CHAPTER 08:02
CRIMINAL PROCEDURE AND EVIDENCE

ARRANGEMENT OF SECTIONS

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Proc. 52, 1938,
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Act 22, 1978,
Act 17, 1979,
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Act 16, 1986,
Act 7, 1997,
Act 14, 2005.

An Act to make provision with respect to procedure and evidence in criminal cases, and to provide for other matters incidental to such procedure and evidence.

[*Date of Commencement: 1st January, 1939*]

PART I
Preliminary (ss 1-3)

1. Short title

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

2. Procedure for offences

All offences under the Penal Code and, subject to the provisions of any enactment, all other offences shall be enquired into, tried and otherwise dealt with according to this Act.

3. Interpretation

In this Act, unless the context otherwise requires-

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"company" means a company incorporated or registered under the Companies Act or under any other enactment;

"counsel" includes an attorney in proceedings before the High Court in which such attorney has the right of audience;

"court" or **"the court"**, in relation to any matter dealt with under a particular provision of this Act, means the judicial authority which under this Act or any other law has jurisdiction in respect of that matter;

"day" or **"day-time"** means the interval between half-past six o'clock in the morning and half-past six o'clock in the evening;

"district", in relation to the area of jurisdiction of any magistrate's court, means a district prescribed under the Magistrates' Courts Act;

"judicial officer" means a judge or magistrate;

"justice" means a justice of the peace appointed or exercising functions as such under any law;

"juvenile" means any person under the apparent age of 18 years;

"local authority" includes a tribal administration;

"magistrate" means any person appointed as a magistrate under the Constitution or the Magistrates' Courts Act:

Provided that for the purposes of Part VIII **"magistrate"** has the meaning assigned to it in section 60;

"money" includes bank notes, currency notes, bank drafts, cheques and any other orders, warrants or requests for the payment of money;

"night" or **"night time"** means the interval between half-past six o'clock in the evening and half-past six o'clock in the morning;

"offence" is an act, attempt or omission punishable by law;

"peace officer" includes any magistrate or justice; a sheriff or a deputy sheriff; any officer, non-commissioned officer, constable or trooper of a police force established under any law or of any body of persons carrying out any law under the powers, duties and functions of a police force in Botswana; a gaoler or a warder of any gaol, and any Chief, Sub-Chief or Headman recognized or appointed as such in terms of the Bogosi Act;

"person" and **"owner"** and other like terms when used with reference to property includes corporations of all kinds and any other association of persons capable of owning property, and also when so used includes the State and any local authority;

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"policeman" includes any commissioned officer, non-commissioned officer, constable or trooper of a police force established under any law or of any body of persons carrying out under any law the powers, duties and functions of a police force in Botswana; and "police" has a corresponding meaning;

"premises" includes any land, any building or any other place, and any vehicle, conveyance or vessel;

"prescribed" means prescribed under this Act or under any regulations or rules of court lawfully made thereunder;

"property" includes any description of movable or immovable property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange whether immediately or otherwise;

"public prosecutor" includes any person delegated generally or specially by the Director of Public Prosecutions under this Act;

"rules of court" means rules in force under the High Court Act or the Magistrates' Courts Act, as the case may be;

"summons" includes charge;

"telegraph" includes transmission by radio telegraphy or radio telephone;

"valuable security" includes any document which is the property or in the lawful possession of any person and which is evidence of the ownership of any property or of the right to recover or receive any property;

"vessel" means an aircraft, a ship, boat or similar craft.

PART II
Criminal Jurisdiction of Courts (ss 4-6)

4. Jurisdiction of High Court

The High Court as constituted by the Constitution of Botswana shall have jurisdiction in respect of the trial of all persons charged on indictment with committing any offence within Botswana.

5. Jurisdiction of magistrates' courts

Magistrates' courts shall, subject to the provisions of this Act, have jurisdiction in all cases of offences committed within their several areas of jurisdiction, such jurisdiction being as prescribed in the laws relating to the jurisdiction of such courts.

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6. The High Court and magistrates' courts

(1) The superior court is the High Court.

(2) For the purposes of this Act the magistrates' courts are the courts described in section 3 of the Magistrates' Courts Act.

PART III
Prosecution at the Public Instance (ss 7-13)

A. DIRECTOR OF PUBLIC PROSECUTIONS (ss 7-12)

7. Director of Public Prosecutions vested with right of prosecuting all offences

The Director of Public Prosecutions is vested with the right and entrusted with the duty of prosecuting in the name and on behalf of the State in respect of any offence committed in Botswana.

8. Prosecution by Director of Public Prosecutions in person or by appointed substitute

The Director of Public Prosecutions may appear personally or by any person delegated by him at any preparatory examination held under Part VIII or to conduct any prosecution before any court.

9. Presiding officer may appoint prosecutor in certain cases

If through any cause whatsoever the person so appointed to conduct a prosecution or to appear at any preparatory examination is unable to act or if no person has been appointed, the officer presiding over such court or examination may, by writing under his hand, designate some fit and proper person for that occasion to prosecute or (as the case may be) to appear:

Provided that where no fit and proper person is available, the presiding officer may, in his discretion, proceed with the trial of any case or the hearing of any examination in the absence of a prosecutor.

10. Attorney-General's power of stopping prosecutions

The Director of Public Prosecutions may, at any time before conviction, stop any prosecution commenced by him or by any other person charged with the prosecution of criminal cases.

11. Power of ordering liberation of persons committed for further examination, sentence or trial

The Director of Public Prosecutions may order the liberation of any person committed to prison for further examination, sentence, or trial. For that liberation a writing setting forth that the Director of Public Prosecutions sees no ground for prosecuting such person and

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subscribed by him shall be a sufficient warrant.

12. Neither acquittal nor conviction a bar to civil action for damages

Neither a conviction nor an acquittal following on any prosecution is a bar to civil action for damages at the instance of any person who may have suffered any injury from the commission of an alleged offence.

B. LOCAL PUBLIC PROSECUTOR (s 13)

13. Powers and duties of local public prosecutor

(1) All public prosecutors in any magistrate's court are, as representatives of the Director of Public Prosecutions and subject to his instructions, charged with the duty of prosecuting in that court, in the name and on behalf of the State all offences which that court has jurisdiction to try.

(2) Criminal proceedings instituted in any magistrate's court by any public prosecutor may be continued by any other public prosecutor.

(3) Whenever there is lodged with or made before a local public prosecutor a sworn declaration in writing by any person disclosing that any other person has committed an offence chargeable in the magistrate's court to which such public prosecutor is attached, he shall determine whether there are good grounds or not:

Provided that-

(i) he may refer to the Director of Public Prosecutions the question whether he shall prosecute or not; and

(ii) any other person may be specially authorized by the Director of Public Prosecutions to prosecute in the matter.

PART IV
Private Prosecutions (ss 14-25)

14. Private prosecution on refusal of Director of Public Prosecutions to prosecute

In all cases where the Director of Public Prosecutions declines to prosecute for an alleged offence, any private party who can show some substantial and peculiar interest in the issue of the trial, arising out of some injury which he individually has suffered by the commission of the offence, may prosecute in any court competent to try the offence, the person alleged to have committed it.

15. What other persons entitled to prosecute

(1) The following persons also possess the right of prosecution under section 14 as private parties-

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(*a*) a husband in respect of offences committed against his wife;

(*b*) the legal guardians or curators of minors or lunatics in respect of offences committed against their wards;

(*c*) the wife or children or, where there is no wife or child, any of the next of kin of any deceased person in respect of any offence by which the death of such person is alleged to have been caused.

(2) All such persons as are described in this section or section 14 are hereinafter referred to as private prosecutors.

16. Private prosecutions by certain public bodies and persons

(1) Any public body or any person on whom the right to prosecute in respect of any offence is expressly conferred by law, may prosecute in any court competent to try the offence, the person alleged to have committed it.

(2) The right is hereby conferred on city councils, town councils, district councils and township authorities to prosecute in respect of offences against their bye-laws.

17. Private prosecutor may apply to court for warrant

Whenever any private prosecutor desires to prosecute for any offence any person for whose liberation from prison any warrant has been issued by the Director of Public Prosecutions, such private prosecutor may apply to the court within whose jurisdiction the offence is alleged to have been committed, for a warrant for the further detention or, if he is on bail, for the detention of such person, and such court shall make such order as to it seems right under the circumstances.

18. Certificate of Director of Public Prosecutions that he declines to prosecute

It shall not be competent for any private party referred to in section 15 to obtain the process of any court for summoning any party to answer any charge, unless such private party produces to the officer authorized by law to issue such process a certificate signed by the Director of Public Prosecutions that he has seen the statements or affidavits on which the charge is based and declines to prosecute at the public instance; and in every case in which the Director of Public Prosecutions declines to prosecute he shall, at the request of the party intending to prosecute, grant the certificate aforesaid.

19. Recognizances to be entered into by private prosecutor

No private party referred to in section 15 shall take any proceedings under the right conferred upon him by this Part until he-

(*a*) has, if the prosecution is in the High Court, deposited the sum of P100 or entered into a recognizance in the sum of P100 with two sufficient sureties in the sum of P50 each (to be approved by the court in which the proceedings are to be instituted) as security

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that he will prosecute the charge against the accused to a conclusion without delay; and

(*b*) has in any prosecution given security in such amount and in such manner as the court may direct that he will pay the accused such costs incurred by him in respect of his defence to the charge, as the court before which the case is tried may order him to pay.

20. Failure of private prosecutor to appear on appointed day

(1) If a private prosecutor does not appear on the day appointed for appearance, the charge or complaint shall be dismissed unless the court sees reason to believe that such prosecutor was prevented from being present by circumstances beyond his control, in which case it may adjourn the hearing of the case.

(2) In the case of any such dismissal as aforesaid, the accused shall not be again liable to prosecution, on the same charge, by any private prosecutor; but no such dismissal shall prevent the Director of Public Prosecutions, or a public prosecutor on the instructions of the Director of Public Prosecutions, from afterwards instituting a prosecution.

21. Mode of conducting private prosecutions

(1) A private prosecution shall, subject to the provisions of this Act, be proceeded with in the same manner as if it were being conducted at the public instance, except that all costs and expenses of the prosecution shall be paid by the party prosecuting, subject to any order that the court may make when the prosecution is finally concluded.

(2) A private prosecution in a magistrate's court may be initiated and conducted on behalf of-

(*a*) a city or town council, by the city or town clerk, treasurer or any person (including a police officer) authorized by the city or town clerk in writing;

(*b*) a district council, by the district council secretary, treasurer or any person (including a police officer) authorized by the district council secretary in writing;

(*c*) a township authority, by any member of the township authority or a person (including a police officer) authorized by the township authority in writing.

22. Competency of Director of Public Prosecutions to take up and conduct prosecution at the public instance in all cases

In the case of prosecution at the instance of a private prosecutor, the Director of Public Prosecutions or the local public prosecutor may apply by motion to any court before which the prosecution is pending to stop all further proceedings in the case, in order that the prosecution for the offence may be instituted or continued at the public instance and such court shall in every such case make an order in terms of the motion.

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23. Deposit of money by private prosecutor

In the case of a criminal prosecution at the instance of a private prosecutor, the registrar or clerk of the court shall, for the service of any summons or subpoena or execution of any warrant of arrest or other process, demand and receive the prescribed fees.

24. Costs of private prosecutions

(1) Where a person prosecuted at the instance of a private prosecutor is acquitted, the court in which the prosecution was brought may order the prosecutor to pay to the person prosecuted the whole or any part of the expenses (including the costs both before and after committal) which may have been occasioned to him by the prosecution.

(2) Where the court, upon hearing the charge or complaint on a private prosecution, pronounces the same unfounded and vexatious, it shall award to the accused on his request such costs as it may think fit.

25. Disposal of fines in certain private prosecutions

Whenever in any proceedings initiated in pursuance of section 16(2) a fine is imposed, such fine shall be paid into the court which imposed the fine, and of any amount of such fine which may be recovered such court shall pay half into the general revenues of the Republic and half into the general fund of the prosecuting council or authority.

PART V
Prescription of Offences (s 26)

26. Prosecution for murder not barred by lapse of time, for other offence barred by lapse of 20 years

The right of prosecution for murder shall not be barred by any lapse of time; but the right of prosecution for any other offence, whether at the public instance or at the instance of a private party, shall, unless some other period is expressly provided by law, be barred by the lapse of 20 years from the time when the offence was committed.

