Criminal procedure

PIETER DU TOIT
North-West University, Potchefstroom

1 Delays in criminal proceedings

Section 342A(1) of the Criminal Procedure Act 51 of 1977 provides that a criminal court may conduct an investigation into delays in criminal proceedings. The section further provides for a number of factors that a court must consider in determining whether such delays are unreasonable (s 342A(2)), as well as a number of orders that a court may issue should it find that the completion of the proceedings is being unreasonably delayed (s 342A(3)). The provision does not empower courts to order a permanent stay of a prosecution. However, our courts (including the Constitutional Court) have held that such an order may indeed be appropriate to protect the fair trial rights of an accused person. Still, such an order should not be granted lightly, as it is a drastic measure (*Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at para [42]; *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA) at para [9]; *Bothma v Els* 2010 (1) SACR 184 (CC); *Director of Public Prosecutions and Minister of Justice and Constitutional Development v Phillips* [2012] 4 All SA 513 (SCA). There are conflicting judgments on the question as to whether or not a magistrate's court has the power to order the permanent stay of a prosecution. In *Broome v Director of Public Prosecutions, Western Cape; Wiggins v Acting Regional Magistrate Cape Town* 2008 (1) SACR 178 (C) the high court apparently assumed that a magistrate's court may make such an order. In *S v The Attorney-General of the Western Cape; S v Regional Magistrate, Wynberg* 1999 (2) SACR 13 (C) and *Director of Public Prosecutions KwaZulu-Natal v Regional Magistrate, Durban* 2001 (2) SACR 463 (N) it was expressly held that magistrates' courts have the jurisdiction to order the permanent stay of a prosecution. In *S v Naidoo* 2012 (2) SACR 126 (WCC), on the other hand, it was held that no such power was bestowed upon magistrates' courts. This court held (at para [18]) that an accused person who seeks a permanent stay of prosecution by reason of unreasonable delay before commencement of criminal proceedings (in other words in circumstances not provided for in s 342A of the Criminal Procedure Act) must bring such application before the high court having jurisdiction. On the other hand, delays occurring after the commencement of criminal proceedings have to be dealt with exclusively by the court seized with the criminal proceedings.

In *Naidoo v Regional Magistrate, Durban* 2017 (2) SACR 244 (KZP) a full court had the opportunity of considering the issue whether magistrates' courts are clothed with jurisdiction to grant an order to permanently stay a prosecution. The court agreed with the reasoning adopted in *S v Naidoo* supra and concluded that magistrates' courts do not have such jurisdiction. In this regard the court held that it is trite in our law that magistrates' courts are creatures of statute and, unlike the high courts, possess no inherent jurisdiction. The jurisdiction of the magistrates' courts is dependent on legislation granting such jurisdiction. The court referred to s 170 of the Constitution of the Republic of South Africa, 1998, which provides that magistrates' courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a high court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President. Section 170 of the Constitution should be interpreted and understood in a way that magistrates' courts only have jurisdiction if an Act of Parliament grants them such authority (at para [13]). It is submitted that this judgment correctly reflects the legal position relating to the jurisdiction of a lower court to order a permanent stay of prosecution and that judgments to the contrary should no longer be followed. Apart from the fact that lower courts may not stray beyond the powers bestowed upon them by statute, it was also pointed out in *S v Naidoo* supra (at paras [15] and [16]) that the character and effect of an order for the permanent stay of a prosecution is in essence, that of a judicial review accompanied by a declaratory order. Such orders ordinarily fall outside the jurisdiction of magistrates' courts. The court held that this well-established limitation on the jurisdiction of magistrates' courts probably explains why the wording of s 342A of the Criminal Procedure Act is limited to a delay after the commencement of proceedings, in other words a delay that occurs while the matter is under the supervision of the court.

