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CRIMINAL PROCEDURE AND EVIDENCE AMENDMENT BILL, 2006

MEMORANDUM

This Bill seeks to amend the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the "principal Act") in certain major respects. Firstly, it is proposed to abolish the obsolete procedure known as the "preparatory examination". Secondly, flowing from the abolition of the "preparatory examination" procedure, it is necessary to re-enact certain provisions previously applicable to both preparatory examinations and to what are called "confirmation proceedings" so that they apply only to the latter. Thirdly, also flowing from the abolition of the "preparatory examination" procedure, it is necessary to provide for some form of verification of the evidence of certain witnesses gathered at the beginning of a criminal investigation to secure its admissibility at the trial in case those witnesses later die or otherwise become unavailable. Finally, the existing law relating to bail is sought to be comprehensively codified and reformed.

In more detail, the individual sections of the Bill provide as follows:

Clause 1

This sets out the Bill's short title.

Clause 2

This clause seeks to insert the definitions of "sexual offence" and "suitably qualified nurse" in the interpretation section (section 2) of the principal Act. The purpose of these definitions is explained below in connection with clauses 23 and 25.

Clause 3

This clause seeks to repeal Part VII of the principal Act and to replace it by a new Part to the effect described below.

The present Part VII of the principal Act provides for "preparatory examinations", as well as what are called "direct indict" proceedings. Some historical background is required to appreciate the meanings of these terms. Prior to 1962, no criminal trial could be held in the High Court until after a preparatory examination by a magistrate had established that there was sufficient reason to believe that an "indictable" offence had been committed, that is, an offence which was triable by the High Court. This proceeding involved the calling of witnesses and the examination of their evidence by the prosecutor and the accused and his or her legal practitioner. If the magistrate found sufficient reason to believe that an indictable offence had been committed by the accused, the magistrate would commit the accused for trial in the High Court and transmit the record of the preparatory examination to the Attorney-General, who might then, depending on the nature of the case and the evidence led, indict the

accused for trial before the High Court or remit the case back to a magistrate for trial. At the trial the same witnesses were called and the same evidence was led as were called and led at the preparatory examination.

In 1962, the principal Act was amended to give the Attorney-General power to bring any case to trial before the High Court without holding a preparatory examination. The idea was to avoid the expense of time and resources (to both the State and the accused) involved in holding a preparatory examination, especially in cases that were straightforward or where there was difficulty in securing the attendance of witnesses. This "direct indict" procedure, as it became known, was increasingly resorted to, until preparatory examinations practically ceased to be held (the last preparatory examination was completed in 1999).

Accordingly, the new Part VII provides only for "direct proceedings" in recognition of what has been the practice for some time.

Clauses 4, 5, 6, 7 and 8

These clauses amend Part VIII of the principal Act, which provides for "confirmation proceedings". The nature of these proceedings is explained below.

Ordinarily, what are called "extra-curial statements", that is to say statements, including confessions, made outside of the court to investigating police officers or other persons, are admissible by the court as evidence if the accused accepts that such statements were indeed made freely and voluntarily and without undue influence. Where, however, the accused disputes that any statements were made by him or her freely and voluntarily without undue influence, a "trial-within-a-trial" ensues to determine the issue. The State must then discharge its onus of proving that, notwithstanding the accused's denial, the statements were made freely and voluntarily, otherwise the statements will not be admissible as evidence by the court.

In order to avoid these frequently lengthy "trials-within-a-trial" proceedings, a prosecutor may choose, before the trial of the accused, to "confirm" the extra-curial statements of the accused before a magistrate under Part VIII of the principal Act. If the accused does not deny that the statements were made freely and voluntarily, the statements are confirmed by the magistrate and become admissible at the trial of the accused. The accused may still challenge their admissibility at the trial, but the onus then rests on him or her to show that the statements were not made freely and voluntarily. If, on the other hand, the accused denies at the confirmation proceedings that the statements were made freely and voluntarily, the magistrate will ask particulars of the grounds upon which the accused bases his or her challenge so that the matter may be investigated and the State be put in a better position to inquire into and refute any allegations which have been made. In this way the State receives fair notice of any challenge to the extra-curial statements it may seek to have admitted into evidence at the trial of the accused, and is not taken by surprise at the trial by allegations of which it was not made aware before.

The proposed abolition of the "preparatory examination" procedure involves the re-enactment and modification of certain provisions previously applicable to both preparatory examinations and confirmation proceedings, so that they apply only to the latter. One of these provisions empowers the presiding magistrate to order a parent or guardian to be present at confirmation proceedings where the accused is a juvenile. Another provision requires the

presiding magistrate to ensure that an accused is in his or her sound and sober senses during confirmation proceedings. There are also provisions for securing the attendance of witnesses at confirmation proceedings (however, the provision excluding the public from confirmation proceedings will not be re-enacted, with the result that such proceedings will be conducted in open court).

Clause 8

This clause seeks to insert a new section (115A) in Part VIII that is designed to compensate for certain advantages of the preparatory examination procedure which, as discussed above, will be abolished. These advantages were, firstly, that preparatory examinations were often held when the evidence was still fresh, that is, not long after the investigation of the case by the police was completed; secondly, that the evidence led at preparatory examinations could, under certain conditions, be admissible at a subsequent trial where the witness who originally gave it was no longer available. The new section 115A provides a procedure whereby the prosecution is enabled to verify the depositions of witnesses obtained at the early stages of an investigation of an offence, so that such depositions can be used later at the trial in the event that the witnesses who gave it are no longer available to give the evidence personally. This new provision will also go some way towards resolving the problem of securing the admission of evidence by expert witnesses at a trial. Many of these experts (such as pathologists) have now to be invited from abroad, and their attendance on the trial day is therefore highly problematic. The verification procedure provided under the new section 115A will enable the evidence of such experts to be tested by the defence in the presence of a magistrate before the day of the actual trial.

The new section 115B also inserted by this clause provides that the record of verification proceedings under section 115A, as well as the record of confirmation proceedings under section 113, will be admissible as evidence on its mere production before any court.

Clauses 9 and 27

These clauses seek to repeal and replace the existing bail provisions of the principal Act by other provisions which comprehensively codify and reform the existing law on the granting and withholding of bail by the courts. The circumstances under which the law recognises that it is or is not in the interests of justice to release on bail an accused person have been canvassed by the courts on many occasions in the past. It is now desirable to spell out these circumstances clearly for the benefit of judicial officers, prosecutors, defence counsel and the accused, and to make reforms where necessary.

The bail regime as codified and modified by these clauses specifies the broad grounds on which the refusal to grant bail may justified in the interests of justice (section 117(2)). Section 117(3) sets out the considerations to be taken into account by a court where a prosecutor argues that bail should be denied on the grounds that:

- the accused, if released, is likely to endanger the safety of the public or any particular person, or commit an offence referred to in the First Schedule (117(3)(a));
- the accused, if released, is likely not to stand his or her trial or appear to receive sentence (117(3)(b));

- the accused, if released, is likely to attempt to influence or intimidate witnesses or to conceal or destroy evidence (117(3)(c));
- the accused, if released, is likely to undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system (117(3)(d))
- the release of the accused will likely disturb the public order or undermine public peace or security (117(3)(e)).

In taking into account the aforementioned considerations, the court is enjoined to weigh the interests of justice against the right of the accused to his or her personal freedom (117(4)).

Even where the prosecution does not oppose the granting of bail, the court has the duty to weigh up the personal interests of the accused against the interests of justice (117(5)).

Where the accused is charged with any of the very serious offences specified in the Third Schedule, then the onus is on the accused to satisfy the court that it is the interests of justice for him or her to be released on bail. The Third Schedule is divided into two Parts, relating to serious crimes of a higher and lesser gravity respectively. In a case where the accused is charged with a crime of the first category, he or she must satisfy the court that there are exceptional circumstances which in the interests of justice permit his or her release (117(6)).

