COURSE: CRIMINAL PROCEDURE A: 2024

OVERVIEW

PURPOSE OF THE COURSE:

For the student to acquire a basic knowledge of criminal procedure, especially as applied in the lower courts (Magistrate's Court and Regional Magistrates Court) in South Africa.

HOW THIS FITS INTO THE OVERALL DEGREE STRUCTURE:

As a procedural (adjectival) law subject, this course equips the student to apply substantive criminal law in courts in South Africa. It also has close ties with the law of evidence.

CREDIT VALUE: 10

This works out as follows:

18 hours	24 lectures @ 45 min each
45 min	1 written test .
2 hours	1 written examination
	Written assignment

Total hours supervised: 20 hours 45 minutes

Individual learning (pre and post-lecture reading and researching).

Total: 80 hours of work

ASSUMPTIONS OF PRIOR LEARNING

General exposure to the idea of legal principles (legal theory, constitutional law, interpretation of statutes). The student should be able to read and interpret statute law, decided cases in law reports and to apply the doctrine of precedent.

The student should be able to analyse a set of facts; identify the legal problem contained therein and apply the appropriate law to derive a solution.

OUTCOMES

CRITICAL CROSS-FIELD OUTCOMES (CCFOs)

This course should contribute to the following critical outcomes, an ability to:

A. Identify and solve complex legal problems critically and ethically.
B. Collect, analyse and evaluate information.
C. Communicate effectively.
D. Understand and apply relevant methods, strategies and techniques involved in legal research.
E. Critique existing legal rules and principles.

F. Draft basic criminal procedural documents.
G. Work with a detailed major statute governing most of the law on a single subject

RESOURCES

The Constitution of the Republic of South Africa, 1996.

Criminal Procedure Act 51 of 1977.

Criminal Law Amendment Act 105 of 1997.

Magistrates' Courts Rules 32 of 1944.

Uniform Rules of Court (High Court Rules).

Superior Courts Act 10 of 2013.

JJ Joubert *et al: Criminal Procedure Handbook* 12ed (2017).

JJ Joubert et al: Criminal Procedure Handbook 13 ed (2020).

Hiemstra's Criminal Procedure (LexisNexis).

Du Toit *et al: Commentary on the Criminal Procedure Act.*

Legal Education and Development (Updated by Dr Lerm) Criminal Court Practice Guide 2019.

There are also various aspects of criminal procedure available in the library.

MARK ALLOCATION

Examination	70 marks
Class Test	15 marks
Class assignment	15 marks
Total	**100 marks**

Assignment Assessment Criteria

Written assignments:

Presentation:	10%
Structure:	10%
Content:	20%

Understanding:	30%
Insight	30%

SPECIFIC INTENDED OUTCOMES

TEACHING METHODS

Lectures - PowerPoint slides
Skeleton handouts
Reading list
Class attendance.
Assignment and Test.

THE MAIN PARTICIPANTS IN THE CRIMINAL PROCESS

The main participants in the criminal process are the police or other law enforcement agency, the prosecuting authority, witnesses, the court (which includes presiding officer and other staff members involved in the administration of the court), Correctional Services, and last but not least, the suspect, accused or convict and/or his representative. In the following paragraphs, a few remarks will be made about the role each participant plays. The role of the court will be discussed in the section that follows.

Before embarking on this discussion, it is necessary to point out that the participants mentioned above are not the only participants that take part in the administration of Justice. In certain instances, other persons may also play a role. In some cases, a probation officer may be requested to investigate the personal circumstances of an accused and to advise the court on an appropriate sentence, while in other cases psychiatrists may be requested to advise the court on the mental condition of the accused, i.e. whether he is fit to stand trial, whether he was criminally responsible at the time of the commission of the offence and even to what extent the mental condition of the accused contributed to the commission of the offence.

THE POLICE OR OTHER LAW ENFORCEMENT AGENCIES

It is inter alia the function of the police to maintain law and order, to prevent crime and to investigate crimes that were allegedly committed. Chapter 11 and more specifically section 205 of the Constitution provides for the establishment of a police force.

The police normally receive notice in one of the following ways

They may:

- Present during the commission of the offence and witness the commission thereof:

- Receive a complaint from his victim or his representative or a witness of an alleged offence;
- Receive information from an informer or an interested party that an offence has allegedly been committed or that an offence may possibly be committed; or
- Receive a request from the prosecuting authority to investigate an offence that was allegedly committed.