PART VI
Arrests (ss 27-50)

A. WITHOUT WARRANT (ss 27-36)

27. Arrest and verbal order to arrest for offences committed in the presence of judicial officers

(1) It shall be lawful for any judicial officer who has knowledge of any offence by seeing it committed, himself to arrest the offender or by a verbal order to authorize other persons to do so.

(2) The persons so authorized are empowered and required to follow the offender if he flee,

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and to execute such order on him out of the presence of such judicial officer.

28. Arrest by peace officer for offences committed in his presence and on reasonable grounds of suspicion as to certain offences

Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorized to arrest without warrant-

(*a*) every person who commits any offence in his presence;

(*b*) every person whom he has reasonable grounds to suspect of having committed-

(i) any of the offences specified in the Penal Code, other than the offences specified in such Code and the other enactments as are set out in Part II of the First Schedule to this Act;

(ii) any offence, other than an offence specified in the Penal Code, the punishment for which may be a period of imprisonment exceeding six months, without the option of a fine;

(iii) any offence, other than an offence specified in the Penal Code, where the law constituting that offence provides that such arrest may be made,

(*c*) every person whom he finds attempting to commit an offence, or clearly manifesting an intention to do so.

29. When peace officer may arrest without warrant

(1) Any peace officer may, without any order or warrant, arrest-

(*a*) any person having in his possession any implement of house-breaking, and not being able to account satisfactorily for such possession;

(*b*) any person in whose possession anything is found which it is reasonably suspected is stolen property or property unlawfully obtained, and who is reasonably suspected of having committed an offence with respect to such thing;

(*c*) any person who obstructs a policeman or other peace officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;

(*d*) any person reasonably suspected of being a deserter from the Botswana Police Force;

(*e*) any person being or loitering in any place by night under such circumstances as to afford reasonable grounds for believing that he has committed or is about to commit an offence;

(*f*) any person reasonably suspected of committing or having committed an offence under any law governing the making, supplying, possession or conveyance of

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intoxicating liquor or of habit-forming drugs or the possession or disposal of arms and ammunition;

(*g*) any person reasonably suspected of being a prohibited immigrant in Botswana for the purpose of any law regulating entry into or residence in Botswana;

(*h*) any person reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law for preventing the theft of stock or produce.

(2) Whenever it is provided in any law that the arrest of any person may be made by a police officer or constable or other official without warrant, subject to conditions or to the existence of circumstances specified in that law, an arrest by any peace officer, without warrant or order, may be made of such person subject to those conditions or the existence of those circumstances.

30. Failure to give particulars of name and address to a peace officer constitutes an offence

(1) A peace officer may call upon-

(*a*) any person whom he has power to arrest;

(*b*) any person reasonably suspected of having committed an offence; and

(*c*) any person who may, in his opinion, be able to give evidence in regard to the commission or suspected commission of any offence,

to furnish such peace officer with his full name and address.

(2) If any person fails on such demand to furnish his full name and address, the peace officer making the demand may forthwith arrest him; and if any such person on such demand furnishes to such peace officer a name or address which such peace officer upon reasonable grounds suspects to be false, such person may be arrested and detained for a period not exceeding 24 hours until the name and address so furnished have been verified.

(3) Any person who, when called upon under the provisions of subsection (1) or (2) to furnish his name and address, fails to do so or furnishes a false or incorrect name or address shall be guilty of an offence and liable to a fine not exceeding P60 or, in the discretion of the court, to imprisonment without the option of a fine for a term not exceeding three months.

31. Arrest by private person for certain offences committed in his presence

(1) Every private person, in whose presence anyone commits or attempts to commit an offence mentioned in subparagraphs (i), (ii) and (iii) of paragraph (*b*) of section 28 or who has knowledge that any such offence has been recently committed, is authorized to arrest without warrant or forthwith to pursue the offender; every other private person to whom the purpose of the pursuit has been made known is authorized to join and assist therein.

(2) Every person is hereby authorized to arrest without warrant any other person whom he

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believes on reasonable grounds to have committed an offence and to be escaping therefrom, and to be freshly pursued by one whom such private person believes on reasonable grounds to have authority to arrest the escaping person for that offence.

32. Arrest by private person in case of an affray

Every private person is authorized to arrest without warrant any person whom he sees engaged in an affray in order to prevent such person from continuing the affray, and to deliver him over to the police authorities to be dealt with according to law.

33. Owners of property may arrest in certain cases

The owner of any property on or in respect to which any person is found committing an offence, or any person authorized by such owner, may arrest without warrant the person so found.

34. Arrest by private persons for certain offences on reasonable suspicion

Any private person may without warrant, arrest any other person upon reasonable suspicion that such other person has committed any of the offences mentioned in subparagraphs (i), (ii) and (iii) of paragraph (*b*) of section 28.

35. Arrest of persons offering stolen property for sale, etc.

Where anyone may, without warrant, arrest another for committing an offence, he may also arrest without warrant any person who offers to sell, pawn or deliver to him any property which, on reasonable grounds, he believes to have been acquired by such person by means of any such offence.

36. Procedure after arrest without warrant

(1) No person arrested without warrant shall be detained in custody for a longer period than in all the circumstances of the case is reasonable; and such period shall not (subject to the provisions of subsection (2)) unless a warrant has been obtained for the further detention upon a charge of an offence, exceed 48 hours, exclusive of the time necessary for the journey from the place of arrest to the magistrate's court having jurisdiction in the matter.

(2) Unless such person is released by reason that no charge is to be brought against him, he shall, as soon as possible, be brought before a magistrate's court having jurisdiction upon a charge of an offence.

(3) Nothing in this section shall be construed as modifying the provisions of Part IX or of any other law whereby a person under detention may be released on bail.

(4) Whenever a person effects an arrest without warrant, he shall forthwith inform the arrested person of the cause of the arrest.

B. WITH WARRANT (ss 37-43)

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37. Warrant of apprehension by judicial officer or justice

(1) Any judicial officer or justice may issue a warrant for the arrest of any person or for the further detention of a person arrested without a warrant on a written application subscribed by the Director of Public Prosecutions or by the local public prosecutor or any commissioned officer of police setting forth the offence alleged to have been committed and that, from information taken upon oath, there are reasonable grounds of suspicion against the person, or upon the information to the like effect of any person made on oath before the judicial officer issuing the warrant:

Provided that it shall not be lawful for any judicial officer or justice to issue any such warrant except when the offence charged has been committed within his area of jurisdiction, or except when the person against whom the warrant is issued was, at the time when it was issued, known, or suspected on reasonable grounds, to be within the area of jurisdiction of the judicial officer or justice.

(2) Every such warrant may be issued on a Sunday as on any other day and shall remain in force until it is cancelled by the person who issued it, or until it is executed.

(3) When a warrant has been issued for the arrest of a person who is being detained by virtue of an arrest without a warrant, such warrant of arrest shall have the effect of a warrant for his further detention.

38. Endorsement of warrants

Every judicial officer and every justice, on production to him of a warrant or summons or other process relating to any criminal matter issued by any other judicial officer or justice shall grant his concurrence to it by an endorsement thereof. Thereafter the warrant, summons or other process may be executed within the area of jurisdiction of the judicial officer or justice so endorsing it:

Provided that, whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the judicial officer or justice within the area of whose jurisdiction the warrant, summons or other process is to be executed, will prevent its execution, the officer of the law to whom it is directed may execute it, without such endorsement, in any place beyond such area of jurisdiction.

39. Execution of warrants

(1) Every peace officer is hereby authorized and required to obey and execute any warrant issued by a judge of the High Court under this Act.

(2) Every peace officer is hereby authorized and required to obey and execute any warrant issued or endorsed by a judicial officer or any justice of the district in which such officer has been appointed to act.

(3) Every warrant issued by any judicial officer or justice shall have effect and, when endorsed as provided in section 38 (if such endorsement is necessary), may lawfully be

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executed anywhere within Botswana by any peace officer.

(4) A peace officer or other person arresting any person by virtue of a warrant under this Act shall, upon demand of the person arrested, produce the warrant to him, notify the substance thereof, and permit him to read it.

(5) A person arrested by virtue of a warrant under this Act shall, as soon as possible, be brought to a police station or charge office, unless any other place is specially mentioned in the warrant as the place to which such person shall be brought, and he shall thereafter be brought as soon as possible before a magistrate's court upon a charge of the offence mentioned in the warrant.

40. Telegram stating issue of warrant authority for execution of the same

(1) A telegram from any officer of any court or from any peace officer, stating that a warrant has been issued for the apprehension or arrest of any person accused of any offence, shall be a sufficient authority to any peace officer for the arrest and detention of such person until a sufficient time, not exceeding 14 days, has elapsed to allow the transmission of the warrant or writ to the place where such person has been arrested or detained unless the discharge of such person be previously ordered by a judicial officer:

Provided that any such judicial officer may, upon cause shown, order the further detention of any such person for a period to be stated in such order, but not exceeding 28 days from the date of arrest of such person.

(2) Nothing in this section shall be construed as derogating from the provisions of this Act or of any other law whereby a person so arrested may be admitted to bail.

41. Arresting wrong person

(1) Any person duly authorized to execute a warrant of arrest, who thereupon arrests a person believing in good faith and on reasonable and probable grounds that he is the person named in the warrant, shall be protected from responsibility to the same extent and subject to the same provisions as if the person arrested had been the person named in the warrant.

(2) Any person called on to assist the person making such arrest and believing that the person in whose arrest he is called on to assist is the person for whose arrest the warrant was issued, and every gaoler who is required to receive and detain such person, shall be protected to the same extent and subject to the same provisions as if the arrested person had been the person named in the warrant.

42. Irregular warrant or process

Any person acting under a warrant or process which is bad in law on account of a defect in substance or in form apparent on the face of it, shall, if he in good faith and without culpable ignorance and negligence believes that the warrant or process is good in law, be protected from responsibility to the same extent and subject to the same provisions as if the warrant or

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process were good in law, and ignorance of the law shall in such case be an excuse:

Provided that it shall be a question of law whether the facts of which there is evidence may or may not constitute culpable ignorance or negligence in his so believing the warrant or process to be good in law.

43. Tenor of warrant

Every warrant issued under this Act shall be to apprehend the person described therein and to bring him before a judicial officer as soon as possible upon a charge of an offence mentioned in the warrant.

C. GENERAL (ss 44-50)

44. Assistance by private persons called on by officers of the law

Every male inhabitant of Botswana between the ages of 16 and 60 is, when called upon by any policeman, authorized and required to assist such policeman in making any arrest which by law such policeman is authorized to make, of any person charged with or suspected of the commission of any offence, or to assist such policeman in retaining the custody of any person so arrested. Any such inhabitant who, without sufficient excuse, refuses or fails when called upon to do so shall be guilty of an offence and liable to a fine not exceeding P40 or, in the discretion of the court, to imprisonment without the option of a fine for a term not exceeding one month.

45. Breaking open doors after failure in obtaining admission for the purpose of arrest or search

It shall be lawful for any peace officer or private person who by law is authorized or required to arrest any person known or suspected to have committed any offence, to break open for that purpose the doors and windows of, and to enter and search, any premises in which the person whose arrest is required is known or suspected to be:

Provided that such officer or private person aforesaid shall not act under this section unless he has previously failed to obtain admission after having audibly demanded the same and notified the purpose for which he seeks to enter such premises.

46. Arrest: how made, and search thereon of person arrested

(1) In making an arrest the peace officer or other person authorized to arrest shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action.

(2) A peace officer or other person arresting any person under the provisions of this Part may search such person and shall place in safe custody all articles (other than necessary wearing apparel) found on him.

(3) Whenever a woman is searched on her arrest, the search shall only be made by a

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woman and shall be made with strict regard to decency. If there is no woman available for such search who is a police officer or is a prison officer, the search may be made by any woman specially named for the purpose by a peace officer.

47. Resisting arrest

(1) Where a peace officer or other person authorized to arrest a person (such latter person being hereinafter in this section referred to as "the offender") endeavours to make such arrest, and the offender forcibly resists the endeavours to arrest him, or attempts to evade the arrest, such peace officer or other person may use all means necessary to effect the arrest.