The new section 117A re-enacts section 117 of the principal Act (presently titled "Application for bail") with the addition of provisions which elaborate upon the conduct of the bail proceedings themselves. It codifies the procedure which already prevails, namely that the rule against disclosure of previous convictions does not apply to bail proceedings as it applies to trials, and the accused may not (except with the consent of the Attorney-General) have access to any information, record or document which is contained in a police docket. The record of the bail proceedings will form part of the record of the trial (except for any part of the record of the bail proceedings relating to previous convictions). Moreover, if the accused elects to testify during bail proceedings, his or her testimony can be used against him or her at the subsequent trial, and he or she must be warned by the judicial officer accordingly.

Clauses 10 and 12

The amendments sought by these clauses are consequential to the one made by clause 3.

Clause 11

At present, the proviso to section 120 ("Excessive bail not to be required") requires that a court should not demand "excessive bail". The amendment sought by this clause will put a duty on the courts to ensure that amount or terms of bail are such as to deter an accused from evading his or her trial or not appearing to receive sentence, where such a possibility is not too remote. Accordingly, bail fixed in those circumstances will not be deemed to be "excessive".

Clauses 12, 13, 14, 15 and 16

The amendments sought by these clauses are consequential to the abolition of the preparatory examination procedure.

Clause 17

Generally, in criminal proceedings, a husband or wife is not competent to give evidence for the prosecution against the other spouse without the latter's consent. Section 247 of the Act specifies certain types of cases to which this rule does not apply, that is to say, it specifies certain offences in the prosecution of which a spouse can be compelled to give evidence against the other spouse.

The Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code") that was passed by Parliament last year comprehensively codified or abolished common law offences, and replaced or repealed certain statutory offences. Consequently, there is a need to amend section 247 of the principal Act so that the names of the offences there specified are the same as the names given to those offences by the Criminal Law Code.

Clause 18

This clause seeks to replace section 255 of the principal Act, which provided, among other things, for the admissibility of the evidence of any witness given at a preparatory examination, in circumstances where the witness was no longer available to give evidence personally at the subsequent trial of the accused. Since it is proposed to formally abolish the preparatory examination procedure, the new section 255 will permit the depositions of absent witnesses to be admitted if the depositions were verified under the new section 115A (see clause 8 above). The depositions of absent witnesses that were not so verified may still be admitted, but only at the discretion of the court (as is presently the case under section 255 (3) of the principal Act with respect to the depositions of absent witnesses generally).

Clauses 19, 20, 21 and 22

The amendments sought by these clauses are consequential to the abolition of the preparatory examination procedure.

Clause 23

The amendments sought by this clause was recommended by the Task Force on Child Sexual Abuse established by the Ministry of Health.

At present, affidavit evidence in the form of a Medical Report Form completed by a medical practitioner is admissible as evidence at a criminal trial on its mere production by the prosecutor; in other words, if the contents of the Form are undisputed, it is not necessary to summon to court the medical practitioner who completed the Form ("the deponent medical practitioner") in order for him or her to give formal evidence on matters referred to in the Form.

(In cases where the evidence contained in such Medical Report Forms is challenged, the court has a discretion to call the deponent medical practitioner so that his or her testimony can be heard in court. The court may do so of its own motion or at the request of the prosecutor or the accused).

The Task Force on Child Sexual Abuse requested that suitably qualified nurses should also be enabled to complete Medical Report Forms in relation to victims of child sexual abuse who have been examined or treated by such nurses. This is because medical practitioners are not always available at Rural and District hospitals.

The effect of this clause is to enable suitably qualified nurses to complete Medical Report Forms in relation to all victims of sexual crimes who have been examined or treated by them, in addition to child victims of sexual crimes.

Clause 24

The amendment sought by this clause is consequential to the abolition of the preparatory examination procedure.

Clause 25

Under section 17 of the Sexual Offences Act a court that convicts a person of a sexual offence has the power to order that the convicted person be tested for HIV infection. Any such test is compulsory, and reasonable force may be used to take any sample for testing. The results of the test have a bearing on the sentence imposable upon the convicted person, who is liable to a heavier penalty if the results are positive.

Section 17 of the Sexual Offences Act was later incorporated, with some changes, as section 302A of the principal Act by the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Act No. 23 of 2004). The principal change is that the court convicting a person of a sexual offence **must** in every such case order that the convicted person be tested for HIV infection.

The implementation of this mandatory provision is difficult for the reasons stated under clause 23 above, namely that because medical practitioners are not always available at Rural and District hospitals. And although the Minister responsible for health may, under section 302A(1), "designate" persons other than medical practitioners to conduct HIV tests, it was felt desirable in the interests of clarity that suitably qualified nurses should be specifically mentioned in section 302A of the principal Act as being competent to conduct these tests.

Clause 26

The amendment sought by this clause is consequential to the abolition of the preparatory examination procedure.

Clause 27 and Schedule

This clause and its related Schedule effect minor amendments to the principal Act, especially those amendments required by the abolition of the preparatory examination procedure.

Clause 29

The individual paragraphs of this clause amend the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (No. 23 of 2004) ("the Code") in the following respects:

a) this paragraph seeks to correct an error in section 1 of the Code;

b) this paragraph seeks to correct an error in section 16 of the Code;

c) where a mandatory penalty is involved, there must be a power for a court to find "special circumstances" in cases that warrant a lower penalty than the mandatory one; also, the mandatory penalty should not extend to cases where the crime is unfinalised. Section 80 of the Code ("Sentence for certain crimes where accused is infected with HIV") is wanting in both respects, and this paragraph seeks to improve it accordingly;

d) the conduct and the mental element required to be proved for the "concurrent" charges mentioned in section 114(7)(c) of the Code are the same, that is:

1. Stock theft involving the acquisition of livestock from another person without reasonable cause for believing that the livestock belonged to that person **and** receiving stolen property knowing it to have been stolen.

2. Stock theft involving the possession of livestock in circumstances giving rise to the suspicion that it was stolen **and** possessing property reasonably suspected of being stolen.

Since this renders an accused person liable to double punishment, this paragraph seeks to amend section 114(7)(c) so that it will refer to "alternative" charges only.

e) this paragraph seeks to employ the phrase "potentially prejudicial", which is already defined in section 135 of the Code, in the description of the crime of fraud in section 136;

f) the present definition of "cannabis plant" in section 155 of the Code is too narrow. It is sought to improve it along the lines of the definition of "Indian hemp" contained in the present Dangerous Drugs Act;

g) consequentially to paragraph (f), the reference to "other than cannabis" in section 156(2) should be deleted and substituted by "other than any cannabis plant, prepared cannabis, or cannabis resin"; also, for the same of consistency of wording with section 114(3) of the Code, the phrase "special circumstances in the particular case" in section 156(1)(i) and 156(3) should be replaced by "special circumstances peculiar to the case";

h) the phrase "benefit or advantage" in section 170(2)(a) and (b) should be deleted in favour of the phrase "gift or consideration" for the sake of consistency with the rest of Chapter IX of the Code. The phrase "gift or consideration" is used in section 170(1) of the Code, and the word "consideration" is defined in section 160;

i) "threats" to commit the offences of "indicating witches and wizards" and "hijacking" should be deleted from section 186(3) of the Code because threatening to do either of these things already constitutes a crime under section 99 of 151 of the Code;

j) the amendment sought by this paragraph corrects an error in section 191 of the Code;

k) this paragraph and paragraph (l) seek to make clear that persons who render assistance to the accomplices of a crime rather than to the actual perpetrators should be also liable as accessories to the crime;

m) the defence of ignorance or mistake of the law should not extend to "advice" by judicial officers. Judicial officers do not give "advice" on the law but render judgments interpreting it.

n) the amendment sought by this paragraph corrects an error in section 236 of the Code;

o) this paragraph modifies section 253(1)(a) and (b) of the Code to bring it more into line with the existing common law.