Once the alleged commission of an offence has been brought to their attention, it is the duty of the police to investigate the circumstances surrounding the alleged commission of the offence, to establish whether an offence was, in their view, committed and, if so, to identify the perpetrator. The police have wide-ranging powers subject to the constitutional prescripts to conduct investigations into alleged offences. These powers include powers to enter the property, to interrogate people, to arrest persons, to search persons and premises and to seize objects.
Once the alleged commission of an offence is reported to the police, an investigating official is normally appointed to coordinate the investigation. After having completed the investigation, the police will normally furnish the National Director of Public Prosecutions or his representative with full particulars concerning the circumstances surrounding the commission of the offence usually contained in the police docket to enable him to decide whether or not to institute criminal proceedings against the perpetrator.

The South African Police Service is not only the law enforcement agency in South Africa. By virtue of regulations promulgated in terms of section 334 of the CPA, several other officials (such as traffic officers, metro police and game wardens) are also regarded as peace officers for the purposes of the CPA, which means that they may also exercise certain of the powers granted to police officials. Furthermore, some statutes empower other officials (such as customs officials, certain inspectors, etc.) to conduct preliminary investigations. They will then hand over the matter to the police, who will refer the results of all the investigations to the National Director of Public Prosecutions or his representative for her/ his consideration.

THE PROSECUTING AUTHORITY

A Director of Public Prosecutions (DPP) has the authority to prosecute on behalf of the state in the area for which he has been appointed, and he does so in the name of the Republic, Section 179(2) of the Constitution empowers the prosecuting authority to institute criminal proceedings on behalf of the State, The National Prosecuting Authority Act 32 of 1998 provides inter alia the powers of the prosecuting authority to institute and conduct criminal proceedings on behalf of the state, to carry out the necessary functions incidental thereto and to discontinue criminal proceedings.

As far as prosecutions in the High court are concerned, a DPP must personally decide whether to institute a prosecution subject to the directions of the National Director although he or she may conduct a member of his personnel to conduct the actual prosecution on his or her behalf. **Previously a member of his personnel was known as a state Advocate, but are now all referred to as Prosecutors.** In the case of lower courts the public prosecutor, as the representative of the National Director and subject to the control of the National Director or DPP, is responsible for deciding whether a prosecution should be instituted or not and to conduct the actual prosecution.

Once a case docket is received from the police, the DPP (or senior public prosecutor in a case of a lower court) normally appoints a public prosecutor from his or her staff to peruse it and advise him on whether or not to institute a prosecution. It sometimes happens that the public prosecution needs further clarification or information in order to advise the DPP (senior public prosecutor). In such instances, the docket will be referred back to the police with instructions to obtain clarification or to conduct further investigations. Once a decision has been made, the police are advised accordingly. If a prosecution is instituted a date is set for the trial and the necessary indictment (summons in the case of a lower court) and subpoenas are issued and served by the police on the accused and witnesses respectively.

In cases where the accused has been arrested and is still in custody, a slightly different procedure is followed. **Since an arrested person has to be brought before a lower court within the extended period of forty-eight hours (provided for in section 50 of the CPA) or else released,** a public prosecutor is often confronted with a case in which the accused has to be released or be brought before a court, but in respect of which the police investigation has not yet been completed and he is accordingly unable to proceed with prosecution.

In instances of this nature, the public prosecutor will normally (in consultation with the police) peruse the available evidence, including the evidence upon which the police official concerned decided to arrest the suspect, and then decide whether there is a reasonable prospect that the police will be able to obtain sufficient evidence within a reasonable period which would enable him to proceed to prosecute the suspect and whether or not it is in the interest of justice that the accused remains in custody while the police conduct further investigations. The prosecutor is thus *dominus litis* and he or she decides what charge to prefer against the accused. See *S v Mashinini* 2012 SACR 604(SCA).

If he is satisfied that there is a reasonable prospect that the police will be able to obtain sufficient evidence within a reasonable period which would enable him to proceed to prosecute evidence within a reasonable period which would enable him to proceed to prosecute the suspect, the public prosecutor will formulate provisional charges but will request that the case be remanded until a future date (suggested by him or arranged with the suspects legal

representative) by which date he believes that he will have sufficient evidential material to proceed with the prosecution to finalise the actual charges which to prosecute the accused. If he is not so satisfied, the suspect will be brought before the court and the prosecutor will withdraw the charges which will entitle the accused to his release.