(2) Nothing contained in this section shall be deemed to justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.

48. Power to retake on escape

If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him or cause him to be pursued and arrested in any place in Botswana.

49. Saving of other powers of arrest

Nothing contained in this Part shall be construed as taking away or diminishing any authority specially conferred by any other law to arrest, detain, or put any restraint on, any person.

50. Saving of civil rights

Nothing contained in this Part shall, except as is otherwise expressly provided, be construed as taking away or diminishing any civil right or liability of any person in respect of a wrongful or malicious arrest.

PART VII
Search Warrants, Seizure and Detention of Property Connected with Offences and Custody of Women Unlawfully Detained for Immoral Purposes (ss 51-59)

51. Search warrants

(1) If it appears to a judicial officer on complaint made on oath that there are reasonable grounds for suspecting that there is upon any person or upon or at any premises or other place or upon or in any vehicle or receptacle of whatever nature within his jurisdiction-

(*a*) stolen property or anything with respect to which any offence has been, or is suspected on reasonable grounds to have been, committed;

(*b*) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any offence; or

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(*c*) anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any offence,

he may issue his warrant directing a policeman or policemen named therein or all policemen to search any person, premises, other place, vehicle, or receptacle, and any person found in or upon such premises, other place, or vehicle, and to seize any such thing if found, and to take it before a judicial officer to be dealt with according to law.

(2) Any such warrant shall be executed by day unless the judicial officer by the warrant specially authorizes it to be executed by night, in which case it may be so executed; and in the searching of any woman the provisions of subsection (3) of section 46 shall *mutatis mutandis* apply. Such warrant may be issued and executed on Sunday as on any other day.

52. Search by police without warrant

(1) If a policeman of the rank of Sergeant or above such rank believes on reasonable grounds that the delay in obtaining a search warrant would defeat the object of the search he may himself search any person, premises, other place, vehicle or receptacle of whatever nature, and any person found in or upon such premises, other place or vehicle, for any such thing mentioned in section 51 and may seize such thing if found and take it before a judicial officer:

Provided that in the searching of any woman the provisions of subsection (3) of section 46 shall *mutatis mutandis* apply.

(2) Such search must, as far as possible be made in the day time and in the presence of two or more respectable inhabitants of the locality in which the search is made.

(3) It shall be lawful for any policeman of or above the rank of Sub-Inspector, and any policeman having a special written authority from a judicial officer or policeman of or above the rank of Sub-Inspector, to enter and inspect, without warrant, any drinking bar, common gaming house or other place of resort of loose and disorderly persons.

53. Search for stolen stock or produce, liquor or habit-forming drugs

(1) If any policeman of the rank of Sergeant, or above such rank, has reason to suspect that any stolen stock or produce (as defined in any law dealing with the theft of stock or produce) is upon any premises or at any place, or that any substance has been placed upon any premises or at any place or is in the custody or possession of any person upon any premises or at any place, in contravention of a provision of any law relating to intoxicating liquor or habit-forming drugs, he may at any time enter upon and search such premises or place and search any person thereupon or thereat, or grant written authority to any person applying therefor to make such entry and search. Any person in lawful occupation of any land shall in respect of any premises or place upon that land be entitled to exercise the powers conferred by this subsection upon a policeman as aforesaid.

(2) Any person who, under colour of this section, wrongfully and maliciously or without

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probable cause applies for, obtains, or acts upon any such written authority, or wrongfully and maliciously or without probable cause exercises the powers of search conferred by this section, shall be guilty of an offence and liable to a fine not exceeding P100 or, in default of payment, to imprisonment for a term not exceeding three months. Such person shall also be liable to pay to the person lawfully in occupation of the premises or place when the same was searched such sum by way of damages, not exceeding P200 as any competent court may award.

(3) Nothing contained in subsection (2) shall be construed as depriving any aggrieved person of the right to elect to take any other remedy allowed by law in lieu of the remedy under that subsection.

54. Judicial officer may order seizure of books or documents in possession of any person

(1) If it appears from information on oath that any person is in possession of any book of account or document or any other thing whatsoever which is necessarily required in evidence in any criminal proceedings, any judicial officer presiding at such proceedings may issue an order directing the officer to whom such order is addressed to take possession of such book or document or thing and hand it over to such person as may be named in such order, and thereupon such officer may lawfully execute such order.

(2) Any person who resists or hinders, or aids, incites or encourages any other person to resist or hinder, such officer in executing the order shall be guilty of an offence and liable to a fine not exceeding P200, or in default of payment, to imprisonment for a term not exceeding 12 months.

55. Seizure of counterfeit coin, etc.

(1) If any person finds in any place whatever or in the possession of any person without lawful authority or excuse-

(*a*) any counterfeit coin or any forged bank-note or bank-note paper;

(*b*) any tool, instrument, or machine, adapted and intended for making any such counterfeit coin or forged bank-note or bank-note paper;

(*c*) any filings or clippings of gold or silver or any gold or silver in bullion, dust, solution or any other state which may be suspected on reasonable grounds to have been obtained by dealing with any current gold or silver coin in such a manner as to diminish its weight,

the person who finds the same may seize the article or articles found and take the same forthwith before a judicial officer to be dealt with according to law.

(2) For the purposes of subsection (1) "bank-note" includes any note (by whatsoever name called) which is legal tender in the country in which it is issued.

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56. Seizure of vehicle or receptacle used in connection with certain offences

On the arrest of any person on a charge of an offence specified in Part I of the First Schedule the person making the arrest may seize any vehicle or receptacle in the possession or custody of the arrested person at the time of the arrest and used in the conveyance of or containing any article or substance in connection with which the said offence is alleged to be or to have been committed.

57. General powers of police to seize or take property affording evidence as to commission of offence

Subject to sections 51 and 52, a policeman may seize or take anything which he believes on reasonable grounds will afford evidence as to the commission of any offence and thereafter that policeman or any other policeman into whose possession the thing is subsequently delivered or otherwise comes may retain it in his possession until such time as the Director of Public Prosecutions is satisfied that no use or further use will be made of the thing to afford evidence in any criminal proceedings, whether actual or contemplated, as to the commission of any offence.

58. Disposal of property seized

(1) When on the arrest of any person on a charge of an offence relating to property, the property in respect of which the offence is alleged to have been committed is found in his possession, or when anything is seized or taken under the provisions of this Act, the person making the arrest or (as the case may be) the person seizing or taking the thing shall deliver, or cause to be delivered, the property or thing to a judicial officer within such time as in all the circumstances of the case is reasonable.

(2) Whenever anything is so seized or taken, marks of identification when practicable shall, by the person seizing it, be placed thereon at the time of the seizure or taking or as soon thereafter as can conveniently be done.

(3) The judicial officer shall cause the property or thing so seized, or taken to be detained in such custody as he may direct, taking reasonable care for its preservation until the conclusion of a summary trial or of any investigation that may be held in respect of it; and if any person is committed for trial for any offence committed with respect to the property or thing so seized or taken, or for any offence committed under such circumstances that the property or thing so seized or taken is likely to afford evidence at the trial, the judicial officer shall cause it to be further detained in like manner for the purpose of its being produced in evidence at such trial.

(4) At the conclusion of the summary trial or (as the case may be) if the Director of Public Prosecutions declines to prosecute, the judicial officer shall direct that the thing be returned to the person from whose possession it was taken, unless he is authorized or required by law to dispose of it otherwise.

(5) This section shall not apply in respect of anything seized or taken by a policeman in

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exercise of the powers conferred on him by section 57.

59. Weapons seized under search warrants

(1) If any weapon believed to be dangerous to the public peace is seized under a search warrant, it shall be kept in safe custody in such place as the judicial officer directs, unless the owner of the weapon proves to the satisfaction of the judicial officer that it was not kept for any purpose dangerous to the public peace.

(2) Any person from whom any such weapon is so taken may, if the judicial officer upon whose warrant it was seized refuses upon application made for that purpose to restore it, apply to the Minister for the restoration of such weapon. Ten days' notice of such application shall be given to the judicial officer, and the Minister shall make such order for the restoration or safe custody of such weapon as, upon such application, appears to him to be proper.

PART VIII
Preparatory Examination (ss 60-103)

60. Persons who may hold preparatory examinations

The term "magistrate", when used in relation to preparatory examinations, means a Magistrate Grade I or over.

61. Summons to appear at preparatory examination

At the request of a public prosecutor who has decided to institute a preparatory examination against any person not in custody, the clerk of the court to which such public prosecutor is attached shall make out a summons, requiring the said person to appear before such court for the purpose of undergoing a preparatory examination and shall deliver such summons to the person who is to serve it in terms of section 62(2).

62. Contents of summons

(1) A summons referred to in section 61 shall be directed to the accused person, and shall state the nature of the offence which he is alleged to have committed together with such particulars of the offence as are sufficient to enable him to know the substance of the charge he has to meet and shall also state the time and place where he is required to appear.

(2) Every summons shall be served by a person authorized to serve criminal process in the district in which the accused is required to appear, or by any other duly authorized person, upon the accused person to whom it is directed, either by delivering it to him personally, or, if the accused cannot conveniently be found, by leaving it for him at his place of business, or most usual or last known place of abode, with some inmate thereof.

(3) The service of any such summons may be proved by the testimony upon oath of the person effecting the service, or by his affidavit or by due return of service under his hand.

(4) Nothing in this section or in section 61 shall be deemed to abrogate the custom whereby

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an accused person may be warned through his Chief, Sub-Chief or Headman to appear before a magistrate's court.

(5) If, upon the day appointed for the appearance of any person for the purpose of undergoing a preparatory examination, he fails to appear, and the magistrate is satisfied upon the return of service that he was duly summoned, or is satisfied by evidence upon oath that he was duly warned, the magistrate may, at the request of the prosecutor, issue a warrant for the apprehension of the said person, and may also impose on him for his default a fine not exceeding P10, or, in default of payment, may sentence him to imprisonment for a term not exceeding one month. The court may, upon cause shown, remit any fine or imprisonment imposed under this subsection.

63. Commencement of preparatory examination

(1) When the accused is before a magistrate having jurisdiction, whether voluntarily or upon summons or after warning or after being apprehended with or without warrant or while in custody for the offence of which he is accused or any other offence, the local public prosecutor or other person charged with the prosecution of criminal cases shall institute a preparatory examination before the magistrate, and the magistrate shall proceed in the manner hereinafter described to inquire into the matters charged against the accused.

(2) Before proceeding to inquire into the matter charged against the accused, the magistrate shall read and explain the charge to the accused and the procedure on a preparatory examination shall be made clear to him but he shall not be required to make any statement in reply to the charge: this same procedure shall be followed in the case of any person subsequently joined as an accused.

(3) At any stage after the commencement of a preparatory examination any person suspected of having committed or of having taken part in the commission of the offence in respect of which the preparatory examination was instituted may be joined with the accused, and thereupon the preparatory examination of the accused and such person shall proceed jointly:

Provided that the evidence given by every witness before such joinder shall be read over to such person, and if he or his representative requests the magistrate holding the preparatory examination to recall any such witness for the purpose of being cross-examined, the magistrate shall recall him and if necessary shall direct that he be subpoenaed to reappear before him, for the purpose of being cross-examined by the said person or his representative, and re-examined by the public prosecutor.

64. Irregularities not to affect the proceedings

No irregularity or defect in the substance or form of the summons or warrant or in the manner of arrest, and no variance between the charge contained in the summons or warrant and the evidence adduced on the part of the prosecution at the inquiry, shall affect the validity of any criminal proceedings at or subsequent to the hearing.

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65. Clerk of the court to subpoena witness

(1) A public prosecutor who has decided to institute or has instituted a preparatory examination, or an accused against whom a preparatory examination is being or is to be held (or the latter's representative), may compel the attendance of any person at such preparatory examination to give evidence, or to produce any book or document, by means of a subpoena, issued at the instance of the public prosecutor or accused, as the case may be, by the clerk of the court of the district in which the preparatory examination is being or is to be held.

(2) If a magistrate holding a preparatory examination 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 may direct the clerk of the court to issue, in the manner aforesaid, a subpoena requiring such person to appear before him at a time and place 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 holding a preparatory examination may call as a witness any person in attendance, although not subpoenaed as a witness, or may re-call and re-examine any person already examined as a witness.