Clause 30

The Legal Practitioners Act [*Chapter 27:07*] was amended by the General Laws Amendment Act, 2005 (No. 6 of 2005) to enable persons employed as legal practitioners by

the Zimbabwe Revenue Authority to have the right of audience before the Fiscal Appeal Court and Special Court for Income Tax Appeals. It is proposed to extend this right to any other court in any civil and (if authorised by the Attorney-General under section 6 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]) criminal proceedings to which the Authority is a party or that involve any of the Acts specified in the First Schedule to the Revenue Authority Act.

PRESENTED BY THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

BILL

To amend the Criminal Procedure and Evidence Act [*Chapter 8:07*], the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (No. 23 of 2004) and section 92 of the Legal Practitioners Act [*Chapter 27:07*]; and to provide for matters connected therewith or incidental thereto.

ENACTED by the President and the Parliament of Zimbabwe.

1 Title

This Act may be cited as the Criminal Procedure and Evidence Amendment Act, 2006.

2 Amendment of section 2 of Cap. 9:07

(1) Section 2 ("Interpretation") of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (hereinafter called "the principal Act") is amended by the insertion of the following definitions—

""sexual offence" means—

(a) rape, sodomy, incest or indecent assault; or

(b) a contravention of section 3 or 4 of the Sexual Offences Act [*Chapter 9:21*] (No. 8 of 2001); or

(c) a contravention of section 8(1) of the Sexual Offences Act [*Chapter 9:21*] (No. 8 of 2001) by the commission of an act referred to in paragraph (a) or (c) of that subsection; or

(d) a contravention of section 15 of the Sexual Offences Act [*Chapter 9:21*] (No. 8 of 2001); or

(e) an attempt to commit an offence specified in paragraph (a), (b), (c) or (d);

"suitably qualified nurse" means a State certified nurse, paediatric nurse, State certified traumatology nurse or general registered nurse registered as such in terms of the Health Professions Act [*Chapter 27:19*] (No. 6 of 2000);".

(2) With effect from the date of commencement of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (No. 23 of 2004), section 2 ("Interpretation") of the principal Act is amended by the repeal of the definition of "sexual offence" and the substitution of—

""sexual offence" means—

(a) for the purpose of section 278, any of the following offences or an attempt to commit any of the following offence—

(i) rape;

(ii) aggravated indecent assault;

(iii) sexual intercourse or performing an indecent act with a young person;

(iv) sodomy;

(v) sexual intercourse within a prohibited degree of relationship;

(vi) deliberate infection of another with a sexually transmitted disease;

(vii) deliberate transmission of HIV;

(viii) coercing or inducing a person for the purpose of engaging in sexual conduct;

(b) for the purpose of section 302A, any of the following offences or an attempt to commit any of the following offences—

(i) rape;

(ii) aggravated indecent assault;

(iii) sexual intercourse or performing an indecent act with a young person, involving any penetration of any part of his or her or another person's body that involves a risk of transmission of HIV;

(iv) deliberate transmission of HIV;".

3 New Part substituted for Part VII of Cap. 9:07

Part VII of the principal Act is repealed and the following Part is substituted—

"PART VII

COMMITTAL FOR TRIAL IN THE HIGH COURT OF ACCUSED PERSONS

65 Accused to be committed for trial by magistrate before High Court

No person shall be tried in the High Court for any offence unless he or she has been previously committed for trial by a magistrate for or in respect of the offence charged in the indictment:

Provided that—

(i) in any case in which the Attorney-General has declined to prosecute, the High Court or any judge thereof may, upon the application of any such

private party as is described in sections 13 and 14, order any person to be committed for trial;

(ii) an accused person, other than an accused person committed for trial under section 66, shall be deemed to have been committed for trial for or in respect of the offence charged in the indictment if the evidence taken before the committing magistrate contains an allegation of any fact or facts upon which the accused might have been committed upon the charge named in the indictment, although the committing magistrate may, when committing the accused upon such evidence, have committed him or her for some offence other than that charged in the indictment or for some other offence not known to the law;

(iii) an accused person who is in actual custody when brought to trial, or who appears to take his or her trial in pursuance of any recognizance entered into before any magistrate, shall be deemed to have been duly committed for trial upon the charge stated in the indictment unless he or she proves the contrary;

(iv) nothing in this section shall be construed as affecting the power of a judge to sentence a person whose case has been transferred to that court on the direction of the Attorney-General in terms of section 225;

(v) no irregularity or defect in—

(a) any proceedings referred to in section 66; or

(b) any other matter relating to the bringing of an accused person before the High Court;

shall affect the validity of the trial, but the court may, on the application of the prosecutor or the accused, adjourn the trial to some future day.

66 Summary committal for trial of accused person

(1) If the Attorney-General is of the opinion that any person is under reasonable suspicion of having committed an offence for which the person may be tried in the High Court, the Attorney-General shall cause written notice to be served on—

(a) a magistrate for the province within which the person concerned resides or for the time being is present; or

(b) any magistrate before whom the trial of the offence could be held in respect of the offence concerned;

informing the magistrate of his or her decision to indict the person concerned for trial before the High Court and of the offence for which the person is to be tried.

(2) On receipt of a notice in terms of subsection (1), the magistrate shall cause the person concerned to be brought before him or her and notwithstanding any other provision of this Act, shall forthwith commit the person for trial before the High Court and grant a warrant to commit him or her to prison, there to be detained till brought to trial before the High Court for the offence specified in the warrant or till admitted to bail or liberated in the course of law.

(3) For the purpose of bringing a person before a magistrate to be committed for trial in terms of subsection (2)—

(a) the clerk of the magistrates court concerned shall issue a summons at the request of a public prosecutor requiring the person to appear before the magistrate at a specified date, time and place and stating the nature of the offence in respect of which he or she is to be indicted for trial; or

(b) the magistrate may issue a warrant for the person's arrest.

(4) Section 140 shall apply, with any changes that may be necessary, to a summons issued in terms of subsection (3)(a) as if it had been issued in terms of that section.

(5) Part V shall apply, with any changes that may be necessary, to a warrant issued in terms of subsection (3)(b) as if it had been issued in terms of section 33(1).

(6) Where an accused has been committed for trial in terms of subsection (2), there shall be served upon him or her in addition to the indictment and notice of trial—

(a) a document containing a list of witnesses it is proposed to call at the trial and a summary of the evidence which each witness will give, sufficient to inform the accused of all the material facts upon which the State relies; and

(b) a notice requesting the accused—

(i) to give an outline of his or her defence, if any, to the charge; and

(ii) to supply the names of any witnesses he or she proposes to call in his or her defence together with a summary of the evidence which each witness will give, sufficient to inform the Attorney-General of all the material facts on which he or she relies in his or her defence;

and informing the accused of the provisions of section 67(2).

(7) The Attorney-General shall lodge with the registrar of the High Court a copy of the document and notice referred to in subsection (6).

(8) Where the accused is to be represented at his or her trial by a legal practitioner, the legal practitioner shall, at least three days, Saturdays, Sundays and public holidays excluded, before the date for trial determined by the Attorney-General in terms of section 160(1)—

(a) send to the Attorney-General; and

(b) lodge with the registrar of the High Court;

a document containing the information referred to subsection (6)(b).

(9) Where the accused is not to be represented at his or her trial by a legal practitioner, the Attorney-General may—

(a) serve on the accused a notice directing him or her to appear before a specified magistrate to provide the information referred to in subsection (6)(b); and

(b) send to the magistrate specified in terms of paragraph (a) a copy of—

(i) the document and notice referred to in subsection (6); and

(ii) the notice served in terms of paragraph (a).

(10) The magistrate shall cause an accused on whom a notice in terms of subsection (9) is served to appear before him or her and—

(a) ask the accused if he or she understands the facts set out in the document referred to in subsection (6)(a) and, if necessary, explain those facts; and

(b) inform him or her of the provisions of section 67(2); and

(c) request the accused to supply the information referred to in subsection (6)(b);

and the proceedings shall be recorded.

(11) The magistrate shall transmit a certified copy of the record made in terms of subsection (10) to the registrar of the High Court.