Care should be taken by prosecutorial staff not to just randomly arrest accused persons just for the sake of pleasing a complainant or the general public. Instead of arresting the suspect, the case against him or her should be fully investigated and only then should the suspect be summoned to appear in court.

If a DPP or the National Director decides not to prosecute in a particular case, section 7 of the CPA determines that he must, on the request of an interested party who wishes to institute private prosecution, issue a certificate (*nolle prosequi* certificate) indicating that he has decided not to prosecute. Section 7-17 of the CPA provide for matters pertaining to the institution a private prosecution.

There is a single national prosecuting authority established in terms of section 179 of the Constitution. The prosecuting authority was established in terms of section 179 of the Constitution. The prosecuting authority has independent political autonomy and should not be interfered with by either the executive or the judiciary.

The National Prosecuting Authority Act, 1998 (Act 32 of 1998) which came into operation on 16 October 1998 established the office of the National Director and the offices of the prosecuting authority at seats of the High Courts. The State President appoints the National Director and may appoint up to three Deputy National Directors. He also appoints Directors of Public Prosecutions in all the offices of the prosecuting authority. In terms of the transitional arrangement in the said Act All Attorneys- General who held such office in terms of the old Attorney General Act, 1992 (Act 92 of 1992) are deemed appointed as Directors.

Any reference in any act to an Attorney-General must be taken to refer now to a Director of Public Prosecutions (DFF). Prosecutions are also now appointed in terms of this Act to the

- Office of the National Director
- Office of the Prosecuting Authority at each High Court seat;
- Investigating directors, and
- Lower courts in the Republic

The prosecuting authority has the discretion to prosecute or not but a duty to prosecute if there is a prima facie case supported by statements and real and documentary evidence available. But note only those criminally responsible for their actions should be prosecuted. That excluded children as provided for by the Child justice Act 75 of 2008 and for example mentally ill persons.

Prosecutions when performing their duties or exercising any of their powers have to act in accordance with the Code of Conduct issued by the National Director of Public Prosecutors. The Code was published on 29 December 2010 in the Government Gazette. It sets out professional standards of conduct, independence and impartiality of all members of the prosecuting authority. The main aim of the Conduct is to inform the public of the role and powers of the prosecutors. As with attorneys, prosecutors also have to be "fit and proper" to practice law. Those who belong to the General Council of the Bar should display certain qualities, including integrity, dignity, knowledge and skill, respect for legal order and a sense of fairness and equality. See *General Council of the Bar of South Africa v Jiba and others* (2016) ZAGPPC 833. Our courts have stated before that 'it is not expected for the prosecution to win cases at all costs. It has an overriding duty to see that justice is done. See *Rozani v Director of Public Prosecutions, Western Cape* 2009 (1) SACR (C).

WITNESSES

We distinguish between state and defence witnesses

State Witnesses

A state witness is a person who has supplied the State (prosecutor/police) with information regarding the commission of the offence and who may potentially be used by the State as a witness against the accused at the trial. Previously where the need arose for the defence attorney to consult with a state witness before judgement, he could only do so after having obtained the permission of the public prosecutor or attorney- General concerned *(Hassim* 1972 (1) SA 200 and 1972 SALJ- 292).

In *Shabalala and Five Others v Attorney-General of the Transvaal and Another* 1996 (1) SA 725 (CC) it was held that this rule must be qualified in section 25(3) of the Interim Constitution. Section 25(3) of the Interim Constitution provides that every accused has a right to a fair trial. According to the Constitution Court, this right requires that an accused be allowed to prepare his or her defence.

According to the court, this implies that the accused must be allowed to consult with state witnesses after the accused has been charged and the indictment or charge sheet has been served upon him or her. The court held that the DPP or his representative must still be approached for permission to consult with state witnesses, he or she may only refuse such permission if there are reasonable grounds to believe that such a consultation might lead to the intimidation of the witness or tampering with his or her evidence or that might lead to the disclosure of state secrets or the identity of informers or that it might otherwise prejudice the proper ends of justice.

The court stated that it is a precondition that the witness agrees to be interviewed. Furthermore, the DPP\Prosecutor is entitled to be present during

the interview and may record what transpires during it. If the DPP or his or her representative refuses permission for the interview to take place, the court may exercise its discretion to order that the defence be allowed to interview the witness despite such refusal (see par 72 of the judgement).