Whilst there are many reported cases on the issue of permanent stay of prosecutions, the court in *Mohan v Director of Public Prosecutions, Kwazulu-Natal* 2017 (2) SACR 76 (KZD) had to deal with an application for the confirmation of an earlier *rule nisi* ordering the *temporary*, as opposed to a permanent, stay of prosecutions in three separate cases. The basis of the application essentially was that the applicant lodged a complaint regarding the investigation of the case against him to the office of the judge responsible for investigating complaints against the Directorate for Priority Crime Investigation. The judge had referred the matters for further investigation. The applicant argued that the criminal proceedings against him should therefore be temporarily stayed pending finalisation of the investigation. Regarding the duty to disclose material facts, Chetty J stressed that applicants for a stay of

prosecution and their legal representatives must be fully candid with the court. Failure to do so can, in itself, constitute a ground to dismiss the application. In this case the litigants did not reveal in their founding papers, or at the hearing of their application, that one of the three cases had already commenced (at paras [32]-[33]). The court nevertheless deemed it necessary to deal with the merits of the case. Relying on *Sanderson v Attorney-General, Eastern Cape* supra, the court held that it is well-established that a bar to criminal proceedings is likely to be available to an accused only in a narrow range of circumstances, namely those in which the accused has probably suffered irreparable trial prejudice as a result of the trial-related delays (at para [34]). The court referred to *Attorney-General of Natal v Johnstone & Co, Ltd* 1946 AD 256, in which it had been held that the proper way of deciding on the guilt of an accused was by initiating criminal proceedings against him (at para [35]). The court held that the applicant had not pointed to any miscarriage of justice that would befall him in the event of the criminal trials proceeding. He was legally represented in all three trials, and to the extent that he complained that this was a compliant driven investigation, the decision to prosecute is solely that of the Director of Public Prosecutions, not of the police service. The court found that there was in any event nothing inherently prejudicial or sinister about compliant-driven investigations, especially in a case of alleged tax fraud, as in the case under discussion, where the necessary expertise to properly investigate such matters resides in investigators within the revenue service (at para [47]). Where evidence has been improperly obtained or tainted in some way or another, the accused will be entitled to object to its admissibility (at para [48]). Chetty J held that whilst the applicant only sought a temporary interdict as opposed to a permanent stay of prosecution, such an order was nonetheless a drastic incursion into the powers of the prosecuting authority. In light of case law such as *National Director of Public Prosecutions v Freedom Under Law* 2014 (2) SACR 107 (SCA), Chetty J concluded that an order for a temporary stay of prosecution in the three criminal trials the applicant faced, would infringe the doctrine of separation of powers (at paras [50]-[51]). The *rule nisi* granting the temporary stay of prosecutions was therefore dismissed (at para [56]). The cases discussed above illustrate attempts by accused persons to frustrate their prosecutions. Courts should discourage preliminary litigation that has no other purpose than to circumvent the application of s 35(5) of the Constitution. The trial court is best placed to decide the pertinent issues, including the issue of the admissibility of the evidence (*Thint (Pty) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* 2008 (2) SACR 421 (CC) at para [65]). The purpose of a fair trial is not to make it impractical for

the prosecuting authority to conduct a prosecution, and courts must discourage accused persons from attacking the prosecution, instead of confronting the charges they face (see *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) at para [5]).

In *S v Hewu* 2017 (2) SACR 67 (ECG) the accused appeared before a regional court. On the trial date, the court struck the matter from the roll as the case had been postponed for trial twice before and the interpreter required for the trial was not present at court. At that stage the accused had already been in custody for 10 months. Immediately upon the release of the accused they were arrested by the investigating officer on the strength of an arrest warrant issued by a magistrate (at paras [2] and [3]). The following day the case was brought before a different regional magistrate who took the view that the incarceration of the accused was unjustified as the method used by the state to secure their attendance was procedurally unfair. She struck the matter from the roll for the second time (at paras [6]-[8]). The following week the accused were brought before the same magistrate after having been rearrested earlier on the same day. The magistrate expressed her misgivings about the validity of the arrest warrant which formed the basis of the arrest and struck the matter from the roll for a third time. When the prosecuting authority obtained an assurance that the interpreter would be available the following week, the matter was again set down on the roll and the accused were rearrested on the morning of the trial and brought before court. The same magistrate expressed her misgiving about the validity of the arrest warrant, stressing that she had already made a ruling on the matter, and once again struck the matter from the roll (at para [9]). The senior magistrate was of the view that the arrest warrants were indeed valid. The senior magistrate was further of the opinion that the accused had to be re-arrested as they were charged with a Schedule 6 offence and therefore the court had to order their detention unless they were able to demonstrate exceptional circumstances which in the interest of justice permitted their release. He therefore referred the matter to the high court for review (at paras [10]-[13]). On review, the high court held that the rearrests of the accused by the police, immediately after their release, seemed to be conduct aimed at thwarting the effect of the magistrate's order and bore a close resemblance to contempt of court. Such conduct might constitute grounds for or bolster a civil suit for damages against the Minister of Police. If the arrest served merely to circumvent the magistrate's order, as the facts in the case suggested, it would call for some censure and should be taken up with the appropriate authorities. The court, however, held that striking a matter from the roll for a second and a third time as a summary response to the actions of the police, was not the appropriate way to deal with