(12) The registrar shall transmit—

(a) the document and notice lodged with him or her in terms of subsection (7); and

(b) the document lodged with him or her in terms of subsection (8)(b) or a certified copy of the record transmitted in terms of subsection (11), as the case may be;

to the judge who is to preside at the trial.

67 Information provided by accused or failure of accused to mention fact relevant to his or her defence may be used as evidence against accused

(1) A document purporting to be a copy of a document referred to in section 66(8) or a certified copy of a record made in terms of subsection (10) of that section shall be received in evidence before the court upon its mere production by the prosecutor without further proof, unless it is shown that the information given by the accused was not in fact duly given:

Provided that, except in so far as it amounts to an admission of any allegation made by the State, any information provided by the accused shall not be taken into account for the purpose of deciding whether the accused should be found not guilty in terms of section 198(3).

(2) If an accused has failed to mention any fact relevant to his or her defence as requested in the notice in terms of section 66(6)(b), being a fact which, in the circumstances existing at the time, he or she could reasonably have been expected to have mentioned, the court, in determining whether there is any evidence that the accused committed or whether the accused is guilty of the offence charged or any other offence of which he or she may be convicted on that charge, may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused.

(3) In deciding, in terms of subsection (2), whether in the circumstances existing at the time the accused could reasonably have been expected to mention any fact, the court may have regard to the document referred to in section 66(6)(a).".

4 New section substituted for section 112 of Cap. 9:07

Section 112 of the principal Act is repealed and the following is substituted—

"112 Interpretation in Part VII

In this Part—

"confirmation proceedings" means confirmation proceedings in terms of section 113;

"expert witness" means any person whose professional, scientific or technical training gives authority to evidence given in his or her professional, scientific or technical capacity;

"statement" means any statement, including a confession, that is written or made orally and subsequently reduced to writing;

"verification proceedings" means verification proceedings in terms of section 115A.".

5 Amendment of section 113 of Cap. 9:07

Section 113 ("Confirmation or investigation of statement") of the principal Act is amended by the repeal of subsections (6) and (7).s

6 New sections inserted after section 113 of Cap. 9:07

The principal Act is amended by the insertion of the following sections after section 113—

"113A Parents or guardian of juvenile may be summoned to confirmation proceedings

(1) If confirmation proceedings are held in respect of a person under the age of eighteen years, the magistrate conducting the proceedings may, at any time during those proceedings, direct any persons to warn the parent or guardian of the person orally to attend the proceedings and to remain in attendance at them, or to serve a warning in writing upon the parent or guardian:

Provided that no magistrate shall give a direction in terms of this subsection in respect of the parent or guardian of a person who is married or, in the opinion of the magistrate, is tacitly emancipated.

(2) If a parent or guardian who has been warned under subsection (1) fails to attend on the date and at the time appointed, or to remain in attendance during the confirmation proceedings on that day and on any day to which the proceedings may be adjourned, the magistrate presiding at the proceedings may issue a warrant for the apprehension of that parent or guardian and may also order him or her to pay a fine not exceeding level three or, in default of payment, to be imprisoned for a period not exceeding one month.

(3) The magistrate may, on cause shown, remit any penalty imposed under subsection (2).

113B Accused must be in his or her sound and sober senses

(1) Before commencing confirmation proceedings and at all times during the course thereof, the magistrate shall satisfy himself or herself that the accused is in his or her sound and sober senses, and if the magistrate is, before commencing or any time during the course of the proceedings, satisfied that the accused is not in his or her sound and sober senses, the magistrate shall record that fact and order the accused to be kept in

custody in such place for such period and under such conditions as to observation as the magistrate may think fit.

(2) An order in terms of subsection (1) shall expire at the termination of fourteen days from the date of its issue, but may, from time to time be renewed by the magistrate for a period not exceeding fourteen days.

(3) If at the expiry of the period of the period of the order or of any renewal thereof or before such expiry the accused is found to be in his or her sound and sober senses, the accused shall again be brought before the magistrate who shall commence or, as the case may be, continue the confirmation proceedings.

113C Subpoenaing of witnesses

(1) A public prosecutor who has initiated confirmation proceedings, or an accused in respect of whom those proceedings are being or are to be held, or the latter's legal representative, may compel the attendance of any person at those proceedings to give evidence or to produce any book or document, by means of a subpoena, issued in the manner prescribed by the rules of court, at the instance of the public prosecutor or accused, as the case may be, by the clerk of the magistrates court in which the proceedings are being or are to be held.

(2) If a magistrate conducting confirmation proceedings believes that any person may be able to give evidence or to produce any book or document which is relevant to the subject of the examination, he or she may direct the clerk of the magistrate court to issue, in the manner mentioned in subsection (1), a subpoena requiring such person to appear before him or her at a time mentioned therein, to give evidence or to produce any book or document.

(3) Any such subpoena shall be served in the manner prescribed by the rules of court, upon the person to whom it is addressed.

(4) A magistrate conducting confirmation proceedings may call as a witness any person in attendance, although not subpoenaed as a witness, or may recall and re-examine any person already examined as a witness.

(5) Every person subpoenaed to attend confirmation proceedings shall obey the subpoena and remain in attendance throughout the proceedings, unless excused by the magistrate conducting the proceedings.

113D Arrest and punishment for failure to obey subpoena or to remain in attendance

(1) If any person subpoenaed to attend confirmation proceedings without reasonable cause fails to obey the subpoena, and it appears from the return or from evidence given under oath that the subpoena was served upon the person to whom it is directed, or if any person who has attended in obedience to a subpoena fails to remain in attendance, the magistrate conducting the proceedings may issue a warrant directing that such person be arrested and brought at a time and place stated in the warrant, or as soon thereafter as possible, before him or her or any other magistrate.

(2) When the person in question has been arrested under the said warrant, he or she may be detained thereunder before the magistrate who issued it or in any prison or lock-

up or other place of detention or in the custody of the person who is in charge of him or her, with a view to securing the person's presence as a witness at the confirmation proceedings, or such magistrate may release him or her on a recognizance, with or without sureties, for his or her appearance to give evidence as required and for his or her appearance at the inquiry mentioned in subsection (3).

(3) The magistrate may in a summary manner inquire into the said person's failure to obey the subpoena or to remain in attendance, and unless it is proved that the said person had a reasonable excuse for such failure, the magistrate may sentence him or her to a fine not exceeding level three or to imprisonment for a period not exceeding one month or to both such fine and such imprisonment.

(4) Any person sentenced by a magistrate to a fine or imprisonment in terms of subsection (3) shall have the same right of appeal as if he or she had been convicted and sentenced by a magistrates court in a criminal trial.

(5) If a person who has entered into a recognizance for his or her appearance to give evidence at confirmation proceedings or for his or her appearance at an inquiry referred to in subsection (3) fails so to appear, he or she may, apart from the estreatment of his or her recognizance, be dealt with as if he or she had failed to obey a subpoena to attend confirmation proceedings.

113E When tender of witness' expenses not necessary

No prepayment or tender of expenses shall be necessary in the case of a person who is required to give evidence at confirmation proceedings and who is also within five kilometres of the premises in which such proceedings are being held.

113F Witness refusing to be examined or to produce evidence may be committed

(1) Whenever any person appearing, either in obedience to a subpoena or by virtue of a warrant, or being present and being verbally required by the magistrate to give evidence at confirmation proceedings, refuses to be sworn or, having been sworn, refuses to answer such questions as are put to him or her, or refuses or fails to produce any document or thing which he or she is required to produce, without in any such case offering any just excuse for such refusal or failure, the magistrate may adjourn the proceedings for any period not exceeding eight clear days, and may in the meantime by warrant commit the person so refusing to prison unless he or she sooner consents to do what is required of him or her.

(2) If a person referred to in subsection (1), upon being brought up upon the adjourned hearing, again refuses to do what is so required of him or her, the magistrate may, if he or she sees fit, again adjourn the proceedings, and by order commit him or her for a like period and so again from time to time until such person consents to do what is required of him or her.

