**CRIMINAL AND RELATED MATTERS AMENDMENT BILL [B 17- 2020]: PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES**

1. On 11 November 2020, the Department briefed the Portfolio Committee on Justice and Correctional Services (the PC) on the comments that were received during the public consultation process on the Criminal and Related Matters Amendment Bill (the Bill). The Department also identified possible amendments that have been proposed to the Bill. The following aspects were specifically discussed, namely:

(a) ***Clause 10***: Clause 10 amends section 316B of the Criminal Procedure Act, 1977 (Act 51 of 1977), to allow the State to appeal a sentence imposed by a High court sitting as a court of appeal in terms of section 310A, in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute. Legal Aid SA, relying on the judgment in *DPP Western Cape v Kock* 2016 (1) SACR 539 (SCA) (the accused should not be exposed to an increase in his sentence after the trial), indicated that they cannot support the amendment. The Department referred to judgment of *DPP, Gauteng v Ramolefi* 2019 ZASPA 60, and indicated that the amendment can be justified on the basis of the narrow criteria on which the State may appeal, namely, where a grave failure of justice would otherwise result; or the administration of justice may be brought into disrepute. The constitutionality of the clause was questioned.

(b) ***Clause 15(a)***: Clause 15(a) amends the offence of "Murder" in Part I of Schedule 2 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997) (the CLAA). Attempted murder is not included in Part I of Schedule 2 of the CLAA. The resultant effect would be that Part I of Schedule 2 will not apply to circumstances where a victim is not killed in similar circumstances provided for in the offence of "Murder". This was regarded as an oversight.

2. On 13 November 2020, the Department submitted proposed amendments to the Bill to the PC for consideration. The main issue that was discussed relates to the balancing of the respective rights of the victim and the alleged perpetrator in GBV offences in bail proceedings as contemplated in the Bill. It was decided that a legal opinion must be obtained from the Parliamentary Legal Services (PLS) regarding –

(a) the constitutionality of the provisions of the Bill that deal with bail; and

(b) the possible tightening of parole.

(A-List)

3. On 10 February 2020, the PLS briefed the PC on the above aspects. In summary the opinion advises as follows:

(a) ***Bail***

The two categories of protected rights that intersect are the freedom and security of person as contemplated in section 12 of the Constitution and the right contemplated in section 35(1)(f) of the Constitution, namely that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

Accord to the Constitutional Court judgment in Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC), is that section 12 read with section 7(2) of the Constitution impose a duty on the State to prevent criminals in custody from committing violent acts against members of the public.

In S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC), the Constitutional Court clarified bail vis-a-vi section of the Constitution. According to the judgment section 35(1)*(f)*, makes three things plain. The first is that the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences, and may for that reason be detained in custody. The Constitution itself therefore places a limitation on the liberty interest protected by section 12 of the Constitution. The second is that notwithstanding lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody subject to reasonable conditions. The third basic proposition flows from the second, and really sets the normative pattern for the law of bail, is whether the interests of justice permit it (the interest of justice concept was clarified as "a value judgment of what would be fair and just to all concerned").

The grant or refusal of bail is a judicial function. That is so notwithstanding so-called "police bail" under section 59 and "`prosecutor's bail" under section 59A. Those provisions are clearly prefatory and incidental to bail under section 60. As long as the proposed amendments do not amount to an outright denial of bail, the restrictions on imposed by the Bill on bail should be constitutional.

The so called "reverse onus" in the proposed section 60(11)*(c)* is similar to that in section 60(11)*(b)* and therefore constitutional.

(b) ***Parole***

Clause 9 of the Bill which amends section 299A of the Criminal Procedure Act does not give rise to a constitutional issue. The directives that was issued by the Commissioner : Correctional Services in terms of section 299A of the CPA is attached.

**4. SECTION 316B**

The constitutionality of the amendments to section 316B to address an appeal against a sentence imposed by a High Court sitting as an appeal court from a lower court (section 310A of the Criminal Procedure Act, 1977), was not addressed in the opinion of the PLS.

In ***DPP Western Cape v Kock*** 2016 (1) SACR 539 (SCA) the court remarked as follows:

**[8] In considering that issue, it is necessary to have regard to the history and policy that has restricted the State’s right to appeal. That was given extensive consideration by this court in Director of Public Prosecutions v Olivier 2006 (1) SACR 380 (SCA). There this court referred with approval to the useful discussion of the right to appeal in South African criminal procedure in the South African Law Reform Commission’s Third Interim Report on Simplification of Criminal Procedure (The right of the Director of Public Prosecutions to appeal on questions of fact) (November 2000) and had regard to the position in comparable foreign jurisdictions. The court observed the following:**

**‘[I]t appears that by and large, common law legal systems are loath to grant rights to the State to appeal convictions on the basis of factual errors, and that the right of the State to appeal against sentence is limited. In some instances, only one right of appeal against sentence is permitted.**

**The motivation appears to be that on one occasion, at least, a higher court should scrutinise a sentence for error. The provisions of our CPA are to this effect. . . .’**

 **[9] The limitation of the right of the State to appeal against both conviction and sentence is underpinned by constitutional and policy considerations. In the first place, granting the State the unlimited right to appeal against sentence through several tiers of appeal might well be unconstitutional. In Olivier reference was made to the decision in Cox v Hakes 1890 15 (AC) 506, decided more than a century ago, where Lord Halsbury (at 522) said the following:**

**‘It is the right of personal freedom in this country which is in debate; and I for one would be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary legislation, so that the final determination upon that question may be arrived at by the last Court of Appeal.’**

**In Olivier, this court recognised that what is set out in that dictum was the very foundation upon which the restriction of the State’s right to appeal is founded.4**