the matter (at para [17]). The court held that it is desirable for an enquiry to be conducted in terms of s 342A of the Criminal Procedure Act, before a decision is made regarding the further progress of the matter and the continued incarceration of the arrested persons. The court pointed out that the discretion, whether or not to postpone a case and strike it from the roll, was curtailed by the introduction of s 60(11) of the Criminal Procedure Act which is concerned with a court's discretion to grant bail in circumstances where Schedules 5 and 6 find application (at para [21]). The court, however, stated that s 342A of the Act is concerned with a broader issue, namely the investigation by a court into delays in the completion of criminal proceedings. This section confers very wide powers on the investigating court, including the refusal of postponement of the proceedings. Such an order would naturally result in an accused's release from custody. The section also makes provision for striking the matter from the roll (at para [22]). The court held that s 60(11) does not constitute an absolute bar to a court's refusal to grant a postponement or a decision to strike the matter from the roll. Where a postponement is refused following a s 342A enquiry because the accused had been in prison for a very long time with no prospect that the matter would be brought to trial, the re-arrest of the accused immediately after such a ruling could constitute an abuse of power in some circumstances. Should it later transpire that the trial can be proceeded with and completed promptly, the re-arrest of the accused could be justified. All will depend on the facts of the particular matter (at para [23]). The court held that the magistrate also did not consider the provisions of s 60(11). It appeared that she was motivated by her view that the police and her colleagues undermined her authority and the rights of the accused. Although her concerns regarding the rights of the accused were not misplaced, she should have investigated the reasons for the postponement and the prospects of finalising the matter in terms of s 342A, with due regard to the purposes of s 60(11), of the Act. Had she investigated and considered all the facts, she would have appreciated that the postponement requested by the prosecution upon the accused's second re-arrest was for a very brief period. She had also been given the assurance that the foreign language interpreter would be present on the trial date for the matter to proceed to trial. The high court held that the magistrate should rather have postponed the matter, subject to any such conditions she might have deemed appropriate, as provided for in s 342A(3)(*b*) of the Criminal Procedure Act. The facts of this case did not entitle her to strike the matter from the roll. This finding might have been different had any of the magistrates conducted an investigation, finding that the matter was not likely to even proceed to trial, due to the state's negligence. In such circumstances an immediate

re-arrest of the accused would have been unjustified, irrespective of the provisions of s 60(11) of the Criminal Procedure Act (at para [24]). Section 342A of the Criminal Procedure Act requires from courts to apply their minds to the facts and considerations underlying each application for postponement (at para [25]). The court held that the accused could have been re-arrested for purposes of their trial (at para [26]). The failure to conduct an enquiry in terms of s 342A was a failure of justice. The court directed that the magistrate who was to preside in the matter had to hold an enquiry in terms of s 342A of the Act, in the event that a further postponement of the matter was sought by the state (at para [27]). In this regard one could also latch on to the arguments advanced in *S v Naidoo* supra and *Naidoo v Regional Magistrate, Durban* supra regarding magistrates' courts as creatures of Statute. An order to strike a matter from the roll is competent in terms of s 342A(3)(*c*) of the Criminal Procedure Act. This may be ordered where the accused has not yet pleaded to the charge. The prosecution may then only be resumed or instituted *de novo* upon the written instruction of the Director of Public Prosecutions. Such an order is, however, dependent on an enquiry in terms of s 342A(2) of the Act into the question as to whether an unreasonable delay had in fact occurred. It seems that no such enquiry was made in this case.