(3) An appeal shall lie from any order of committal in terms of subsection (1) or (2) to the Supreme Court, which may make such order on the appeal as to it seems just.

(4) Nothing in this section shall prevent the magistrate from committing the accused for trial or otherwise disposing of the proceedings in the meantime according to any other sufficient evidence taken by him or her.

(5) No person shall be bound to produce at confirmation proceedings any document or thing not specified or otherwise sufficiently described in the subpoena unless he or she actually has it with him or her.".

7 Repeal of section 114 of Cap. 9:07

Section 114 of the principal Act is repealed.

8 New sections inserted after section 115 of Cap. 9:07

The principal Act is amended in Part VIII by the insertion of the following sections after section 115—

"115A Verification of witnesses' depositions in certain circumstances

(1) Where, at any time before an accused is brought to trial for an offence, a witness has made a deposition giving material information relating to the offence, and it appears to the prosecutor that—

(a) the witness is dangerously ill; or

(b) the evidence of the witness is given in his or her capacity as an expert witness, and that the nature of the witness's professional commitments is such as to render it difficult to secure his or her attendance at the trial on any given day; or

(c) for any other reason it may not be possible to secure the attendance of such witness at the trial;

the prosecutor may, if so authorised by the Attorney-General, make an urgent *ex parte* application to a magistrate in chambers for an order to verify the deposition in terms of this section.

(2) An application in terms of subsection (1) shall be accompanied by—

(a) the deposition referred to in subsection (1); and

(b) a statement of the reasons why it appears to the prosecutor that it is necessary for the deposition to be verified in terms of this section.

(3) If the magistrate grants leave in terms of subsection (1), the magistrate shall, by written order delivered by hand to the accused or his or her legal representative, if any—

(a) summon the accused and his or her legal representative, if any, to attend a conference to be held in private at the time and place (being a magistrates court or any other place selected by the magistrate for the purpose) specified in the order for the purpose of verifying the witness's deposition in the presence of the magistrate, the prosecutor, the witness and any police officer concerned with the investigation of the alleged offence:

Provided that—

(i) the accused or his or her legal representative, if any, shall have not less than three days' notice (including Saturdays, Sundays and public holidays) of the time and place of the conference; and

(ii) the magistrate may, upon the written request of the accused or his or her legal representative, and after consultation with the prosecutor, postpone or bring forward the date of the conference;

and

(b) inform the accused that, in the event of failure by him or her to comply with the order, the provisions of section 255 may apply to his or her case.

(4) At a conference convened in terms of this section—

(a) the prosecutor shall cause the deposition of the witness to be read over or made available to the accused, and thereupon the accused shall be entitled, personally or by his or her legal representative, if any, to cross-examine the witness, and in such case the prosecutor may re-examine the witness; and

(b) the magistrate may put any question he or she sees fit to the prosecutor, the accused or his or her legal representative, or the witness.

(5) During a conference convened in terms of this section the magistrate shall make or cause to be made a record of—

(a) the time and place of the conference, the names of all those who attended at the conference and the capacities in which they so attended; and

(b) the examination or re-examination of the witness, if any.

(6) At the conclusion of a conference convened in terms of this section—

(a) the magistrate, if he or she is satisfied that the deposition which is the subject of the verification proceedings—

(i) was made by a witness referred to in subsection (1)(a), (b) or (c); and

(ii) may properly be admitted in criminal proceedings for the prosecution of the offence to which it relates as *prima facie* proof of the evidence deposed to in therein;

shall verify the deposition by endorsing upon it the word "verified" and his or her signature and the place and date of verification;

and

(b) the magistrate and the prosecutor shall sign the record referred to in subsection (5) and, if the accused and his or her legal representative, if any, attended at the conference, the magistrate shall invite the accused or the legal representative to sign it:

Provided that if the accused or his or her legal representative refuses to sign the record, the magistrate shall note that fact in the record, and the reasons for the refusal, if any are given.

(7) If the accused or his or her legal representative fails to attend a conference convened in terms of this section after having been given an opportunity to do so under subsection (3), then subsection (4)(b) and subsections (5) and (6) shall apply, with any changes that may be necessary, as if the accused or his or her legal representative were in attendance.

115B Proof of evidence and statements given or made at confirmation or verification proceedings and furnishing of copies thereof to accused

(1) Subject to subsection (2), in any proceedings in any court—

(a) a document purporting to be the longhand record of the evidence given by a witness or of a statement or evidence made or given by the accused at confirmation or verification proceedings and purporting to have been taken down by the magistrate holding such proceedings; or

(b) a document which—

(i) purports to be a transcription of the original record of the evidence given by a witness or of a statement or evidence made or given by the accused at confirmation or verification proceedings and taken down in shorthand writing or by mechanical means; and

(ii) purports to have been certified as correct under the hand of the person who transcribes such record;

shall, upon its mere production by any person, be *prima facie* evidence of such statement or evidence, as the case may be, and, if the same was made or given as aforesaid through an interpreter or interpreters, of the correctness of the interpretation.

(2) Notwithstanding subsection (1), the terms of—

(a) any statement produced in confirmation proceedings shall not be proved except by the production of the statement as confirmed by the magistrate in terms of section 113(3) or, where the statement is not so confirmed, by calling as a witness the person to whom the statement was made;

(b) any deposition which was the subject of verification proceedings shall not be proved except by the production of the deposition as verified by the magistrate in terms of 115A(6) or, where the deposition is not so verified, by calling as a witness the person who made the deposition, unless the court, in its discretion (where the witness cannot be found after diligent search, or cannot be compelled to attend the court), allows the deposition to be read as evidence at the trial, subject to the conditions mentioned in section 255(1).

(3) If the accused is indicted for trial before the High Court, a copy of any of the following documents as may relate to his or her case shall be served upon the accused together with the other documents served upon him or her in terms of section 66—

(a) a statement confirmed in terms of section 113(3); and

(b) a deposition verified in terms of section 115A(6); and

(c) a record referred to in subsection (1).".

9 New sections substituted for sections 116 and 117 of Cap. 9:07

Sections 116 and 117 of the principal Act are repealed and the following are substituted—

"116 Power to admit to bail

Subject to this section and sections 32 and 34, a person may, upon an application made in terms of section 117A, be admitted to bail or have his or her conditions of bail altered—

(a) in respect of any offence, by a judge at any time after he or she has appeared in court on a charge and before sentence is imposed;

(b) in respect of any offence, except an offence specified in the Third Schedule, by a magistrate within whose area of jurisdiction the accused is in custody at any time after he or she has appeared in court on a charge and before sentence is imposed:

Provided that, with the consent of the Attorney-General, a magistrate may admit a person to bail or alter a person's conditions of bail in respect of any offence;

(c) if he or she is a person whose case is adjourned in terms of section 55(1) of the Magistrates Court Act [*Chapter 7:10*] or in respect of whom an order has been made in terms of section 351(4), by a judge or by any magistrate within whose area of jurisdiction he or she is in custody:

Provided that—

(i) the Attorney-General, in the case of any application to a judge in terms of section 117A, or the local public prosecutor, in the case of any application to a magistrate in terms of section 117A, shall be given reasonable notice of any such application;

(ii) where an application in terms of this section 117A is determined by a judge or magistrate, a further application in terms of that section may only be made, whether to the judge or magistrate who has determined the previous application or to any other judge or magistrate, if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination;

(iii) a magistrate shall not, without the consent of the Attorney-General, admit a person to bail or alter a person's conditions of bail in respect of an offence specified in the Third Schedule.

117 Entitlement to bail

(1) 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 is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.

(2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—

(a) where there is a likelihood that the accused, if he or she were released on bail, will—

(i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or

(ii) not stand his or her trial or appear to receive sentence; or

(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system;

or

(b) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.