When the prosecution authority refuses to allow the defence to consult with a state witness/s the defence may consider applying to the court for an order to consult with the witness/s. What the court will decide is this: whether the accused will be prejudiced in his or her defence if such consultation is disallowed.

For a more recent case on the extent of the prosecutors, obligations to make certain witnesses available see *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA) at paras {12} – {13}.

It is obvious that an attorney or his client may never attempt to influence state witnesses not to testify against the accused, whether such consultation takes place with or without the permission of the DPP or the public prosecutor concerned or not. Although this aspect will be dealt with later on, it is necessary at this stage to refer to a similar situation with which attorneys are from time to time confronted. The situation we are referring to is that where the client, and not the attorney, has spoken to a state witness and has in the process obtained highly relevant information in innocent circumstances (eg. During the alleged commission of the offence), there is of cause no reason why an attorney should not take note thereof and why he may not make use of the information.

It sometimes happens, however, that the client approaches the state witnesses after they have already become state witnesses. In such a case, the client's conduct may constitute an offence and an attorney must consider carefully whether or not he should act on that information at all. If a client for instance offers the attorney (as has happened in the past) a copy of the police docket on the offence, an attorney should in principle refuse to accept it. A police docket often contains privileged information to which an attorney or his client is not entitled. This fact has been recognised in all judgements dealing with the right of access to the information contained in police dockets which have been delivered since the commencement date of the Constitution. To accept it would be highly unethical and would amount to conduct unbecoming an attorney, apart from the fact that the circumstances in which it was obtained may indicate that an offence was committed by the client.

Only in exceptional circumstances, for instance, where the docket or other information obtained by the client supplies proof that he has been framed or of corruption during the investigation, may an attorney decide to act on it. In such a case, the correct procedure which an attorney decides to act on it. In such a case, the correct procedure which an attorney should follow would be to inform the public prosecutor or DPP concerned of the contents of the information received or of the fact that such proof is contained in a docket handed to him, and to supply him with the information or copy of the docket.

The serious light, in which interference with state witnesses is considered, is borne out by the fact that bail applications are often refused because it is feared that an accused may interfere with state witnesses. Access to information in a docket is not allowed for purposes of a bail application unless the prosecutor contents thereto.

DEFENCE WITNESSES

A defence witness is a person who is not a state witness and who may potentially testify on behalf of the client and whose testimony would support the client's case. The defence attorney must establish during the consultation with the client whether any persons could potentially testify in support of his client's case and, where necessary, to consult with such persons to ascertain whether they will be able to testify in support of the client's innocence, but also persons who are able to testify in migration of a possible sentence are potential defence witnesses and should also be consulted before they are approached to testify.

Care should be taken by a defence lawyer not to commence with a trial unless he or she has fully minuted a statement from the defence witness/s, especially where the defence is that of an alibi. If he or she does not, besides being embarrassed, that may very well work against the accused. It is a golden rule of ethics that a legal representative shall not influence in any way whatsoever. To interfere with or attempt to influence a defined witness is tantamount to compromising the integrity of that witness which could also compromise an accused's right to a fair trial. See *The State v Vuiswa Masoka and Siyamthemba Mnqayi* Eastern Cape Decision.

Any witness not called by the prosecutor is available as a witness for the defence

THE CORRECTIONAL SERVICES

The Correctional Services are responsible for detaining awaiting-trial persons as well as prisoners sentenced to imprisonment. Once a person is sentenced to imprisonment, the court issues a warrant in which the Correctional Services are ordered to take the person identified in the warrant into custody and to detain him for the specified period. Immediately after the sentence is imposed, the person sentenced is removed from the court by the court orderly and taken to the police cells at the court.

The convict and the warrant are handed to an official of the Correctional Services who then removes the convict from the police cells to prison. Under normal circumstances, the family and friends of the convict are allowed to see him before he is removed by the official of the Correctional Services. The police official in charge of the police cells is also normally able to inform the family and friends of the accused to which prison he will be taken. Once a convict arrives at the prison, his personal belongings are taken into custody

by the officials of the prison, and he is issued with clothes and other necessities which he will need during his stay in prison. On his arrival at the prison, the convict is also classified according to the type of offence he was convicted of.

This classification will play a role in determining where he will be held and the type of privileges to which he will be entitled to. In prison, the convict is subject to strict discipline. During his stay in prison, the convict is monitored and his classification may change from time to time according to the manner in which he conducts himself. Reclassification may bring with it additional privileges, such as more regular visits by friends and family etc.