2 Bail

In *S v Nwabunwanne* 2017 (2) SACR 124 (NCK) the appellant appealed against an initial refusal of bail by a magistrate and also a subsequent refusal of an application to introduce new evidence. The charge sheet indicated that the appellant was charged with two counts of contravening s 5(*b*) of the Drugs and Drug Trafficking Act 140 of 1992 in that he had dealt with certain undesirable dependence-producing substances. The weights of the substances were specified in the charge sheet, but not the value thereof. From the record it appeared as if the parties, as well as the magistrate, initially accepted that the bail application fell within the ambit of s 60(11)(*b*) of the Criminal Procedure Act. This would have saddled the applicant with the onus to prove that his release was in the interests of justice. Nevertheless, it appeared as if the prosecution accepted the onus and commenced proceedings by leading the evidence of the investigating officer, after which affidavits by the appellant and his co-accused and other confirmatory affidavits were presented in support of their bail applications (at para [6]). The magistrate also dealt with the bail application as an ordinary bail application, without making any reference to the issue of the evidentiary burden. Bail was refused (at paras [8]-[9]). On appeal, the high court held that Schedule 5 bail applications entails that an

accused is burdened with an onus and should commence adducing evidence, which must satisfy the court, on a balance of probabilities, that the interests of justice permit his release (at para [10]). In bail applications, other than those envisaged in s 60(11) of the Criminal Procedure Act, the onus is on the prosecution to show that the interests of justice do not permit the release of an accused on bail (at para [11]). The court found that no reference was made in the charge sheet to the value of the dependence-producing substance, and it could thus not be ascertained whether the offences indeed fell within the ambit of Schedule 5. The prosecutor also did not hand in a written confirmation in terms s 60(11A) of the Criminal Procedure Act to the effect that the Director of Public Prosecutions intended to charge the appellant with a Schedule 5 offence (at para [13]). With regard to the subsequent application to lead further evidence, which was dismissed by the magistrate, the court held that an accused should not lightly be denied the opportunity of presenting new facts by means of adducing evidence. The court held that the submissions by the appellant's counsel to the magistrate in this regard, at least *prima facie*, indicated that the evidence presented on behalf of the prosecution during the initial bail application, might have been compromised and that the state's case might not have been as strong as the magistrate initially assumed it to have been. Furthermore, the prosecution did not dispute what had been conveyed on behalf of the appellant in this respect (at para [25]). The strength or weakness of the state's case is a relevant consideration in determining where the interests of justice lie. The bail application was remitted to the magistrate, to make a ruling as to whether the bail application was to be adjudicated in terms of the provisions of s 60(11)(*b*) of the Criminal Procedure Act 51 of 1977. The court further ordered that the appellant had to be afforded the opportunity of adducing evidence in respect of the alleged new facts that had come to light and/or any new facts that had subsequently come to light. The prosecution also had to be afforded the opportunity of adducing further evidence in response to any further evidence presented by the appellant (at para [29]). This case reaffirms that courts should take great care when dealing with bail applications in terms of s 60(11) of the Criminal Procedure Act, which provision places an evidentiary burden on bail applicants. Courts must play an inquisitorial role in bail applications (see JJ Joubert (ed) *Criminal Procedure Handbook* 12ed (2017) 212). It seems that this includes the duty to establish with certainty the nature of the offence the accused is charged with. However, before an accused can be saddled with the burden of proof, it must be clear from the description of the offence in the charge sheet that he or she is charged with a Schedule 5 or 6 offence. This jurisdictional fact may also be established by submitting to the court a certificate by the