(3) In considering whether the ground referred to in—

(a) subsection (2)(a)(i) has been established, the court shall, where applicable, take into account the following factors, namely—

(i) the degree of violence towards others implicit in the charge against the accused;

(ii) any threat of violence which the accused may have made to any person;

(iii) the resentment the accused is alleged to harbour against any person;

(iv) any disposition of the accused to commit offences referred to in the First Schedule, as evident from his or her past conduct;

(v) any evidence that the accused previously committed an offence referred to in the First Schedule while released on bail;

(vi) any other factor which in the opinion of the court should be taken into account;

(b) subsection (2)(a)(ii) has been established, the court shall take into account—

(i) the ties of the accused to the place of trial;

(ii) the existence and location of assets held by the accused;

(iii) the accused's means of travel and his or her possession of or access to travel documents;

(iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefor;

(v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee;

(vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;

(vii) any other factor which in the opinion of the court should be taken into account;

(c) subsection (2)(a)(iii) has been established, the court shall take into account—

(i) whether the accused is familiar with any witness or the evidence;

(ii) whether any witness has made a statement;

(iii) whether the investigation is completed;

(iv) the accused's relationship with any witness and the extent to which the witness may be influenced by the accused;

(v) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;

(vi) the ease with which any evidence can be concealed or destroyed;

(vii) any other factor which in the opinion of the court should be taken into account;

(d) subsection (2)(a)(iv) has been established, the court shall take into account—

(i) whether the accused supplied false information at arrest or during bail proceedings;

(ii) whether the accused is in custody on another charge or is released on licence in terms of the Prisons Act [*Chapter 7:11*];

(iii) any previous failure by the accused to comply with bail conditions;

(iv) any other factor which in the opinion of the court should be taken into account;

(e) subsection (2)(b) has been established, the court shall, where applicable, take into account the following factors, namely—

(i) whether the nature of the offence and the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;

(ii) whether the shock or outrage of the community where the offence was committed might lead to public disorder if the accused is released;

(iii) whether the safety of the accused might be jeopardised by his or her release;

(iv) whether the sense of peace and security among members of the public will be undermined or jeopardised by the release of the accused;

(v) whether the release of the accused will undermine or jeopardise the public confidence in the criminal justice system;

(iv) any other factor which in the opinion of the court should be taken into account.

(4) In considering any question in subsection (2) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely—

(a) the period for which the accused has already been in custody since his or her arrest;

(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

(d) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;

(e) the state of health of the accused;

(f) any other factor which in the opinion of the court should be taken into account.

(5) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty to weigh up the personal interests of the accused against the interests of justice as contemplated in subsection (4).

(6) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in—

(a) Part I of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing the matter shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that exceptional circumstances exist which in the interests of justice permit his or her release;

(b) Part II of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing the matter shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that the interests of justice permit his or her release.

(7) Where a person has applied for bail in respect of an offence referred to in the Third Schedule—

(a) the Attorney-General; or

(b) the Minister responsible for the administration of the Public Order and Security Act [*Chapter 11:17*] (No. 1 of 2002), in respect of offence referred to in paragraph 9 of the Third Schedule;

may issue a certificate stating that it is intended to charge the person with the offence.

(8) If the Minister responsible for the administration of the Extradition Act [*Chapter 9:08*], certifies in writing that a person who has applied for bail has been extradited to Zimbabwe from a foreign country and that the Minister has given an undertaking to the government or other responsible authority of that country—

(a) that the accused person will not be admitted to bail while he or she is in Zimbabwe, the judge or magistrate hearing the matter shall not admit the accused person to bail;

(b) that the accused person will not be admitted to bail while he or she is in Zimbabwe except on certain conditions which the Minister shall specify in his or her certificate, the judge or magistrate hearing the matter shall not admit the accused person to bail except on those conditions:

Provided that the judge or magistrate may fix further conditions, not inconsistent with the conditions specified by the Minister, on the grant of bail to the accused person.

(9) A document purporting to be a certificate issued by a Minister or the Attorney-General in terms of subsection (7) or (8) shall be admissible in any proceedings on its production by any person as *prima facie* evidence of its contents.

117A Application for bail, bail proceedings and record thereof

(1) Subject to the proviso to section 116, an accused person may at any time apply verbally or in writing to the judge or magistrate before whom he or she is appearing to be admitted to bail immediately or may make such application in writing to a judge or magistrate.

(2) Every written application for bail shall be made in such form as may be prescribed in rules of court.

(3) Every application in terms of subsection (2) shall be disposed of without undue delay.

(4) In bail proceedings the court may—

(a) postpone such proceedings;

(b) subject to subsection (5), receive—

(i) evidence on oath, including hearsay evidence;

(ii) affidavits and written reports which may be tendered by the prosecutor, the accused or his or her legal representative;

(iii) written statements made by the prosecutor, the accused or his or her legal representative;

(iv) statements not on oath made by the accused:

(c) require the prosecutor or the accused to adduce evidence;

(d) require the prosecutor to place on record the reasons for not opposing bail.

(5) In bail proceedings the accused is compelled to inform the court whether—

(a) the accused has previously been convicted of any offence; and

(b) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.

(6) Where the legal representative of an accused submits the information referred to in subsection (5) the accused shall be required by the court to declare whether he or she confirms such information.

(7) The record of the bail proceedings, excluding the information referred to in subsection (5), shall form part of the record of the trial of the accused following upon such bail proceedings:

Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her that anything he or she says may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.

(8) Any accused who wilfully—

(a) fails or refuses to comply with subsection (5); or

(b) furnishes the court with false information required in terms of subsection (5);

shall be guilty of an offence and liable to fine not exceeding level seven or to imprisonment for a period not exceeding two years or both.

(9) The court may make the release of an accused subject to conditions which, in the court's opinion, are in the interests of justice.

(10) Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police officer charged with the investigation in question, unless the Attorney-General otherwise directs:

Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for the purposes of his or her trial.".

10 Amendment of section 118 of Cap. 9:07

Section 118 ("Conditions of recognizance") (2) of the principal Act is amended—

(a) in subsection (2) by the deletion of "section *one hundred and seventeen*" and the substitution of "section 117A";

(b) in subsection (2) by the repeal of paragraph (a).

11 Amendment of section 120 of Cap. 9:07

Section 120 ("Excessive bail not to be required") of the principal Act is amended by the insertion of the following subsection, the present section becoming subsection (1)—

"(2) Notwithstanding the proviso to subsection (1), if it is established that there is a possibility that the accused, if released on bail, will not stand his or her trial or appear to receive sentence, and that possibility, though short of a likelihood, is not too remote, a court shall not release the accused on bail unless it satisfies itself that the amount or the terms of the bail or both are reasonably sufficient to deter the accused from fleeing, given the factors referred to in section 117(3)(b).".

12 Amendment of section 123 of Cap. 9:07

Section 123 ("Power to admit to bail pending appeal or review") of the principal Act is amended by the repeal of subsections (2), (3), (4), (5) and (6) and the substitution of—

"(2) Sections 117 and 117A shall, with any changes that may be necessary, apply to this section.".

13 Amendment of section 160 of Cap. 9:07

Section 160 ("Bringing of accused persons to trial before High Court") of the principal Act is amended by the repeal of subsection (3).

14 Amendment of section 177 of Cap. 9:07

Section 177 ("Court may order delivery of particulars") of the principal Act is amended by the repeal of subsection (3).

15 Repeal of sections 205 and 206 of Cap. 9:07

Sections 205 and 206 of the principal Act are repealed.

16 Amendment of section 225 of Cap. 9:07

Section 225 ("Powers of Attorney-General") (a) of the principal Act is amended by the repeal of subparagraph (i).