(5) Every person subpoenaed to attend a preparatory examination shall obey the subpoena and remain in attendance throughout the examination unless excused by the magistrate holding the examination.

(6) Nothing in this section shall be deemed to abrogate the custom whereby a witness may be warned through his Chief, Sub-Chief or Headman to attend before a magistrate's court.

66. Arrest and punishment for failure to obey subpoena or to remain in attendance

(1) If any person subpoenaed or warned to attend a preparatory examination fails without reasonable excuse to obey the subpoena or warning, and it appears from the return or from evidence given under oath that the subpoena was served upon or warning given to the person to whom it is directed or that he is evading service or warning, or if any person who attended in obedience to a subpoena or warning has failed to remain in attendance, the magistrate holding the preparatory examination may issue a warrant, directing that he be arrested and brought, at a time and place stated in the warrant, or as soon thereafter as possible, before such magistrate or any other magistrate.

(2) Such warrant may be executed anywhere within the area of jurisdiction of the magistrate who issued it, and if the person to be arrested thereunder is outside the area, the provisions of section 38 shall *mutatis mutandis* apply in regard thereto.

(3) When the person in question has been arrested under the said warrant he may be detained thereunder before the magistrate who issued it or in any gaol or lock-up or other place of detention or in the custody of the person who is in charge of him, with a view to

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securing his presence as a witness at the preparatory examination:

Provided that the magistrate holding that examination may release him on a recognizance with or without sureties for his appearance to give evidence as required, and for his appearance at the inquiry mentioned in subsection (4).

(4) The magistrate may in a summary manner inquire into the said person's failure to obey the subpoena or warning 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 to pay a fine not exceeding P50 or to imprisonment without the option of a fine for a term not exceeding one month.

(5) Such sentence shall be enforced and shall be subject to an appeal as if it were a sentence in a criminal case imposed by a magistrate's court of the district in which it was imposed.

(6) If a person who has entered into any recognizance for his appearance to give evidence at a preparatory examination or for his appearance at an inquiry referred to in subsection (4) fails so to appear, he may, apart from the estreatment of his recognizance, be dealt with as if he had failed to obey a subpoena or warning to attend a preparatory examination.

67. Tender of witness's expenses not necessary

No repayment or tender of expenses shall be necessary in the case of a person who is required to give evidence at a preparatory examination, and who is also within five kilometres of the premises in which such examination is being held.

68. Witness refusing to be examined or to produce document may be committed

(1) Whenever any person appearing, either in obedience to a subpoena or warning or by virtue of a warrant, or being present and being verbally required by the magistrate to give evidence at a preparatory examination, refuses to be sworn, or having been sworn refuses to answer such questions as are put to him, or refuses or fails to produce any document or thing which he 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 gaol unless he sooner consents to do what is required of him. If such person upon being brought up upon the adjourned hearing again refuses to do what is required of him, the magistrate may, if he sees fit, again adjourn the proceedings, and by order commit him for a like period, and so again from time to time until such person consents to do what is required of him. An appeal shall lie from any such order of committal to the High Court and the High Court may make such order on the appeal as to it seems just.

(2) 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.

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(3) No person shall be bound to produce at a preparatory examination any document or thing not specified or otherwise sufficiently described in the subpoena or of which he has not had adequate warning, unless he actually has it with him.

69. Procedure where trial in magistrate's court has been turned into a preparatory examination

Whenever any magistrate's court has stopped the summary trial of an accused person under the powers conferred by the law governing such court, and the proceedings have thereupon become those of a preparatory examination, it shall not be necessary for the magistrate to recall any witness who has already given evidence at the trial, but the magistrate's record of evidence so given certified by him to be correct shall, for all purposes whatsoever, have the same force and effect and shall be receivable in evidence in the same circumstances as the depositions made in the course of a preparatory examination in the manner provided in section 70:

Provided that as often as it appears to the magistrate himself or it is made to appear to him either by the prosecutor or by the accused that the ends of justice might be served by having a witness already examined recalled for further examination, then such witness shall be summoned and examined accordingly. The examination so taken shall be recorded in the manner hereinafter directed as to other examinations.

70. Evidence on oath at preparatory examination

(1) All preparatory examinations shall, except when an oath is by law dispensed with, be taken upon oath, or by affirmation where such is allowed by law, and every witness, before giving his evidence, shall make oath or affirmation (as the case may be) before the magistrate by whom he is to be examined, that in the whole of his deposition he will tell the truth, the whole truth, and nothing but the truth, and each witness shall be examined apart from the others.

(2) Subject to the proviso to subsection (3) of section 63 and to sections 100 and 101 the evidence given by a witness at a preparatory examination shall be given in the presence of the accused, shall be taken down in writing, and shall be read over to the witness who gave it. If such evidence was taken down in shorthand writing, any document purporting to be a transcript of the shorthand record of the said evidence, and purporting to have been certified as correct under the hand of the person who took such evidence down, shall *prima facie* be equivalent to the shorthand record.

(3) The accused or his representative may cross-examine any such witness and thereupon the public prosecutor may re-examine him.

(4) Any evidence given under section 101 in the absence of the accused may be read over to him at the preparatory examination and shall be deemed to have been given at the examination, and thereupon the proviso to subsection (3) of section 63 shall apply.

(5) If a preparatory examination is held on a charge that the accused committed or

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attempted to commit any indecent act towards another person or committed or attempted to commit any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person, or that the accused committed or attempted to commit extortion or a statutory offence of demanding from any person some advantage which was not due and, by inspiring fear in such person's mind, compelling him to render such advantage, no person shall at any time publish by radio or in any document produced by printing or any other method of multiplication any information relating to the said preparatory examination or any information disclosed thereat, unless the magistrate holding the preparatory examination has, after having consulted the person against or in connection with whom the offence charged is alleged to have been committed (or if he is a minor, his guardian), consented in writing to such publication.

(6) Any person contravening subsection (5) shall be guilty of an offence and liable to a fine not exceeding P100 or to imprisonment for a term not exceeding three months, or to both.

71. Recognizance of witness to appear at trial

(1) Every magistrate before whom any preparatory examination is taken may lawfully require any witness, either alone or together with one or more sufficient sureties to the satisfaction of the magistrate to enter into a recognizance under the condition that the witness shall at any time within 12 months from the date thereof, upon being served with a subpoena or upon being warned at some certain place within Botswana to be selected by the witness, appear and give evidence at the trial of the person in respect of whom the preparatory examination was taken.

(2) Every recognizance so entered into shall specify the full name of the person entering into it, his occupation or profession (if any) the place of his residence and the name and number (if any) of the street in which it is, and whether he is the owner of such place of residence or a tenant thereof or a lodger therein.

(3) All such recognizances shall be liable to be estreated in the same manner as any forfeited recognizance is by law liable to be estreated by the court before which the principal party thereto was bound to appear.

72. Absconding witness may be arrested

Whenever any person is bound by recognizance to give evidence or is likely to give material evidence in respect of any offence, any judicial officer before whom the offence is triable may, if he sees fit upon information being made in writing and on oath that such person is about to abscond or has absconded, issue his warrant for the arrest of such person. If such person is arrested any judicial officer aforesaid may, if satisfied that the ends of justice would otherwise be defeated, commit such person to a gaol until the time at which he is required to give evidence, unless in the meantime he produces sufficient sureties; but any person so arrested shall be entitled on demand to receive a copy of the information upon which the warrant for his arrest was issued.

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73. Witness refusing to enter into recognizance

Any witness who refuses to enter into any such recognizance as aforesaid may, by warrant, be committed by the magistrate holding the examination to a gaol, there to be kept until after the trial, or until the witness enters into such a recognizance as aforesaid before a magistrate having jurisdiction in the place where the gaol is situated:

Provided that, if the accused is afterwards discharged, any magistrate having jurisdiction shall order such witness to be discharged.

74. Provisions as to taking statement or evidence of accused person

(1) If, after the conclusion of the evidence in support of the charge, the magistrate considers that on the evidence as it stands there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand declaring with what offence or offences the accused is charged and shall read the charge to the accused person and explain the nature thereof to him in simple language, and address to him the following words, or words to the like effect:

> "This is not your trial but, subject to the power of the Director of Public Prosecutions to remit this case for trial to a magistrate's court, you will be tried later in another court before a judge, where all the witnesses you have heard here will be produced and you will be allowed to question them. You will then be able to make any statement you may wish or to give evidence on oath and call any witnesses on your own behalf. Unless you wish to reserve your defence, which you are at liberty to do, you may now either make a statement not on oath or give evidence on oath, and may call witnesses on your behalf. If you give evidence on oath you will be liable to cross-examination. Anything you may say whether on oath or not will be taken down and may be used in evidence at your trial.
>
> I must also give you clearly to understand that you have nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to you to induce you to make any admission or confession of your guilt, and that whatever you now say may be given in evidence at your trial notwithstanding any such promise or threat."

(2) Immediately after complying with the requirements of subsection (1), the magistrate shall ask the accused if he wishes to say anything either by way of statement or evidence and everything which the accused person says, either by way of statement or evidence shall be recorded in full and shall be shown or read over to him, and he shall be at liberty to explain or add to anything contained in the record thereof and the magistrate shall record such explanation or addition and show or read it over to him. The statement or evidence as agreed by the accused person shall then be attested by the magistrate who shall certify that such statement or evidence was taken in his presence and hearing and contains accurately the whole statement made, or evidence given, as the case may be, by the accused person. The accused person shall be called on by the magistrate to sign or attest by his mark such record. If he refuses, the magistrate shall add a note of such refusal, and the record may be used as if

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he had signed or attested it. If an interpreter has been used in the recording of the statement or evidence, the interpreter shall also sign the record.

75. Evidence and address in defence

(1) Immediately after complying with the requirements of section 74 relating to the statement or evidence of the accused person, and whether the accused person has or has not made a statement or given evidence, the magistrate shall ask him whether he desires to call witnesses on his own behalf.

(2) The magistrate shall take the evidence of any witnesses called by the accused person in like manner as in the case of the witnesses for the prosecution, and every such witness, not being merely a witness to the character of the accused person, shall, if the magistrate is of opinion that his evidence is in any way material to the case, be bound by recognizance to appear and give evidence at the trial of the accused person.

(3) If the accused person states that he has witnesses to call but that they are not present in court and the magistrate is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present give material evidence on behalf of the accused person, the magistrate may adjourn the examination and issue process or take other steps to compel the attendance of such witnesses and, on their attendance, shall take their depositions and bind them by recognizance in the same manner as witnesses under subsection (2).

(4) In any preparatory examination under this Part the accused person or his legal representative shall be at liberty to address the magistrate-

(*a*) after the examination of the witnesses called on behalf of the prosecution;

(*b*) if no witnesses for the defence are to be called, immediately after the statement or evidence of the accused person;

(*c*) if the accused person elects-

(i) to give evidence or to make a statement and witnesses for the defence are to be called; or

(ii) not to give evidence or to make a statement but to call witnesses,

immediately after the evidence of such witnesses.

(5) If the accused person or his legal representative addresses the magistrate in accordance with the provisions of paragraph (*a*) or (*b*) of subsection (4), the prosecution shall have the right of reply.

(6) Where the accused person reserves his defence, or at the conclusion of any statement in answer to the charge, or evidence, as the case may be, the magistrate shall ask him whether he intends to call witnesses at the trial, other than those, if any, whose evidence has

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been taken under the provisions of this section, and, if so, whether he desires to give their names and addresses so that they may be summoned. The magistrate shall thereupon record the names and addresses of any such witnesses whom the accused person may mention.

76. Saving as to further evidence and admissions

Nothing in section 75 shall-

(*a*) prevent the magistrate receiving further evidence for the prosecution after hearing any evidence given on behalf of the accused, or re-opening the examination;

(*b*) prevent the prosecution from giving in evidence any admission or confession or other statement made or any evidence given by the accused which under this Act would be admissible at his trial.

77. Discharge of accused person

(1) If, at the close of the case for the prosecution or after hearing any evidence in defence, the magistrate considers that the evidence against the accused person is not sufficient to put him on his trial, the magistrate shall forthwith order him to be discharged as to the particular charge under inquiry; but such discharge shall not be a bar to any subsequent charge in respect of the same facts nor derogate from the Attorney-General's powers under section 81:

Provided always that nothing contained in this section shall prevent the magistrate from either forthwith, or after such adjournment of the examination as may seem expedient in the interests of justice, proceeding to investigate any other charge upon which the accused person may have been summoned or otherwise brought before it, or which in the course of the charge so dismissed as aforesaid, it may appear that the accused person has committed.