Director of Public Prosecutions in terms of s 60(11A) of the Criminal Procedure Act in terms of which the DPP may, irrespective of what charge is noted on the charge sheet, issue a written confirmation to the effect that he or she intends to charge the accused with an offence referred to in Schedule 5 or 6 (*S v Botha* 2002 (1) SACR 222 (SCA) at para [16]). It will certainly not be permissible to place the burden of proof on the accused in the absence of such jurisdictional fact having been clearly established (E du Toit et al *Commentary on the Criminal Procedure Act* (RS 58 2017) 9-67 refers to *S v Jacobus* unreported, ECG case no CA&R 156/2016, 22 August 2016, in further support of this proposition). In the case under discussion one could, on the one hand, argue that since the prosecution failed to establish the required jurisdictional fact in the magistrate's court the magistrate's approach to hold an 'ordinary' bail enquiry cannot be faulted. The appellant did not suffer any prejudice as the magistrate did not expect from him to discharge an onus and it was therefore unnecessary for the high court to refer the matter back to the magistrate to determine whether the matter resorts under s 60(11) of the Criminal Procedure Act. One could ask whether courts should second-guess the charges preferred against the accused by the state who acts as *dominus litis*. On the other hand, the record of the proceedings in the magistrate's court showed that both parties laboured under the impression that the offence in question was a Schedule 5 offence, and yet, a procedure was followed contrary to the provisions of the Criminal Procedure Act. In these circumstances the magistrate should have played a more active role for the sake of obtaining clarity. In *S v Mathonsi* 2016 (1) SACR 417 (GP) it was held that there is a duty on the court hearing a bail application to guide the parties as to how the proceedings should unfold (at para [14]).

3 Appointment of assessors in murder trials in the regional court

In *S v Mathe* 2017 (2) SACR 63 (GJ) the court reaffirmed the position that the failure of a regional magistrate's court trying an accused on a charge of murder to invoke the provisions of s 93*ter* of the Magistrates' Court Act 32 of 1944 pertaining to the appointment of assessors is a fatal procedural irregularity. In this case the trial magistrate simply informed the accused that due to a lack of resources no use will be made of assessors. This issue has been dealt with in some detail in previous volumes of this journal and nothing more needs to be said in this regard (P du Toit 'Recent cases: Criminal procedure' (2015) 28 *SACJ* 387 at 399-400 and P du Toit 'Recent cases: Criminal procedure' (2016) 29 *SACJ* 182 at 191-192.)

4 Plea and sentence agreements

In *S v Knight* 2017 (2) SACR 583 (GP) the court dealt with an appeal against convictions in a regional magistrate's court for a number of serious offences that had been finalised in a plea and sentence agreement in terms of s 105A of the Criminal Procedure Act 51 of 1977. It was submitted on behalf of the appellant that the agreement had to be regarded as a nullity because no proof was provided by the prosecutor that he was duly authorised by the National Director of Public Prosecutions (the 'NDPP') to enter into or negotiate a plea and sentence agreement (at para [8]). The appellant further contended that the regional magistrate failed to comply with s 105A(8) of the Act, which requires from the court to inform the parties that it is satisfied that the agreement is just, whereupon the court must convict the accused of the offence charged and sentence the accused in accordance with the agreement (at paras [9], [10]). The state conceded that no authority by the National Director was mentioned in the plea agreement and secondly that a perusal of the transcribed record did not reflect a pronouncement of a guilty verdict (at para [12]). The state, however, submitted that the agreement was still valid, in terms of the general authority issued by the NDPP in 2011, in terms of which authority to enter into plea and sentence agreements was granted to any regional court prosecutor, provided the agreement was negotiated and concluded in consultation with his or her superior (at para [13]). The court, however, held that it was significant that, until the matter was heard on appeal, no affidavits to confirm this position had been filed (at para [14]). The court held that the record showed that even that directive, in the absence of it being mentioned during the proceedings in the court *a quo*, was not observed. It was further found that the record showed that the court *a quo* did not convict the appellant as required by s 105A(8) of the Act (at para [15]). The court held that the failure to pronounce on the conviction of the appellant was a fatal irregularity, as there can be no sentence without a conviction (at paras [17]-[18]). The sentence was set aside and referred back to the trial court for consideration *de novo* (at para [24]). Section 105A of the Criminal Procedure Act provides protection to an accused person who has, by virtue of entering into a plea and sentence agreement, waived his or her rights to a public trial before an ordinary court and to be presumed innocent in return for agreeing to both the plea and sentence. These provisions ensure an appropriate check and balance against the abuse of the plea bargain process in the context of the waiver of the accused's constitutional rights (see *S v De Goede* (121151) [2012] ZAWCHC 200 (30 November 2012)).