17 Amendment of section 247 of Cap. 9:07

With effect from the date of commencement of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Act No. 23 of 2004), section 247 ("Evidence for prosecution by husband or wife of accused") of the principal Act is amended by the repeal of subsection (2) and the substitution of—

"(2) The wife or husband of an accused person shall be competent and compellable to give evidence for the prosecution without the consent of the accused person where such person is prosecuted for any offence against the person of either of them or any of the children of either of them, or for any of the following offences—

(a) rape;

(b) aggravated indecent assault;

(c) sexual intercourse or performing an indecent act with a young person;

(d) sexual intercourse within a prohibited degree of relationship;

(e) kidnapping or unlawful detention of a child;

(f) bigamy;

(g) perjury committed in connection with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by the one of them against the other, or in connection with or for the purpose of any criminal proceedings in respect of any offence included in this subsection.".

18 New section substituted for section 255 of Cap. 9:07

Section 255 of the principal Act is repealed and the following is substituted—

"255 Admissibility in criminal cases of evidence of absent witnesses in certain circumstances

(1) The evidence of any witness—

(a) given at a former criminal trial of an accused on the same or a different charge and recorded in a document purporting—

(i) to be a transcript of the original record of the said evidence;

(ii) to have been certified as correct under the hand of the person who transcribed it;

or

(b) whose deposition has been verified in terms of section 115A;

shall, subject to subsection (2), be admissible in evidence on the trial of the accused for any offence.

(2) The evidence of a witness referred to in subsection (1) shall not be admissible unless—

(a) it is proved on oath to the satisfaction of the court that the witness—

(i) is dead or is incapable of giving evidence, or that he or she is too ill to attend; or

(ii) is kept away from the trial by the means and contrivance of the accused; or

(iii) cannot be found after diligent search, or cannot be compelled to attend; or

(iv) is an expert witness whose evidence is given in his or her capacity as an expert witness, and that the nature of the witness's professional commitments is such as to render it impossible to secure his or her attendance at the trial on any given day;

and that the evidence is the same that was given at the previous criminal trial or at the conference referred to in section 115A, as the case may be, without any alteration;

and

(b) it appears on the record or is proved to the satisfaction of the court that the accused, personally or by his or her legal representative, had a full opportunity of cross-examining the witness, even if the accused, or his or her legal representative, did not avail himself or herself of that opportunity.

(3) Where is proved on oath to the satisfaction of the court that any witness, other than one whose deposition was verified as mentioned in subsection (1)(b)—

(a) is dead or incapable of giving evidence, or is too ill to attend; or

(b) has been kept away from the trial by the means and contrivance of the accused; or

(c) cannot be found after diligent search, or cannot be compelled to attend; or

(d) is an expert witness whose evidence is given in his or her capacity as an expert witness, and that the nature of the witness's professional commitments is such as to render it impossible to secure his or her attendance at the trial on any given day;

the evidence of such witness may, at the discretion of the court, be admissible in evidence on the trial of the accused for any offence.".

19 Amendment of section 256 of Cap. 9:07

Section 256 ("Admissibility of confessions and statements by accused") (1) of the principal Act is amended—

(a) by the deletion of ", during a preparatory examination";

(b) in the proviso by the deletion of "subsection (1) of section *eighty-three*" and the substitution of "section 115B".

20 New section substituted for section 257 of Cap. 9:07

Section 257 of the principal Act is repealed and the following is substituted—

"257 Failure of accused to mention certain facts to police may be treated as evidence

Where in any proceedings against a person evidence is given that the accused, on being—

(a) questioned as a suspect by a police officer investigating an offence; or

(b) charged by a police officer with an offence; or

(c) informed by a police officer that he might be prosecuted for an offence;

failed to mention any fact relevant to his or her defence in those proceedings, being a fact which, in the circumstances existing at the time, he or she could reasonably have been expected to have mentioned when so questioned, charged or informed, as the case may be, the court, in determining whether there is any evidence that the accused committed or whether the accused is guilty of the offence charged or any other offence of which he or she may be convicted on that charge, may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused.".

21 Repeal of section 264 of Cap. 9:07

Section 264 of the principal Act is repealed.

22 Amendment of section 267 of Cap. 9:07

Section 267 ("Accomplices as witnesses for prosecution") of the principal Act is amended—

(a) by the repeal of subsection (1) and the substitution of—

"(1) When the prosecutor at any trial informs the court that any person produced by him or her as a witness on behalf of the prosecution has, in his or her opinion, been an accomplice, either as principal or accessory, in the commission of the offence alleged in the charge, such person shall, notwithstanding anything to the contrary in this Act, be compelled to be sworn or to make affirmation as a witness and to answer any question the reply to which would tend to incriminate him or her in respect of such offence.";

(b) in subsection (3) by the deletion of "or an offence disclosed by the preparatory examination or at a re-opening of the preparatory examination".

23 Amendment of section 278 of Cap. 9:07

Section 278 ("Admissibility of affidavits in certain circumstances") of the principal Act is amended by the insertion after subsection (3) of the following subsection—

"(3a) For the avoidance of doubt, and without derogating from subsection (3), it is declared that in any criminal proceedings for the prosecution of a sexual offence, an

affidavit relating to the examination or treatment of the alleged victim of the offence made by a suitably qualified nurse who in that affidavit states he or she is a suitably qualified nurse and in the performance of his or her duties in that capacity ascertained any fact by treating or examining the alleged victim and arrived at any opinion relating to that fact, shall, on its mere production in those proceedings by any person, but subject to subsections (11) and (12), be *prima facie* proof of the facts and of any opinion so stated.".

24 Repeal of section 280 of Cap. 9:07

Section 280 of the principal Act is repealed.

25 Amendment of section 302A of Cap. 9:07

With effect from the date of commencement of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Act No. 23 of 2004), section 302A ("Testing of persons accused of sexual offences for HIV infection") of the principal Act is amended—

(a) in subsection (1) by the repeal of the definitions of "designated person" and "sexual offence";

(b) in subsection (3) by the deletion of "designated person" wherever it occurs and the substitution of "suitably qualified nurse";

(c) in subsection (4)(a) and (b) by the deletion of "designated person" and the substitution of "suitably qualified nurse";

(d) in subsection (6)(c) by the deletion of "designated person" and the substitution of "suitably qualified nurse";

26 Amendment of section 334 of Cap. 9:07

Section 334 ("Provisions applicable to sentences in all courts") of the principal Act is amended by the repeal of subsection (4).

27 New Schedule substituted for Third Schedule to Cap. 9:07

(1) The Third Schedule to the principal Act is repealed and the following is substituted—

"THIRD SCHEDULE **(Sections 32, 116, 117(6) and 123)**
OFFENCES IN RESPECT OF WHICH POWER TO ADMIT
PERSONS TO BAIL IS QUALIFIED

PART I

1 Murder, where—

(a) it was planned or premeditated; or

(b) the victim was—

(i) a law enforcement officer or public prosecutor performing his or her functions as such, whether on duty or not, or a law enforcement officer or public prosecutor who was killed by virtue of his or her holding such a position; or

(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in the First Schedule;

or

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences—

(i) rape; or

(ii) aggravated indecent assault; or

(iii) robbery with aggravating circumstances;

or

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

2 Rape or aggravated indecent assault—

(a) when committed—

(i) in circumstances where the victim was raped or indecently assaulted more than once, whether by the accused or by any co-perpetrator or accomplice; or

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; or

(iii) by a person who is charged with having committed two or more offences of rape or aggravated indecent assault; or

(iv) by a person who knew that he or she had the acquired immune deficiency syndrome or the human immunodeficiency virus;

or

(b) where the victim—

(i) is a girl or boy under the age of 16 years; or

(ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable;

(iii) is mentally disordered or intellectually handicapped, as defined in section 2 of the Mental Health Act [*Chapter 15:12*] (No. 15 of 1996);

(c) involving the infliction of grievous bodily harm.

3 Robbery, involving—

(a) the use by the accused or any co-perpetrators or participants of a firearm; or

(b) the infliction of grievous bodily harm by the accused or any co-perpetrators or participants; or

(c) the taking of a motor vehicle as defined in section 2 of the Road Traffic Act [*Chapter 13:11*].