(2) The magistrate, in determining whether he will or will not commit an accused person for trial, shall take into consideration the statement of the accused person and any evidence given by him or his witnesses.

(3) Where there is a conflict of evidence, the magistrate shall consider the evidence to be sufficient to commit the accused person for trial if the evidence against the accused person is such as, if uncontradicted, would raise a presumption of his guilt.

78. Committal for trial

If the magistrate considers the evidence sufficient to put the accused person on his trial, he shall commit him for trial to the High Court in accordance with the provisions of section 82.

79. Binding over of witnesses conditionally

(1) Where any person is committed by a magistrate for trial by the High Court and the magistrate is satisfied after taking into account anything which may be said with reference thereto by the accused or the prosecutor, that the attendance at the trial of any witness who has been examined before him is unnecessary, by reason of anything contained in any

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statement by the accused person, or of the evidence of the witness being merely of a formal nature, the magistrate shall, if the witness has not already been bound over, bind him over to attend the trial conditionally upon notice given to him and not otherwise, or shall, if the witness has already been bound over, direct that he shall be treated as having been bound over to attend only conditionally as aforesaid, and shall transmit to the High Court a statement in writing of the names, addresses and occupations of the witnesses who are, or who are to be treated as having been, bound over to attend the trial conditionally.

(2) Where a witness has been, or is to be treated as having been bound over conditionally to attend the trial, the Director of Public Prosecutions or the person committed for trial may give notice, at any time before the opening of the Sessions of the High Court, to the committing magistrate, and, at any time thereafter, to the Registrar of the High Court, that he desires the witness to attend at the trial, and any such magistrate or Registrar to whom any such notice is given shall forthwith notify the witness that he is required so to attend in pursuance of his recognizance.

(3) The magistrate shall, on committing the accused person for trial, inform him of his right to require the attendance at the trial of any such witness as aforesaid, and of the steps which he must take for the purpose of enforcing such attendance.

(4) Any documents or articles produced in evidence before the magistrate by any witness whose attendance at the trial is stated to be unnecessary, in accordance with the provisions of this section and marked as exhibits shall, unless, in any particular case, the magistrate otherwise orders, be retained by the court and forwarded with the depositions to the Registrar of the High Court.

80. Admission of previous convictions by accused at conclusion of preparatory examination

(1) As soon as the preparatory examination has been concluded, the prosecutor shall, if he has information or reasonable grounds for believing that the accused has previously been convicted of any offence, transmit direct to the Registrar of the High Court for transmission to the Director of Public Prosecutions particulars of the alleged previous conviction.

(2) If the Director of Public Prosecutions determines under the provisions of section 94 to indict the accused for trial in the High Court, for an offence disclosed by the evidence taken at the preparatory examination, he may direct any magistrate to re-open the preparatory examination for the purpose of ascertaining whether the accused admits that he was previously convicted as aforesaid.

(3) Such magistrate shall, in accordance with the Attorney-General's directions of the Director of Public Prosecutions, re-open the preparatory examination, and shall inform the accused of the particulars of the alleged previous conviction and shall call upon him to admit or deny that he was so previously convicted. If the accused admits that he was so previously convicted, his admission shall be reduced to writing and signed by him if he is willing to sign it, and shall in any case also be signed by such magistrate.

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(4) No person except such magistrate, the public prosecutor, the accused, his legal adviser, the court interpreter and the necessary escort of the accused shall be present at any proceedings taken by such magistrate under subsection (3).

(5) Copies of any admission or denial by the accused made under this section shall be transmitted as soon as possible to the Registrar of the High Court for transmission to the Director of Public Prosecutions.

(6) Due care shall be taken by every officer that no information relative to any alleged previous conviction of the accused is disclosed to any person, except as provided by this section, until evidence of such previous conviction is tendered as provided in Part XVI.

81. Powers of Director of Public Prosecutions on discharge of accused

(1) Where a magistrate has discharged an accused under section 77, any recognizances taken in respect of the charge shall become void unless, within 28 days, the Director of Public Prosecutions as hereinafter provided orders that the accused be committed for trial or that a further examination shall take place.

(2) Notwithstanding that the accused has, after a preparatory examination, been so discharged, a warrant for his arrest may upon information on oath (other than that recorded at his examination), be issued on the specific instructions of the Director of Public Prosecutions by a person empowered under Part VI to issue warrants of arrest; and upon his being brought before a magistrate, the preparatory examination shall be re-opened in accordance with such instruction as the Director of Public Prosecutions may give.

82. Committal of accused for trial

(1) Where it appears to the magistrate that a sufficient case has been made out against the accused to justify his committal for trial for any offence, the magistrate shall commit the accused for trial to the High Court on a charge to be specified in his record of the proceedings and shall either release him on bail where authorized by law, or commit him to gaol, there to be detained until brought to trial or until admitted to bail or liberated in due course of law. If committed to gaol the warrant of committal shall clearly express the offence for which the accused is committed for trial.

(2) A magistrate may make an order of committal or discharge although part of the examination has been taken by another magistrate and he has not been present during the whole time during which the examination has been taken.

83. Proceedings on admission of guilt

(1) Except when the charge is one of treason or murder, if the accused when questioned, as is provided by section 74, states that he is guilty of the charge, then the magistrate shall further say to him the words following or words to the like effect: "Do you wish the witnesses again to appear to give evidence against you at your trial? If you do not, you will now be committed for sentence instead of being committed for trial."

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(2) If the accused in answer to such a question states that he does not wish the witnesses again to appear to give evidence against him, his statement shall be taken down in writing and read to him and shall be signed by the magistrate and by the accused, and shall be kept with the depositions of the witnesses and sent to the Registrar of the High Court for transmission to the Director of Public Prosecutions.

(3) In any such case as is mentioned in subsection (2) the magistrate shall, instead of committing the accused for trial, order him to be committed for sentence before the High Court, and in the meantime the magistrate shall by his warrant commit him to a gaol to be there safely kept until the sitting of such court or until he is admitted to bail or liberated in due course of law.

84. Committal by magistrate where offence committed outside district

Where any person charged with any offence has been summoned or warned or arrested and brought before the court of a district other than that in which such offence is alleged to have been committed and where a magistrate of such court sees cause to commit such person for examination, such magistrate may issue a warrant to commit such person to a gaol in the district in which the offence is alleged to have been committed or to a gaol in the district within which such court is situate or to any other gaol.

85. Removal of accused from gaol of one district to that of another

A magistrate of any district shall, on application to that effect signed by the Director of Public Prosecutions, issue a warrant for the removal of any accused person detained on a criminal charge under any legal warrant within the gaol of that district to the gaol of any other district specified in the application for detention therein for further examination, trial or sentence or until liberated or removed therefrom in due course of law.

86. Committal for further examination

(1) The magistrate holding a preparatory examination may adjourn such examination, if necessary, from time to time for periods not exceeding 15 days if the accused is remanded in custody and not exceeding one month if the accused is not remanded in custody.

(2) Every warrant of commitment for further examination shall specify the time when the accused is again to be brought before the magistrate for examination:

Provided that the magistrate may, with the consent of the accused, proceed with the examination before the expiration of the period mentioned in the warrant.

87. When offence committed on the boundaries of districts or on a journey

(1) When an offence is committed on the boundary or boundaries of two or more districts, or within the distance of four kilometres beyond any such boundary or boundaries, the preparatory examination may be held in any of the said districts.

(2) When an offence is committed in or upon any vehicle employed on any journey in

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Botswana the preparatory examination may be held in any district through any part whereof or on or within the distance of four kilometres beyond the boundary whereof such vehicle has passed in the course of the journey during which the offence was committed.

(3) Where an offence is committed upon any railway train, the preparatory examination may be held in any district in or through any part whereof such railway train passes.

88. Districts in which preparatory examination may be held

(1) Where the accused is charged with committing any offence the preparatory examination may be held in any district within which the offence was committed or within which any act or omission or event which is an element of the offence has taken place or in which the accused was arrested or is in custody.

(2) Where the accused is charged with theft, or with obtaining by any offence any property, the preparatory examination may be held in any district within which any part of the property so stolen or obtained by any such offence is found in his possession.

(3) Where the accused is charged with an offence which involves the receiving of any property by him, the preparatory examination may be held in any district within which he has any part of the property in his possession.

(4) Where the facts show that an accused person charged with an offence counselled or procured the commission thereof, or after the commission thereof harboured or assisted the offender, the preparatory examination may be held in any district within which the preparatory examination in the case of the principal offender might be held.

(5) Where the accused is charged with kidnapping, child-stealing or abduction, the preparatory examination may be held in the district in which the kidnapping, child-stealing or abduction took place or in any district through or in which he conveyed or concealed or detained the person kidnapped, stolen or abducted.

(6) In special cases not falling within any of the preceding provisions the Director of Public Prosecutions may authorize the preparatory examination to be held in any other district.

(7) In case of any doubt or dispute as to the district in which the preparatory examination should be held or of any objection on the part of the accused to the holding of such examination in any particular district, or where more than one offence is alleged to have been committed by the accused but in different districts, the matter shall be referred to the Director of Public Prosecutions, who may direct in which district a preparatory examination or preparatory examinations shall be held, and his direction shall be conclusive and not subject to appeal to any court.

89. Discretionary powers of the magistrate

A magistrate holding a preparatory examination may-

(*a*) change the place of hearing of the examination to any other place within his

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jurisdiction if, through the inability, from illness or other cause, of the accused or a witness to attend at a place where the magistrate usually sits, or if, from any other reasonable cause, it appears desirable to do so, and may adjourn the examination for that purpose;

(*b*) if it appears to him to be in the interest of good order or public morals or of the administration of justice, direct that the preparatory examination shall be held within closed doors or that (with such exceptions as he may direct) females or minors or the public generally or any class thereof shall not be permitted to be present thereat, and if a preparatory examination is to be held or is being held on a charge referred to in subsection (5) of section 70 the magistrate may, at the request of the person against or in connection with whom the offence charged is alleged to have been committed (or if he is a minor, at the request of that person or of his guardian) whether made in writing before the commencement of the preparatory examination, or orally at any time during the preparatory examination, direct that every person whose presence is not necessary in connection with the preparatory examination or any person or class of persons mentioned in the request shall not be allowed to be present thereat;

(*c*) regulate the course of the examination in any way which may appear to him desirable and which is not inconsistent with the provisions of this Act or of any other law;

(*d*) (i) if it appears in the course of the examination that the magistrate's court of the district in which the examination is held has jurisdiction to deal summarily with the offence which is the subject of the examination, or

(ii) if the offence which is the subject of the examination is not an offence with which the said court has jurisdiction to deal summarily, and the prosecutor substitutes a charge of an offence in respect of which the said court has such jurisdiction,

and if, in either case, it appears to such magistrate that it is desirable to try the accused summarily, stop the examination and, with the consent of the prosecutor place the accused on trial for such offence before the said court presided over by the said magistrate, and the evidence already taken at the examination shall thereupon be deemed to have been recorded as evidence at such trial; and either the prosecutor or the accused may require any person who has given evidence at the examination to be recalled for further examination; and if the accused so requests, any evidence already taken at the examination shall be read to him.

90. Bail before conclusion of examination in magistrate's discretion

(1) Until the warrant for commitment for trial or sentence is made out no prisoner can insist on being admitted to bail; but except when the trial is treason or murder, it shall be in the discretion of the magistrate to admit an accused person to bail before the preparatory examination is concluded.

(2) If the accused person, when admitted to bail before the preparatory examination is concluded, does not appear at the time and place mentioned in the recognizance, the

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magistrate may declare the recognizance forfeited, adjourn the examination, and issue a warrant for his apprehension as hereinbefore provided.

91. Prosecutor or magistrate conducting preparatory examination to make local inspection and to cause post mortem and other examinations to be made

The person charged with the prosecution or the magistrate who conducts the preparatory examination shall make or cause to be made any local inspections which the particular circumstances of the case may render necessary; and, in cases of homicide or of serious injury to the person of any individual, shall cause the dead body or the person injured to be examined by a duly registered medical practitioner, if such can be procured, and if not, then by the best qualified person or persons obtainable. Such practitioner or person (as the case may be) shall draw up and subscribe a written statement of the appearances and facts observed on such examination.