5 Reconstruction of lost trial record for purposes of appeal

In terms of s 76(3)(*a*) of the Criminal Procedure Act 51 of 1977 the trial court must keep a record of the proceedings, be it in writing or mechanical, or must cause such record to be kept. It often happens that the record of a criminal trial is lost or incomplete when a court of appeal or review must take the case under reconsideration. For purposes of an appeal the record of the proceedings in the trial court is of cardinal importance as it forms the basis of the rehearing by the court of appeal (*S* v *Chabedi* 2005 (1) SACR 415 (SCA) at para [4]). If the record is inadequate for a proper consideration of the appeal it will, as a rule, lead to the conviction and sentence being set aside. The requirement that the record be adequate for a proper consideration of the appeal does not mean that it must be a perfect recording of everything that was said at the trial (*S v S* 1995 (2) SACR 420 (T) at 423C-D; *S v Van Staden* 2008 (2) SACR 626 (NC) at paras [4]-[5]). The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends on the nature of the defects in the record and on the nature of the issues to be decided on appeal (see *S* v *Chabedi* supra at para [6]; *Ramatsosa v S* (A41/2010) [2010] ZAFSHC 66 (8 July 2010)). The duty to reconstruct an incomplete or lost record lies with the presiding officer (*S v Mabena* 2014 (2) SACR 43 (GP) at para [17]). In *S v Zenzile* 2009 (2) SACR 407 (WCC) at para [21] Yekiso J summarized the method to be followed in the reconstruction of the record as follows:

> 'What the magistrate should have done in circumstances such as this, once he had been informed by the clerk of the court that a portion of the record could not be found, despite diligent search, was the following: to direct the clerk of the court to inform all the interested parties, being the accused or his legal representative, and the prosecutor, of the fact of the missing record; to arrange a date for the parties to reassemble, in an open court, in order to jointly undertake the proposed reconstruction; when the reconstruction is about to commence, the magistrate is to place it on record that the parties have reassembled for the purpose of the proposed reconstruction; the parties are to express their views, on record, that each aspect of reconstruction accords with their recollection of the evidence tendered at trial; and ultimately to have such reconstruction transcribed in the normal way.'

In *S v Schoombee* 2017 (2) SACR 1 (CC) the applicants to the Constitutional Court were convicted of murder and sentenced to life imprisonment. In their attempt to lodge an appeal, it was discovered that the record of the trial was lost. They were, however, provided with the record reconstructed by the trial judge. The reconstructed record was based on extensive notes made by the trial judge during the course of the trial. The applicants did not participate in the

reconstruction of the record, but nevertheless, pursued the appeal on the record as provided by the trial judge. The applicants contended that the reconstructed record was inadequate and that their fair trial rights were violated. The prosecution contended that the applicants waived their right to a fair trial regarding participation in the reconstruction process. Although the applicants indicated that they considered participating in reconstructing the record, they decided to proceed by using the record provided by the trial judge provided on advice of their counsel. By their own acknowledgement, they thus chose not to pursue a reconstruction process (at para [22]). The court held that although the facts of the case suggested a possible waiver of the right to a properly reconstructed record, it was unnecessary to conclusively determine this issue, as well as the issue whether the applicants could have done so (at para [26]). The court held that the applicants had a fair trial, including a fair appeal. Although the record of the trial was improperly and imperfectly reconstructed, it was more than adequate to ensure the applicants exercised their constitutional right of appeal. The notes the trial judge took were unusually detailed. They appeared to have been a complete narrative account of the evidence led in the trial (at para [27]). The court held that the applicants reviewed the reconstructed record. They took the advice of counsel and chose to proceed with their appeal on that record. Even if they did not waive their right to participate in reconstruction, they certainly signified their assent to the substantive recital contained in the reconstructed record (at para [30]). For these reasons the application for leave to appeal to the Constitutional Court was dismissed. The court nevertheless made clear its dissatisfaction with the state of affairs regarding the reconstruction of the record in the present case, and generally. It held that its findings did not detract from the magnitude of the lapses that had taken place in reconstructing the record. The high court failed in its duty to ensure that the reconstruction process involved both parties. The court stated that the loss of trial court records was a widespread problem which raised concerns about endemic violations of the right to appeal. Reconstruction should not be the norm in providing appellants with their trial records. The obligation lies not only on the appellant, but primarily on the court to ensure that this process complies with the right to a fair trial. It is an obligation that must be undertaken scrupulously and meticulously in the interests of criminal accused as well as their victims (at para [38]).

