt known as scandalizing the court was constitutional. Although under the right to freedom of expression there is a right to criticize the court judgments, the right to freedom of expression did not permit the making of comments imputing corrupt or improper motives to the judicial officers as this would create a real or substantial risk of impairing public confidence in the administration of justice. In this case the Attorney-General had severely criticized the sentence imposed by a judge.

## Prescription period for criminal offences

All the criminal offences which are within the jurisdiction of the magistrates courts become prescribed if prosecutions are not brought against the offenders within twenty years from the time that those crimes were committed. In other words, the offenders can no longer be prosecuted for these offences after twenty years: s 23 CPEA.

LIST OF CASES