92. All articles to be used in evidence on the trial to be labelled for identification and to be kept in safe custody

The magistrate conducting the preparatory examination shall cause all documents and any other articles whatsoever, exhibited by the witnesses in the course of the preparatory examination and likely to be used in evidence on the accused's trial, to be inventoried and labelled or otherwise marked, in the presence of the person producing the same, so that they may be capable of being identified at the accused's trial, and shall cause all such documents and articles to be kept in safe custody until the trial so that they may then be produced.

93. Records of preparatory examination to be sent to the Director of Public Prosecutions

The magistrate shall, as soon as possible after the conclusion of a preparatory examination held by him, transmit a copy of the record thereof to the Registrar of the High Court for transmission to the Director of Public Prosecutions for his consideration. If the prosecution is by a private party the Director of Public Prosecutions shall, if he declines to prosecute at the public instance, transmit such copy to that private party together with such a certificate as is mentioned in section 18.

94. Powers of Director of Public Prosecutions

(1) After considering the preparatory examination transmitted to him as aforesaid the Director of Public Prosecutions may-

(*a*) decline to prosecute the accused and shall thereupon cause his decision to be transmitted to a magistrate, who, if the accused is in custody, shall cause him to be liberated forthwith, or, if he is not in custody, shall inform him of the decision of the Director of Public Prosecutions;

(*b*) if a magistrate has committed the accused for trial or sentence, indict the accused for trial before the High Court on a charge of any offence disclosed by the evidence

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taken at the preparatory examination and shall inform the magistrate accordingly;

(*c*) even if a magistrate has discharged the accused, indict the accused for trial before the High Court on a charge of any offence disclosed by the evidence taken at the preparatory examination and direct a magistrate so to commit the accused for trial if, in the Attorney-General's opinion of the Director of Public Prosecutions, the accused ought to have been so committed, or he may remit the case under paragraph (*d*), and in either such case the Director of Public Prosecutions may order a magistrate to issue a warrant for the re-arrest of the accused if he has been discharged from custody, or direct that the recognizance shall remain in operation if the accused has been admitted to bail, or give such other directions in respect of further proceedings against the accused as the Director of Public Prosecutions may think right and determine;

(*d*) unless the offence to be charged is murder or treason, remit the case to be dealt with under its ordinary jurisdiction by the magistrate's court of the district in which the preparatory examination was held;

(*e*) unless the offence to be charged is murder or treason, remit the case to be dealt with by the magistrate's court of such district under any increased jurisdiction conferred upon such court by law governing magistrates' courts or by any other law;

(*f*) in any case in which a person has been committed for sentence under section 83, unless the offence to be charged is murder or treason, remit the case to be dealt with by the magistrate's court of such district, either under its ordinary jurisdiction or under any increased jurisdiction conferred upon such court by any law governing magistrates' courts or by any other law;

(*g*) direct the magistrate to re-open the preparatory examination and take further evidence generally or in respect of any particular matter; or

(*h*) take such measures and give such directions for the trial of the prisoner before a competent court as he may deem most expedient.

(2) The Director of Public Prosecutions in remitting any case to a magistrate's court shall state specifically whether he remits the case under paragraph (*d*), (*e*) or (*f*) of subsection (1) and shall also state specifically whether he remits the case to be dealt with under the ordinary jurisdiction of the magistrate's court or under any increased jurisdiction aforesaid.

95. How remitted cases to be dealt with

Any case remitted to a magistrate's court under any provision of section 94 shall be tried by such court in all respects in accordance with the relevant provisions of Parts X, XI, XIII, XIV, XV, XVI and XVII and also in accordance with and subject to the law governing such court; and any conviction and any sentence imposed in respect thereof shall be subject to review or appeal as prescribed by such law.

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96. Indictment by Director of Public Prosecutions in certain cases

(1) Notwithstanding anything contained elsewhere in this Act the Director of Public Prosecutions may, if he considers it desirable to do so, at any time and whether or not a preparatory examination has been commenced, serve upon an accused notice of his intention to indict him for trial before the High Court on a charge of any offences specified in such notice.

(2) A copy of the notice served under subsection (1) shall be served upon any magistrate having jurisdiction in the district in which a preparatory examination in respect of the offence could be or is being held and, thereupon, such magistrate shall cause the accused to be brought before him and shall, notwithstanding anything contained elsewhere in this Act, forthwith commit the accused for trial before the High Court in respect of the offence specified in such notice and commit the accused to gaol there to be detained until brought to trial before the High Court for the offence specified in the warrant or until admitted to bail or liberty in the due course of law.

(3) Where an accused person has been committed for trial under subsection (2) there shall be served upon him, at the same time as the indictment and notice of trial are served upon him under the provisions of section 123, a list of the witnesses whom it is proposed to call and a summary of the evidence of each of such witnesses. Each summary shall be deemed to be a deposition for the purposes of section 98.

97. Accused to be committed for trial by magistrate before trial in the High Court

No person shall be tried in the High Court for any offence unless he has been previously committed for trial by a magistrate, whether or not the committal was on the direction of the Director of Public Prosecutions in exercise of the powers conferred upon him by section 94(1)(*c*) or in accordance with the provisions of section 96 for or in respect of the offence charged in the indictment:

Provided that-

(i) in any case in which the Director of Public Prosecutions has declined to prosecute, the High Court may, upon the application of any such private party as is described in sections 14 and 15, direct any magistrate to take a preparatory examination against the person accused;

(ii) an accused person shall be deemed to have been committed for trial for or in respect of the offence charged in the indictment, if the depositions taken before the committing magistrate contain 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 depositions, have committed him 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

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take his 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 proves the contrary.

98. Persons committed for trial or sentence entitled to receive copy of depositions of witnesses

Every accused person who is committed for trial or sentence for any offence, shall be entitled to demand, and to have within a reasonable time in that behalf, from the person who has the lawful custody thereof, a copy of the depositions of the witnesses upon which he has been so committed and of his own statement and evidence (if any), and the person who has the lawful custody of such depositions, statements and evidence shall deliver a copy thereof to the person aforesaid or his legal representative on payment of a reasonable sum not exceeding seven thebe for each folio of 100 words, or, in any case where counsel is assigned by the court to defend the accused *pro deo*, shall deliver a copy thereof to the accused or such counsel free of charge:

Provided that-

(i) if such demand is not made before the day appointed for the commencement of the trial of the person on whose behalf such demand is made, such person shall not be entitled to have any such copy of depositions, unless the judge presiding at the trial is of opinion that such copy may be made and delivered without delay or inconvenience to the trial, and

(ii) such judge may, if he thinks fit, postpone the trial by reason of such copy not having been previously had by the accused.

99. Persons under trial may inspect depositions without charge at trial

Every accused person shall be entitled at the time of his trial to inspect without fee or reward all depositions (or copies thereof) which have been taken, and the statement made or evidence given, at the preparatory examination by such person.

100. Record of evidence in absence of accused

If it is proved after a preparatory examination has commenced that the accused absconded and that there is no immediate prospect of arresting him, or if the accused conducts himself in such a manner that the preparatory examination cannot in the opinion of the magistrate properly proceed in the presence of the accused, the magistrate may on the instruction of the Director of Public Prosecutions examine, in the absence of the accused, the witnesses (if any) produced on behalf of the prosecution and record their depositions.

101. Duty of magistrate to take depositions as to alleged offence in cases where the actual offender not known or suspected

(1) Every magistrate may, at any time upon the request of the local public prosecutor,

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require the attendance of any person who is likely to give material evidence as to any supposed offence, whether or not it be known or suspected who is the person by whom the offence has been committed.

(2) The provisions of sections 65 to 68 inclusive shall apply in respect of persons required to attend and give evidence under this section.

102. Access to accused by friends and legal advisers

(1) The friends and legal advisers of an accused person shall have access to him, subject to the provisions of any law or regulations relating to the management of gaol.

(2) An accused person while the preparatory examination is being held is entitled to the assistance of his legal advisers.

103. True copy of warrant of commitment to be furnished to prisoners under a penalty of P100

In every case where an accused person is committed for trial or sentence, he shall be entitled to demand a true copy of the warrant from the officer who is the bearer thereof or keeper of the gaol in which he is detained, who shall be liable to pay by way of penalty a sum not exceeding P100 if he refuses to give such copy within six hours after it is demanded by the accused or his legal adviser. Such penalty shall be recoverable by civil proceedings at the suit of the accused person.

PART IX
Bail (ss 104-122)

A. AFTER PREPARATORY EXAMINATION IS CONCLUDED (ss 104-110)

104. Bailable offences

Every person committed for trial or sentence in respect of any offence except treason or murder may be admitted to bail in the discretion of the magistrate:

Provided that-

(i) the refusal by the magistrate who has committed any person for trial, to grant such person bail shall be without prejudice to such person's rights under section 113, and

(ii) the magistrate may admit to bail a person under the age of 18 committed for trial on a charge of murder.

105. Verbal application for bail

It shall be competent for the accused at the time of the commitment to apply verbally to the judicial officer granting the warrant of commitment, to be liberated on bail.

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106. Application for bail after commitment

(1) At any period subsequent to the time of commitment it shall be competent for the accused to make written application to the magistrate who granted the warrant of commitment, or to a magistrate having jurisdiction within the district in which he was committed for trial, or to a magistrate having jurisdiction within the district in which he is in custody, unless bail has already been refused by any magistrate. When the commitment is on a warrant issued by the High Court it shall only be competent to apply for bail to the High Court.

(2) Every such written application for bail shall be in a form of a petition and shall be accompanied by a copy of the warrant of commitment or by affidavit that a copy is denied.

107. Magistrate to determine whether the offence is bailable

(1) Every magistrate to whom an application for bail is made under section 106 shall within five days thereafter if the offence is bailable by him, fix the amount of the bail to be given, or after consideration of such application may, in his discretion, refuse to grant bail.

(2) In determining whether the offence for which the accused has been committed is bailable or not by him, the magistrate shall, in the ordinary case, take the charge against the accused as he finds it on the face of the warrant of commitment.

108. Refusal of bail from the uncertain issue of act committed

In cases where a doubt may arise concerning the degree and quality of the offence from the uncertain issue in the case of an injury of which it cannot be foretold whether the person injured will die or recover, every judicial officer to whom application for bail is made may refuse to grant the same until all danger to the life of the person injured is at an end.

109. Conditions of recognizances

(1) The recognizance which is taken on the admission of an accused person to bail under sections 104 to 108 of this Part shall be taken by the judicial officer either from the accused alone or from the accused and one or more sureties in the discretion of the judicial officer according to the nature and circumstances of the case.

(2) The conditions of the recognizance shall be that the prisoner shall appear and undergo any further examination which the magistrate or the Director of Public Prosecutions may consider desirable and also answer to any indictment that may be presented, or charge that may be made, against him in any competent court for the offence with which he is charged at any time within a period of 12 months from the date of the recognizance; that he will also attend during the hearing of the case and to receive sentence; and that he will accept service of any summons or warning to undergo further examination and any such indictment or charge, notice of trial, and summons thereon and any other notice under this Act at some certain and convenient place within Botswana chosen by him and expressed therein.

(3) The recognizance shall continue in force notwithstanding that for any reason, when the

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trial takes place, no verdict is then given, unless the indictment or charge is withdrawn.

110. On failure of accused to appear at trial, recognizance to be forfeited

If upon the day appointed for the hearing of a case it appears by the return of the proper officer or by other sufficient proof that a copy of the indictment and notice of trial or, in case of a remittal to a magistrate's court, the summons or warning has been duly served or given and the accused does not appear after he has been three times, in or near the court premises, called by name, the prosecutor may apply to the court for a warrant for the apprehension of the accused, and may also move the court that the accused and his sureties (if any) be called upon their recognizance, and, in default of his appearance, that the same may be then and there declared forfeited; and any such declaration of forfeiture shall have the effect of a judgment on the recognizance for the amounts therein named against the accused and his sureties respectively.

B. IN CASES TRIED BY MAGISTRATES' COURTS (s 111)

111. Power to admit to bail, nature of bail and provision in case of default

(1) When a criminal case before a magistrate's court is adjourned or postponed and the accused remanded, the magistrate may in his discretion, admit the accused to bail in manner herein provided:

Provided that the accused shall not be remanded for more than one month if not in custody, or for more than 15 days if in custody.