6 Appeal by the prosecution

The right of the state to lodge an appeal against the result of a criminal case is much more limited than the right of an accused to appeal

(South African Law Commission (Project 73) 'Simplification of Criminal Procedure (The Right of the Director of Public Prosecutions to Appeal on Questions of Fact' (2000). It has been held that the limitation of the right to appeal by the state is underpinned by constitutional considerations (*DDP Western Cape v Kock* 2016 (1) SACR 539 (SCA) at para [9]). The extent of the right of the state to appeal was further complicated by the introduction of the Superior Courts Act 10 of 2013. Section 1 of that Act provides that an appeal in Chapter 5 of the Act (which deals with general appeals provisions) does not include an appeal in a matter regulated in terms of the Criminal Procedure Act or in terms of any other criminal procedural law. From reported case law it becomes evident that the prosecuting authority increasingly makes use of its right to appeal. As a result, a clearer picture has started to emerge regarding the extent of the right of the state to appeal (see in this regard P du Toit 'Recent cases: Criminal procedure' (2016) 29 *SACJ* 182 at 193-196). Section 310 of the Criminal Procedure Act allows the state to appeal against a decision in a lower court, but only upon points of law. Section 311 of the Act provides for an appeal by the prosecution on questions of law from the high court sitting as a court of appeal to the Supreme Court of Appeal. Section 319 of the Criminal Procedure Act provides that if any question of law arises on the trial in a superior court, that court may reserve that question for the consideration of the Supreme Court of Appeal. The prosecutor may apply for the reservation of a question of law. If granted, it becomes a ground on which the state may appeal. The state may also appeal against sentences imposed by magistrates' courts and superior courts (ss 310A and 316B CPA). This right does not include the right to appeal to the Supreme Court of Appeal against a sentence imposed by the high court, sitting as court of appeal in a matter arising from a lower court (see *DPP v Kock* supra). In *Director of Public Prosecutions, Gauteng v Mphaphama* 2016 (1) SACR 495 (SCA) it was held that the exercise of a judicial discretion in favour of a convicted person with regard to sentence cannot be regarded as a question of law in his favour upon which the state may appeal (at para [11]). The case of *Director of Public Prosecutions v MG* 2017 (2) SACR 132 (SCA) dealt with an interesting issue of an appeal by the state on a question of law in terms of s 311 of the Criminal Procedure Act, in relation to sentence. One would have expected that, in view of the decision in *Mphaphama* supra, the court would not have entertained the appeal against sentence on the basis of an error of law. However, it did. The respondent was convicted in a regional court on three counts of rape and charges relating to the possession of child pornography. The respondent was sentenced to life imprisonment on each of the rape charges as the regional court found no substantial and compelling

circumstances to deviate from the minimum sentence. On appeal to the high court the appeal against the respondent's conviction on two of the counts of rape was upheld and substituted with convictions of sexual assault. Regarding the remaining count of rape and the other counts the high court set aside the sentences and replaced them with a globular sentence of 10 years' imprisonment, half of which was conditionally suspended (at para [14]). Aggrieved by this lenient sentence the prosecution appealed in terms of s 311 of the Criminal Procedure Act. It contended that in terms of s 57(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 a child under the age of 12 years is incapable of consenting to a sexual act. The prosecution argued that the high court erred in taking into account for purposes of sentencing the 'consent' to or 'acquiescence' in the sexual act by the complainant — who was only 10 years old at the time of the incident (at para [20]). It was submitted on behalf of the state that the fact that the high court did so was wrong in law because it undermined the clear and unambiguous provisions of s 57(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Furthermore, it was argued that it was illogical to find that the complainant's supposed 'willing participation' in the sexual acts could ever be a mitigating factor when it came to the question of sentence. The Supreme Court of Appeal held that the right of the state to appeal under s 311 is expressly regulated by the Criminal Procedure Act. The Superior Courts Act 10 of 2013 finds no application (at para [16]). The court held that it could only enter into the merits of the appeal if it was satisfied that the ground of appeal relied upon by the state involved a question of law (at para [17]). In this case the high court imputed consent to the complainant. It did so despite the clear and unequivocal legislative provisions referred to above. In doing so, the high court committed an error of law. The Supreme Court of Appeal found that the case fell 'foursquare within the purview of s 311 of the CPA' and that the interests of justice dictate that the sentence imposed by the high court had to be set aside (at para [28]). The court found that the finding in *Mphaphama* supra, to the effect that the exercise of a judicial discretion in favour of a convicted person in regard to sentence cannot be a question of law, was cast too wide. In particular, it did not deal with the position in which that discretion has been exercised on an incorrect legal basis. The court held that an exercise of a judicial discretion based on a wrong principle or erroneous view of the law is clearly a question of law decided in favour of a convicted person. The court held that in this matter it was not the nature of the sentence, but the legal basis on which it was approached, which placed this matter within the ambit of s 311 of the Criminal Procedure Act (at para [29]). As a result, the question of law raised by the state was determined