**[10] In Olivier, reference was made to the Canadian case, Cullen v R [1949] SCR 658, where, in a dissenting judgment, the following was said (para 23):**

**‘At the foundation of criminal law lies the cardinal principle that no man shall be placed in jeopardy twice for the same matter and the reasons underlying that principle are grounded in deep social instincts. It is the supreme invasion of the rights of an individual to subject him by the physical powers of the community to a test which may mean the loss of his liberty or his life; and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy.’ See also the judgment of the Constitutional Court in *S v Nabolisa* 2013 (2) SACR 221 (CC) para 81 where *Olivier* was considered with approval and the following was said:**

**‘The point that appeals are regulated by statute is underscored in yet another judgment of the Supreme Court of Appeal in *Director of Public Prosecutions v Olivier.* In that case the state, invoking s 316B, sought to appeal against a lenient sentence imposed by the high court on appeal against a judgment of the magistrates’ court. The Supreme Court of Appeal held that the state's right to appeal against sentence is to be found in the Criminal Procedure Act. Since that Act did not, reasoned the court, cater for an appeal against sentence imposed by the high court on appeal, the Supreme Court of Appeal had no jurisdiction to entertain the appeal. This was so, held the court, because s 316B gives a right of appeal to the state which is limited to cases where the trial took place in the high court.’."**

**"[19] ........ Having regard to the constitutional and policy imperatives dealt with earlier in this judgment, the question of a further right of appeal by the State in respect of sentence would have to be specifically dealt with in legislation that is clear and precise. As stated above, legislation to that effect might well be challengeable.".**

In ***DPP Gauteng Local Division, Johannesburg v Ramolefi*** Case No: 705/2018, the accused was convicted of murder. The court did not find any substantial and compelling circumstances to deviate from the prescribed minimum sentence and it sentenced the accused to 15 years imprisonment. The accused appealed his sentence. The Gauteng Local Division of the High Court, upheld the appeal on sentence. The High Court set aside the sentence imposed by the regional court and imposed a sentence of five years’ imprisonment, which was wholly suspended for a period of five years on condition that the accused is not found guilty of an offence committed during the period of suspension for which he is sentenced to a period of imprisonment without the option of a fine. The High Court set aside the sentence imposed by the regional court as it was of the view, among others, that the accused was acting under extreme provocation because of the adulterous affair that the deceased had with the accused’s wife two years before the incident. It found that the accused lost control over his emotions and acted completely irrationally when he stabbed the accused who was fleeing from him. The DPP appealed the matter to the SCA.

The SCA found that the wholly suspended sentence imposed by the high court is shocking in the circumstances and that a serious injustice appears to have been done (paragraph [14].

The SCA then considered the matter of whether the Kock Judgment can be construed to mean that," because this is the first appeal by the State against sentence, this court has jurisdiction to determine it?" The court held that "In the light of the clear reasoning in Olivier, Nabolisa and Kock, the answer is no. As I have indicated, policy considerations have been invoked for the narrow right of appeal accorded to the State. No provision is made for the situation where, as a result of an appeal against sentence by a convicted person, the appeal court wildly errs in the opposite direction, leaving the State without a right to appeal. The situation in the present matter may well expose a *lacuna* in those provisions which might merit consideration by the legislature.".

In the ***Memorandum on the Objects of the Bill*** it is stated that "Clause 10 seeks to address this matter by amending section 316B of the Criminal Procedure Act, 1977, to allow the State to appeal a sentence imposed by the High Court sitting as a court of appeal in terms of section 310A, in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute. The provision is intended to maintain the common law principle of limiting the right of appeal by the State, in that the State is not given a free and endless right of appeal, but limiting the right to cases where injustice may result if the State is not afforded the right of appeal, as the court noted in Ramolefi’s matter.".

**Foreign Jurisdictions**

The law on unduly lenient sentencing in ***Ireland*** is provided by the Criminal Justice Act 1993. The Act provides a power for the Director of Public Prosecutions to apply to the Court of Criminal Appeal if he/she considers a sentence in any case tried on indictment to be unduly lenient. For ***Scotland***, provisions allowing appeals against an unduly lenient sentence are contained in the Criminal Procedure (Scotland) Act, 1995. Section 108 provides for the Lord Advocate (equivalent of the Director of Public Prosecutions) to bring proceedings where a conviction on indictment is involved. In Scotland there is no requirement for leave of the Court to lodge an appeal. The Criminal Justice Act, 1998 (CJA), applies to ***Northern Ireland***, ***England and Wales*** and the State may appeal sentences relating to offences that is prescribed, from Crown Court to the Court of Appeal for reconsideration of sentence that is considered unduly lenient. Permission must be obtained from the Court of Appeal. In terms of the CJA undue leniency occurs if it appears to the DPP that the judge in a case erred in law as to his or her powers of sentencing or failed to impose certain mandatory sentences as required by law[[1]](#footnote-1). The meaning of "unduly lenient" was considered in a judgment of the Court of Appeal in England and Wales in Attorney General’s Reference (No.4 of 1989) which stated:

**“It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that that naturally gave rise to – merely because in the opinion of the court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.**

**In that connection, regard must of course be had to reported cases and in particular to guidance given …..in guideline cases.”.**

Further appeal from the Court of Appeal to the Supreme Court is available, in so far as it involves a point of law relevant to sentence. An application must be made to the Court of Appeal for leave to refer a case to the Supreme Court.

1. Various serious offences are listed in the Schedules to the CJA, among others, cruelty to persons under 16, unlawful sexual intercourse with a girl under 16, indecent assault, dealing in controlled drugs; inciting a girl under 16 to have incestuous sexual intercourse; slavery, servitude and forced or compulsory labour; human trafficking, various sexual offences [↑](#footnote-ref-1)