(2) When a magistrate decides to admit an accused person to bail under this section, a recognizance shall be taken from the accused alone or from the accused and one or more sureties, as the magistrate may determine, regard being had to the nature and circumstances of the case. The conditions of the recognizance shall be that the accused shall appear at a time and place to be specified in writing and as often as and at such intervals not exceeding one month as may be necessary thereafter within a period of six months, until final judgment in his case has been given, to answer the charge of the offence alleged against him or the charge of any other offence which may appear to the Director of Public Prosecutions or the local public prosecutor to have been committed by the accused.

(3) The magistrate may further add to the recognizance any conditions which he may deem necessary or advisable in the interest of justice as to-

(*a*) times and places at which and persons to whom the accused shall present himself;

(*b*) places where he is forbidden to go;

(*c*) prohibition against communication by the accused with witnesses for the prosecution or any named person; or

(*d*) any other matter relating to his conduct.

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(4) If it appears to the magistrate that default has been made in any condition of a recognizance taken before him or if it appears to the magistrate before whom an accused person has to appear in terms of any recognizance entered into before another magistrate that default has been made in any condition of such recognizance, such magistrate may-

(*a*) issue an order declaring the recognizance forfeited, and such order shall have the effect of a judgment on the recognizance for the amounts therein named and against the person admitted to bail and his sureties respectively; and

(*b*) issue a warrant for the person admitted to bail and afterwards, on being satisfied that the ends of justice would otherwise be defeated, commit him, when so arrested, to a gaol until his trial.

C. GENERAL FOR ALL CRIMINAL CASES (ss 112-122)

112. Excessive bail not to be required

The amount of bail to be taken in any case shall be in the discretion of the judicial officer to whom the application to be admitted to bail is made:

Provided that no person shall be required to give excessive bail.

113. Appeal to High Court against refusal of bail

Whenever an accused person considers himself aggrieved by the refusal of any magistrate to admit him to bail or by such magistrate having required excessive bail, he may apply in writing to the judge of the High Court who shall make such order thereon as to him in the circumstances of the case seems just.

114. Power of the High Court to admit to bail

Except where otherwise expressly provided the High Court shall have power, at any stage of any proceedings taken in any court in respect of an offence, to admit the accused to bail, whether the offence is or is not one of the offences specifically excepted in section 104.

115. Insufficiency of sureties

If, through mistake, fraud, or otherwise, insufficient sureties have been accepted or if they afterwards become insufficient, the judicial officer granting the bail may issue a warrant of arrest directing that the accused be brought before him and may order him to find sufficient sureties, and on his failing to do so may commit him to prison.

116. Release of sureties

(1) All or any sureties for the attendance and appearance of an accused person released on bail may at any time apply to the judicial officer before whom the recognizance was entered into to discharge the recognizance either wholly or so far as relates to the applicants.

(2) On such application being made, the judicial officer shall issue a warrant of arrest

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directing that the accused be brought before him.

(3) On the appearance of the accused pursuant to the warrant or on his voluntary surrender, the judicial officer shall direct the recognizances to be discharged either wholly or so far as relates to the applicants and shall call upon the accused to find other sufficient sureties and, if he fails to do so, may commit him to prison.

117. Render in court

The sureties may bring the accused into the court at which he is bound to appear during any sitting thereof and then, by leave of the court, render him in discharge of such recognizance at any time before sentence, and the accused shall be committed to a gaol there to remain until discharged by due course of law; but such court may admit the accused person to bail for his appearance any time it deems meet.

118. Sureties not discharged until sentence or discharge of the accused

The pleading or conviction of any accused person released on bail as aforesaid shall not discharge the recognizance, but the same shall be effectual for his appearance during the trial and until sentence is passed or he is discharged; nevertheless the court may commit the accused to a gaol upon his trial or may require new or additional sureties for his appearance for trial or sentence (as the case may be) notwithstanding such recognizance; and such commitment shall be a discharge of the sureties.

119. Death of surety

When a surety to a recognizance dies before any forfeiture has been incurred, his estate shall be discharged from all liability in respect of the recognizance, but the accused may be required to find a new surety.

120. Person released on bail may be arrested if about to abscond

Whenever an accused person has been released on bail under any of the provisions of this Part, any judicial officer may, if he sees fit, upon the application of any peace officer and upon information being made in writing and upon oath by such officer or by some person on his behalf that there is reason to believe that the accused is about to abscond for the purpose of evading justice, issue his warrant for the arrest of the accused, and afterwards, upon being satisfied that the ends of justice would otherwise be defeated, commit him, when so arrested, to gaol until his trial.

121. Deposit instead of recognizance

(1) When any person is required by any judicial officer to enter into recognizances with or without sureties under any of the provisions of this Act, such judicial officer may, except in the case of a bond for good behaviour, instead of causing such recognizances to be entered into, permit him or some person on his behalf to deposit such sum of money as the judicial officer may fix. Conditions in writing shall be made, in respect of such a deposit of money, of the

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same nature as the conditions prescribed by this Part in respect of recognizances, and all the provisions of this Part prescribing the circumstances in which recognizances taken from the accused alone shall be forfeited, his arrest if about to abscond, and remission of forfeited bail, shall apply *mutatis mutandis* in respect of any such deposit of money.

(2) Where the charge against the accused person is not one of the offences mentioned in subparagraphs (i) and (ii) of paragraph (*b*) of section 28 any policeman of or above the rank of Sub-Inspector, may, at a police station and at such times as no judicial officer is available, admit to bail an accused person who makes or on whose behalf is made a deposit of such a sum of money as such police officer may in the particular circumstances fix. The provisions of subsection (1) as to conditions, forfeiture and remission of forfeited bail shall *mutatis mutandis* apply in respect of a deposit of money made under this subsection.

122. Remission of bail

The President may in his discretion remit any portion of any amount forfeited under this Part and enforce payment in part only.

PART X
Indictments and Summonses (ss 123-132)

A. INDICTMENTS IN THE HIGH COURT (ss 123-124)

123. Charge in the High Court to be laid in an indictment

(1) When a person charged with an offence has been committed for trial or sentence before the High Court, the charge shall be in writing in a document called an indictment.

(2) When the prosecution is-

(*a*) at the public instance, the indictment shall be in the name of, and shall be signed by, the Director of Public Prosecutions;

(*b*) a private one, the indictment shall be in the name of the party at whose instance it is preferred (who must be described therein with certainty and precision) and must be signed by such private party or by counsel on his behalf.

(3) It shall not be competent for two or more persons to prosecute in the same indictment, except in a case where two or more persons have been injured by the same offence.

(4) The service upon an accused person of any indictment, together with any notice of trial thereof, shall be made by the person and in the manner provided by rules of court.

124. When the case is pending

As soon as the indictment in any criminal case brought in the High Court has been duly lodged with the Registrar of that Court, such case shall be deemed to be pending in that Court.

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B. SUMMONSES AND CHARGES IN MAGISTRATE'S COURTS (ss 125-127)

125. Lodging of charges in a magistrate's court

Where a public prosecutor has, by virtue of his office, determined to prosecute any person in a magistrate's court for any offence within the jurisdiction of that court, he shall forthwith lodge with the clerk of the court a statement in writing of the charge against that person, describing him by his name, place of abode and occupation or degree, and setting forth shortly and distinctly the nature of the offence and the time and place at which it was committed.

126. Summons in magistrate's court

(1) The clerk of a magistrate's court shall, upon or after lodging of any charge, at the request of the prosecutor issue and deliver to the messenger of the court a summons to the person charged to appear to answer the charge, together with so many copies of the said summons as there are persons to be summoned.

(2) Except where otherwise specially provided by any law, the service upon accused persons of any summons or other process in a criminal case in a magistrate's court shall be made by the prescribed officer, by delivering it to the accused personally.

(3) If, upon the day appointed for the appearance of any person to answer any charge, he fails to appear, and the court is satisfied upon the return of the person required to serve the summons that he was duly summoned, the court may, at the request of the prosecutor, issue a warrant for the apprehension of the said person, and may also impose on him for his default a fine not exceeding P50, or in default of payment of such fine may sentence him to imprisonment for a term not exceeding three months or may sentence him to imprisonment without the option of a fine for a term not exceeding one month. The court may, upon cause shown, remit any fine or imprisonment imposed under this subsection.

(4) In any case in which the accused is a person ordinarily resident in Botswana it shall be regarded as a sufficient summons to attend the court if such accused is duly warned through his Chief, Sub-Chief or Headman to appear; and proof of such warning shall render the accused liable to the penalties prescribed in this section in the event of his failure to appear at the appointed time.

127. Charges in remitted cases

(1) Whenever any case has been remitted by the Director of Public Prosecutions to be dealt with by a magistrate's court, the court shall, with all convenient dispatch, cause the accused to be brought before it.

(2) If the accused has been released on bail, the court shall cause a notice to be served on him stating that the case has been remitted to it to be dealt with and requiring him to appear on the day appointed for the trial. Such notice shall be served in the same manner as a criminal summons; and if the accused does not so appear, his bail shall be estreated and he may be apprehended and brought before the court as in the case of a person who has not appeared

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upon a criminal summons.

C. INDICTMENTS AND SUMMONSES (ss 128-132)

128. Offence to be specified in indictment or summons with necessary particulars

Every indictment or summons shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

129. Joinder of counts in an indictment or summons

(1) Different offences may be charged together in the same indictment or summons if they are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

(2) Where more than one offence is charged in an indictment or summons, a description of each offence so charged shall be set out in a separate paragraph of the indictment or summons called a count.

(3) Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same indictment or summons, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in an indictment or summons, the court may order a separate trial of any count or counts of such indictment or summons.

130. Joinder of two or more accused in one indictment or summons

The following persons may be joined in one indictment or summons and may be tried together, namely-

(*a*) persons accused of the same offence committed in the course of the same transactions;

(*b*) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;

(*c*) persons accused of more offences than one of the same kind (that is to say, offences punishable with the same amount of punishment under the same section of the Penal Code or of any other law) committed by them jointly within a period of 12 months;

(*d*) persons accused of different offences committed in the course of the same transaction;

(*e*) persons accused of any offence under Division V of Part II of the Penal Code, and persons accused of receiving or retaining property, possession of which is alleged to

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have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit either of such last named offences;

(*f*) persons accused of any offence relating to counterfeit coin under Division VII of Part II of the Penal Code, and persons accused of any other offence under the said Division VII of Part II relating to the same coin, or of abetment of or attempting to commit any such offence.

131. Rules for the framing of indictments or summonses

The following provisions shall apply to all indictments and summonses, and, notwithstanding any rule of law or practice, an indictment or summons shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Act-

(*a*) (i) a count of an indictment or summons shall commence with a statement of the offence charged, called the statement of offence, and a reference to the section of the law creating the offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence;

(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:

Provided that where any rule of law or any law limits the particulars of an offence which are required to be given in an indictment or summons, nothing in this paragraph shall require any more particulars to be given than those so required;

(iv) the forms set out in the Third Schedule to this Act or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of each case;

(v) where an indictment or summons contains more than one count, the counts shall be numbered consecutively;

(*b*) (i) where a law constituting an offence states the offence to be the doing of or the omission to do any one of any different acts in the alternative, or the doing of or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the law, may be stated in the alternative in the count charging the offence;

(ii) it shall not be necessary, in any count charging an offence constituted by a law,

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to deny any exception or exemption from, or qualifications to, the operation of the law creating the offence;

(*c*) (i) the description of property in an indictment or summons shall be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property;

(ii) where the property is vested in more than one person, and the owners of the property are referred to in an indictment or summons, it shall be sufficient to describe the property as owned by one of those persons by name with the others, and, if the persons owning the property are a body of persons with a collective name, such as a company or "Inhabitants", "Trustees", "Commissioners" or "Club" or other such name, it shall be sufficient to use the collective name without naming any individual;

(iii) property belonging to, or provided for, the use of any public establishment, service or department may be described as the property of the State;

(iv) coin, bank notes and currency notes may be described as money; and any allegation as to money, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank or currency note (although the particular species of coin of which such amount was composed, or the particular nature of the bank or currency note, is not proved); and in cases of stealing and defrauding by false pretences, by proof that the accused person dishonestly appropriated or obtained any coin or any bank or currency note, or any portion of the value thereof, although such coin or bank or currency note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same or to any other person and such part has been returned accordingly;

(*d*) the description or designation in an indictment or summons of the accused person, or of any other person to whom reference is made therein, shall be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation, and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description, or designation, such description or designation shall be given as is reasonably practicable in the circumstances or such person may be described as "a person unknown";

(*e*) where it is necessary to refer to any document or instrument in an indictment or summons, it shall be sufficient to describe it by any name or designation by which it is usually known, or by the purport thereof, without setting out any copy thereof;

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(*f*) subject to any other provisions of this section, it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any indictment or summons in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to;

(*g*) it shall not be necessary, in stating any intent to defraud, deceive or injure, to state an intent to defraud, deceive or injure any particular person, where the law creating the offence does not make an intent to defraud, deceive or injure a particular person an essential ingredient of the offence;

(*h*) figures and abbreviations may be used for expressing anything which is commonly expressed thereby;

(*i*) in any indictment or summons relating to an offence under Division V of Part II of the Penal Code it shall be sufficient-

(i) to allege that the thing stated to have been stolen was taken at diverse times between any two certain days named in the indictment or summons, and, upon such indictment or summons, proof may be given of the theft of such thing upon any day or days between the two certain days aforesaid,

(ii) to charge and proceed against the accused for the amount of a general deficiency, notwithstanding that such general deficiency is made up of any number of specific sums of money or of any number of specific articles, the taking of which extended over any space of time.