4 Indecent assault of a child under the age of 16 years, involving the infliction of grievous bodily harm.

5 Kidnapping or unlawful detention involving the infliction of grievous bodily harm.

6 Contravening section 20, 21, 22, 23, 24, 25, 26, 27 or 29 of the Criminal Law Code.

7 An offence referred to in Part II—

(a) where the accused has previously been convicted of an offence referred to in that Part or this Part; or

(b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in that Part or this Part.

PART II

1 Treason or concealing treason.

2 Murder otherwise than in the circumstances referred to in paragraph 1 of Part I.

3 Attempted murder involving the infliction of grievous bodily harm.

4 Malicious damage to property involving arson.

5 Theft of a motor vehicle as defined in section 2 of the Road Traffic Act [*Chapter 13:11*].

6 Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armaments, or the possession of an automatic or semi-automatic firearm, explosives or armaments.

7 A conspiracy, incitement or attempt to commit any offence referred to in paragraph 4, 5 or 6.

8 Any offence where the Attorney-General has notified a magistrate of his intention to indict the person concerned in terms of section 66.".

(1) Until the date of commencement of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (No. 23 of 2004) ("the Criminal Law Code"), any reference in the Third Schedule of the principal Act as substituted by this Act to—

(a) aggravated indecent assault shall be construed as a reference to indecent assault involving sexual intercourse or the penetration of any part of the victim's or perpetrator's body;

(b) kidnapping or unlawful detention shall be construed as a reference to kidnapping;

(c) section 22, 23, 24, 25, 26, 27 or 29 of the Criminal Law Code shall be construed as a reference to section 5, 6, 7, 8, 9, 10 or 11 of the Public Order and Security Act [*Chapter 11:17*] (No. 1 of 2002);

(d) concealing treason shall be construed as a reference to treason;

(e) malicious damage to property shall be construed as a reference to malicious injury to property.

28 Minor and consequential amendments to Cap. 9:07

The provisions of the principal Act specified in the first column of the Schedule are amended to the extent specified opposite thereto in the second column of the Schedule.

29 Amendment of Cap. 9:23

The Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (No. 23 of 2004) is amended-

(a) in section 1 ("Short title and date of commencement") (1) by the deletion of ", and is hereinafter referred to as "this Code"";

(b) in section 16 ("Negligence") (1)(c)(ii)B by the deletion of "foreseen" and the substitution of "realised";

(c) in section 80 ("Sentence for certain crimes where accused is infected with HIV") (1) by the insertion of the following proviso-

"Provided that-

(i) notwithstanding section 192, this subsection shall not apply to an incitement or conspiracy to commit any crime referred to in paragraph (a), (b) or (c), nor top an attempt to commit any such crime, unless the attempt involved any penetration of any part of the body of the convicted person or of another person's body that incurs a risk of transmission of HIV;

(ii) if a person convicted of any crime referred to in paragraph (a), (b) or (c) satisfies the court that there are special circumstances peculiar to the case, which circumstances shall be recorded by the court, why the penalty provided under this subsection should not be imposed, the convicted person shall be liable to the penalty provided under section 65, 66 or 70, as the case may be.";

(d) in section 114 ("Stock theft") (7)(c) by the deletion of "concurrently or";

(e) in section 136 ("Fraud") by the deletion of "if the misrepresentation causes prejudice to another person or creates a real risk or possibility that another person might be prejudiced" and the substitution of "if the misrepresentation causes actual prejudice to another person or is potentially prejudicial to another person";

(f) in section 155 (Interpretation in Cahpter VII") by the repeal of the definition of "cannabis plant" and the substitution of-

""cannabis plant" means the whole or any portion, whether green or dry, of any plant of the genus cannabis also known as "Indian hemp", *bhang*, *camba*, *dagga*, *mbanje* or *intsangu*, but excluding-

(a) any fibre extracted from the plant for use as or in the manufacture of cordage, canvas or similar products; or

(b) any seed which has been crushed, comminuted or otherwise processed in such a manner as to prevent germination; or

(c) the fixed oil obtained from the seed;";

(g) in section 156 ("Unlawful dealing in dangerous drugs")-

(i) in subsection (1)(i) by the deletion of "special circumstances in the particular case" and the substitution of "special circumstances peculiar to the case";

(ii) in subsection (2) by the deletion of "other than cannabis" and the substitution of "other than any cannabis plant, prepared cannabis, or cannabis resin";

(iii) in subsection (3) by the deletion of "special circumstances in the particular case" and the substitution of "special circumstances peculiar to the case";

(h) in section 170 ("Bribery") (2)(a) and (b) by the deletion of "benefit or advantage" and the substitution of "gift or consideration";

(i) in section 186 ("Threats") (3)-

(i) by the deletion of "indicating witches and wizards";

(ii) by the deletion of "malicious damage to property or hijacking " and the substitution of "or malicious damage to property";

(j) in section 191 ("Extra-territorial incitement or conspiracy") (1) by the deletion of "the first-mentioned person or the other person mentioned in paragraph (a) or (b) or both may be charged in Zimbabwe with incitement or conspiracy to commit the crime concerned, as the case may be" and the substitution of "the first-mentioned person in paragraph (a) or (b) may be charged with incitement in Zimbabwe, and the first-mentioned person or other person mentioned in paragraph (a) or (b) or both may be charged in Zimbabwe with conspiracy to commit the crime concerned, as the case may be";

(k) in section 205 ("Interpretation in Part II of Chapter XIII") by the insertion after "the actual perpetrator of the crime" of ", or to any accomplice of the actual perpetrator";

(l) in section 206 ("Assistance after commission of crime") by the deletion of "renders to the actual perpetrator any assistance which enables the actual perpetrator" and the substitution of "renders to the actual perpetrator or to any accomplice of the actual perpetrator any assistance which enables the actual perpetrator or accomplice";

(m) in section 236 ("When mistake or ignorance of law a defence") (1) by the deletion of "or judicial officer";

(n) in section 239 ("When provocation a partial defence to murder") (1) by the insertion after "a person does or omits to do anything" of "resulting in the death of a person";

(o) in section 253 ("Requirements for defence of person to be complete defence") by the repeal of paragraphs (a) and (b) and the substitution of-

"(a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent; and

(b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not or otherwise escape from or avert the attack; and".

30 Amendment of Cap. 27:02

Section 82 ("Right of State certain parastatal employees to appear in court") (2) of the Legal Practitioners Act [*Chapter 27:07*] is amended by the insertion of the following paragraph after paragraph (b)-

"(c) any other court in any civil and (if authorised by the Attorney-General under section 6 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]) criminal proceedings to which the Authority is a party or that involve any of the Acts specified in the First Schedule to the Revenue Authority Act [*Chapter 23:11*] (No. 17 of 1999);".

SCHEDULE (Section 28)

MINOR AND CONSEQUENTIAL AMENDMENTS TO CHAPTER 9:07

Provision	*Extent of amendment*
Section 8	By the deletion of “or to appear at a preparatory examination” and “or examination”.
Sections 60 (1) and (3), 253 (2), 268	By the deletion of “or preparatory examination”.
Sections 239 (1), 240 (1) and 243	By the deletion of “, preparatory examination”.
Section 244	By the deletion of “, or before a magistrate on a preparatory examination”.
Section 245	By the deletion of “or, in the case of a preparatory examination, the magistrate,”.
Section 251	By the deletion of “or on a preparatory examination”.
Section 261	By the deletion of “or of a magistrate holding a preparatory examination”.
Sections 265 and 274	By the deletion of “and before magistrates holding preparatory examinations”.
Sections 275 (1), 277 (2)	By the deletion of “or before a magistrate holding a preparatory examination”.
Section 276	By the deletion of “or before a magistrate on a preparatory examination”.
Section 279 (1), 295 (proviso)	By the deletion of “preparatory examination or”.

Section 314 (2)	By the deletion of “or a preparatory examination”.
Section 327 (2)	By the deletion of “and has not admitted it at the preparatory examination in the manner provided in section *eighty-six*”.