After a specific part of the term of imprisonment has expired, a report on the convict's conduct in prison and readiness to be re-incorporated into society is submitted to the parole board, who may decide to release him on parole before the expiry of his actual term of imprisonment. It is possible to make representations to the parole board and to bring facts to their attention which has a bearing on the readiness of the convict to be re-incorporated into society. Factors that will play an important role in influencing the parole board's decision are whatever the convict will have to place to stay after his release on parole and whether an employer is prepared to offer him employment after release. Information in this regard may be obtained from a prison where the convict is an inmate at that stage.

The Correctional Services are also from time responsible for the detention of persons who have not yet been tried or convicted. Such persons are known as "awaiting trial" persons (now remand detainees). Persons awaiting trial (demand detainees) are detained separately from convicted prisoners and are not supposed to come into contact with convicted prisoners. They also enjoy certain privileges which convicted prisoners do not have. Their legal representatives are allowed to visit them during reasonable hours and to consult with them in private. They are allowed to retain the clothes and belongings that they will reasonably require. Legal practitioners should always carry with them identification cards issued by the Law Society and the like to announce themselves as belonging to the legal profession.

THE CLIENT AND THE DEFENCE ATTORNEY

It is necessary to point out that South Africa law of criminal procedure is based mainly on an accusatorial system in which the Presiding Judicial Officer is supposed to be impartial and to act in a certain sense as referee between the State and the defence who are presenting their cases before him. An accusatorial system can, however, only function effectively if the parties to the case are on an equal footing as far as their knowledge of the law and experience are concerned. Although some concessions are made to an accused who is unrepresented, the accusatorial system is not ideally suited to

handle cases where there is an imbalance in the legal expertise available to the respective parties to the case.

This means that if an accused is not represented by a legal representative, he might be prejudiced by his lack of knowledge and expertise, despite the fact that concessions are made to accommodate him in the system. It is exactly for this reason that the system provides for legal representations of the accused and in fact jealousy guards this right.

However, no one has to be aware that the opposite also supplies. This means that once an accused is in fact represented by a legal representative, it is presumed that the defence has the necessary legal expertise to look after the interests of the accused. If the legal representative is inexperienced, little if any allowance is made for such inexperience, and he is simply presumed to be on an equal footing with the representative of the State. This means that inexperienced legal representatives must take special care to prevent their inexperience from resulting in their client being prejudiced. See *S v Halgryn* 2002 (2) SACR 211 (SCA) at 216h-217c.

The client is, as far as the defence attorney is concerned, probably the most important role player of all. A client is normally a layperson as far as the law is concerned and normally approaches the attorney because he realizes that he has no(or insufficient) knowledge of the law. Once a person briefs a legal representative to act on his behalf, the legal representative is placed in a position in which he is afforded certain powers to perform certain acts on behalf of his client.

The client will under normal circumstances trust the judgement of his representative (otherwise he wouldn’t have approached him) and will do as his representative tells him to do. This places a heavy burden on an especially inexperienced attorney to see to it that the client's interests are looked after in the best possible way and that his inexperience does not prejudice his client. In this respect, it is important to beat in mind that an accused is normally bound by what has been done by a legal representative on his behalf during the trial – *Muruven* 1953 (2) SA 779 (N)

The right to legal representation which was conferred by section 73 of the CPA is now also entrenched in the Bill of Rights may, as has happened in the United States, possibly be that a detained or accused person now has the right to EFFECTIVE OR COMPETENT legal representation. Whether this right would be interpreted similarly in South Africa, is debatable.

Should an attorney be approached by a person, from whom it appears from the consultation that the person has been prejudiced as a result of being represented by an incompetent legal representative, one may perhaps consider the possibility of taking the matter to review and argue that our

Consultation should be interpreted similarly as that of the United States. In such cases, it will be necessary to refer to cases in which this was held in the United States (see e.g. *McMann v Richardson* 397 US 759 (1970), *Cuyler v Sullivan* 446 US 335(1980): and Strickland v Washington 466 US 668(1984).) On the value of competent legal representation see *Legal Aid Board v The State & Porritt and Bennet* 2011(1) SACR 166 (SCA), *Ramonyathi v S* {2014} ZAGPPHC 915.

S SOMANDI

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THE END!!!!!