in its favour and the sentence imposed by the high court was set aside. The case was referred back to the high court for the appeal on sentence to be dealt with in accordance with the principles set out in the judgment (at para [36]).

In *Director of Public Prosecutions v KM* 2017 (2) SACR 177 (SCA) the Director of Public Prosecutions also lodged a successful appeal to the Supreme Court of Appeal in terms of s 311 of the Criminal Procedure Act. In this case, the respondent was convicted in a regional magistrate's court on a charge of rape of a minor and sentenced to life imprisonment (at para [1]). On appeal the conviction and sentence were set aside by the high court. The Director of Public Prosecutions then brought an application for special leave to appeal to the Supreme Court of Appeal against the order of the high court. The application was based on questions of law, as provided for in s 311(1) of the Criminal Procedure Act 51 of 1977 (at para [2]). The high court had set aside the conviction based on certain deficiencies in the DNA evidence presented by the state at the trial of the respondent (at para [15]). Relying on *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) the Supreme Court of Appeal held that the failure of any court to take into account relevant evidence presented at the trial constitutes an error of law. The court held that the high court had in fact committed an error of law as it did not consider anything other than the DNA evidence. The high court failed to take into account other relevant and admissible evidence (at para [18]). With regard to the issue whether the state had to obtain special leave to appeal from the Supreme Court of appeal, the minority of the court held that such leave was indeed required. The majority of the court held that the state did not require special leave to appeal to the Supreme Court of Appeal in a matter arising from s 311. The court referred to s 1 of the Superior Courts Act 10 of 2013, which provides that an appeal referred to in Chapter 5 of the Act (which contains general provisions regarding appeals) does not include an appeal in a matter regulated in terms of the Criminal Procedure Act or in terms of any other criminal procedural law. The court held that if an appeal is 'regulated in terms of' the Criminal Procedure Act, the provisions of s 16(1)(*b*) of the Superior Courts Act requiring special leave to appeal from the Supreme Court of Appeal do not apply. Section 16(1)(*b*) states that an appeal against any decision of a division of a high court on appeal to it lies with the Supreme Court of Appeal upon special leave to appeal having been granted by the Supreme Court of Appeal (at para [35]). The essence of the finding of the majority of the court was that s 311 of the Criminal Procedure Act (unlike some other provisions of the Criminal Procedure Act pertaining to appeals) gives jurisdiction to the Supreme Court of Appeal when a high court on appeal gives a decision

in favour of the person convicted on a question of law. Jurisdiction is founded on s 311 itself and is clear and express. The matter before the Supreme Court of Appeal was brought before the high court by way of an appeal in terms of s 309(1) of the Criminal Procedure Act and the high court decided the question of law in favour of the respondent. Accordingly, the provisions of s 311(1)(*a*) find application. In those circumstances the jurisdiction of the Supreme Court of Appeal is established under s 311 of the Criminal Procedure Act. As s 311 gives a right of appeal, such an appeal is excluded from the operation of Chapter 5 of the Superior Courts Act (at paras [37]-[38]). The appeal was upheld in respect of the question law (it was not necessary to decide a second question of law) and the conviction and sentence of the regional court was reinstated. The matter was remitted to the high court to deal with the appeal on the merits (at para [53]).