132. Amendment of Third Schedule

The Minister may, by order, add to, revoke or vary any of the forms set out in the Third Schedule.

PART XI
Procedure before Commencement of Trial (ss 133-156)

A. IN THE HIGH COURT (ss 133-135)

133. Persons committed to be brought to trial at the first session provided 31 days have elapsed from commitment

(1) Except where otherwise expressly provided in this Act as to the adjournment of a court, every person committed for trial or sentence whom the Director of Public Prosecutions has decided to prosecute before the High Court shall be brought to trial at the first session of that Court for the trial of criminal cases held after the date of the commitment, or else shall be admitted to bail, if 31 days have elapsed between the date of commitment and the time of holding such session, unless-

(*a*) the Court is satisfied that, in consequence of the absence of material evidence or for some other sufficient cause, the trial cannot then be proceeded with without defeating

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the ends of justice; or

(*b*) before the close of such first session an order has been obtained from the Court under the provisions of section 134 for his removal for trial elsewhere.

(2) If such person is not brought to trial at the first session of such Court held after the expiry of six months from the date of his commitment, and has not previously been removed for trial elsewhere, he shall be discharged from his imprisonment for the offence in respect of which he has been committed.

(3) For the purposes of this section a person shall not be deemed to have been committed for trial in any case in which the Director of Public Prosecutions has, under section 94, ordered a further examination to be taken, until such further examination has been completed.

(4) The accused, with his own consent in writing and with the consent of the Director of Public Prosecutions, may be brought to trial at any time after his commitment notwithstanding that the period of 31 days has not expired.

134. Change of place of trial

(1) Whenever an indictment has been presented against an accused person in the High Court, the judge may, upon application by or on behalf of the Director of Public Prosecutions or by or on behalf of the accused, order that the trial shall be held at some place other than that specified in the indictment and at a time to be named in the order.

(2) When any order is made under this section, the consequences shall be the same in all respects and with regard to all persons as if the Director of Public Prosecutions had decided to prosecute the accused at the place named in the order and at the time specified therein, and if he has been admitted to bail, the recognizances of the bail are to be deemed to be extended to that time and place accordingly.

(3) The recognizances of any persons who are bound to attend as witnesses are in like manner to be deemed to be extended to the same time and place.

(4) Notice of such time and place must be given to the persons bound by the recognizances, otherwise their recognizances cannot be forfeited.

135. Such prisoners not brought to trial at second session after commitment entitled to discharge from imprisonment

When a case has been removed for trial elsewhere and the accused is in custody, the court granting the order of removal shall issue a warrant directing his transmission forthwith to the gaol of the district to which the case has been removed. The accused shall be brought to trial at the next criminal session of the court to which the case has been removed, or otherwise shall be discharged from his imprisonment for the offence for which he was transmitted for trial.

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B. IN MAGISTRATES' COURTS (s 136)

136. Commencement of proceedings if accused is in custody

When a person who was arrested upon a criminal charge is brought up before a magistrate's court in terms of section 36 or subsection (5) of section 39 such magistrate's court shall forthwith commence his trial or a preparatory examination upon such charge or, if the matter is cognizable by another court, remand him to such court.

C. GENERAL FOR ALL COURTS (ss 137-156)

137. Persons brought before wrong court

(1) If on the trial of a person charged with any offence before the High Court or any magistrate's court it appears that he is not properly triable before that court, he is not by reason thereof entitled to be acquitted, but the court may, at the request of the accused, direct that he be tried before some proper court and may remand him for trial accordingly.

(2) If he does not make such request the trial shall proceed and the verdict and judgment shall have the same effect in all respects as if the court had originally had jurisdiction to try the accused.

(3) This section shall not affect the right of the accused to plead to the jurisdiction of a court.

138. Trial of pending case may be postponed

Subject to the provisions of section 133, in a case to be tried by the High Court, any court before which a criminal trial is pending may, if it is necessary or expedient, postpone the trial until such time, and to such place, and upon such terms, as to such court may seem proper, and further postponements may, if necessary and expedient, be made from time to time:

Provided that in the case of a magistrate's court, such postponement shall not exceed 15 days if the accused is remanded in custody, or one month if the accused is not remanded in custody.

139. Adjournment of trial

A trial may, if it is necessary and expedient, be adjourned at any period of the trial, whether evidence has or has not been given.

140. Powers of court on postponement or adjournment

(1) When a trial is postponed or adjourned as aforesaid, the court may direct that the accused be detained until liberated in accordance with law or admit him to bail or extend his bail, if he has already been admitted to bail, and may extend the recognizances of the witnesses.

(2) When the trial of an accused who is not in custody, and who has not been admitted to bail, is so postponed or adjourned he shall be deemed to have been served with a summons

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to appear at the time and place to which the trial was postponed or adjourned.

141. Accused to plead to the indictment or summons

Subject to the provisions of section 307, the accused shall, upon the day appointed for his trial or sentence upon any indictment or summons, appear in court, or if he is in custody he shall be brought into court, and shall be informed in open court of the offence with which he is charged as set forth in the indictment or summons, and shall be required to plead instantly thereto, except where, there being an indictment or summons and the accused having objected so to plead, the court finds that he has not been duly served with a copy thereof:

Provided that the court may at the request of the prosecution or the accused or of its own motion, postpone the taking of a plea if the Court considers this to be necessary in the interests of justice.

142. Effect of plea

If the accused is indicted in the High Court after having been admitted to bail, his plea to the indictment shall, unless the Court otherwise directs, have the effect of terminating his bail and he shall thereupon be detained in custody until the conclusion of the trial in the same manner in every respect as if he had not been admitted to bail.

143. Objections to indictment, etc. how and when to be made

(1) Every objection to an indictment or summons for any formal defect apparent on the face thereof shall be taken before the accused has pleaded but not afterwards.

(2) Every court before which any such objection is taken for any formal defect may, if it is thought necessary, and the accused is not prejudiced as to his defence, cause the indictment or summons to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.

144. Exceptions

(1) When the accused excepts only and does not plead any plea, the court shall proceed to hear and determine the matter forthwith. If the exception is overruled he shall be called upon to plead to the indictment or summons.

(2) When the accused pleads and excepts together, it shall be in the discretion of the court whether the plea or exception shall be first disposed of.

145. Proceedings if defence be an alibi

(1) If in any case the defence of the accused is that commonly called an *alibi*, and the court before which the trial is held considers that the accused might be prejudiced in making such defence if proof were admitted that the act or offence in question was committed on some day or time other than the day or time stated in the indictment or summons, then, although the day or time proposed to be proved is within a period of three months before or after the day stated

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in the indictment or summons, the court shall reject such proof, and the accused shall be in the same plight and condition as if he had not pleaded.

(2) If in any case no day is stated in the indictment or summons or an impossible day or a day that never happened, the accused may, at any time before pleading, apply to the court in which he is indicted or charged, and such court shall, upon being satisfied by affidavit or otherwise that the accused is likely to be prejudiced in his defence upon the merits, unless some day or time were stated, make such order in that behalf as in the circumstances of the particular case may seem just.

146. Court may order delivery of particulars

(1) The Court may either before or at the trial, in any case if it thinks fit, direct particulars to be delivered to the accused or any matter alleged in the indictment or summons, and may, if necessary, adjourn the trial for the purpose of the delivery of such particulars.

(2) Such particulars shall be delivered to the accused or to his counsel or attorney without charge, and shall be entered in the record; and the trial shall proceed in all respects as if the indictment or summons had been amended in conformity with such particulars.

(3) In determining whether a particular is required or not, and whether a defect in an indictment before the High Court or on remittal to a magistrate's court is material to the substantial justice of the case or not, the court may have regard to the preparatory examination.

147. Motion to quash indictment, etc.

(1) The accused may, before pleading, apply to the court to quash the indictment or summons on the ground that it is calculated to prejudice or embarrass him in his defence.

(2) Upon such motion the court may quash the indictment or summons, or may order it to be amended in such manner as the court thinks just, or may refuse to make any order on the motion.

(3) If the accused alleges that he is wrongfully named in the indictment or summons, the court may, on being satisfied by affidavit or otherwise of the error, order it to be amended.

148. Notice of motion to quash indictment, etc. and of certain pleas to be given

When the accused intends to apply to have an indictment or summons quashed under section 147, or to except, or to plead any of the pleas mentioned in section 150, except the plea of guilty or not guilty, he shall give reasonable notice (regard being had to the circumstances of each particular case) to the Director of Public Prosecutions or his representative if the trial is before the High Court, or to the public prosecutor if the trial is before a magistrate's court or, when the prosecution is a private one, to the private prosecutor, stating the grounds upon which he seeks to have the indictment or summons quashed or upon which he bases his exception or plea. Any such notice may be waived by the Director of Public

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Prosecutions, or such prosecutor, as the case may be:

Provided that, on good cause shown, the court may dispense with such notice or adjourn the trial to enable such notice to be given.

149. Certain discrepancies between indictment, etc. and evidence may be corrected

(1) Whenever, on the trial of any indictment or summons, there appears to be any variance between the statement therein and the evidence offered in proof of such statement, or if it appears that any words or particulars that ought to have been inserted in the indictment or summons have been omitted, or that any words or particulars that ought to have been omitted have been inserted, or that there is any other error in the indictment or summons the court may at any time before judgment, if it considers that the making of the necessary amendment in the indictment or summons will not prejudice the accused in his defence, order that the indictment or summons be amended, so far as it is necessary, by some officer of the court or other person, both in that part thereof where the variance, omission, insertion, or error occurs, and in every other part thereof which it may become necessary to amend.

(2) The amendment may be made on such terms (if any) as to postponing the trial as the court thinks reasonable. The indictment or summons shall thereupon be amended in accordance with the order of the court and, after any such amendment, the trial shall proceed at the appointed time upon the amended indictment or summons, in the same manner and with the same consequences in all respects as if it has been originally in its amended form.

(3) The fact that an indictment or summons has not been amended as provided in this section shall not, unless the court has refused to allow the amendment, affect the validity of the proceedings thereunder.

150. Pleas

(1) If the accused does not object that he has not been duly served with a copy of the indictment or summons, or apply to have it quashed under section 147, he shall either plead to it, or except to it on the ground that it does not disclose any offence cognizable by the court. If he pleads he may plead either-

(*a*) that he is guilty of the offence charged, or with the concurrence of the prosecutor, of any other offence of which he might be convicted on the indictment or summons;

(*b*) that he is not guilty;

(*c*) that he has already been convicted of the offence with which he is charged;

(*d*) that he has already been acquitted of the offence with which he is charged;

(*e*) that he has received a pardon for the offence charged;

(*f*) that the court has no jurisdiction to try him for the offence; or

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(*g*) that the prosecutor has no title to prosecute.

(2) Two or more pleas may be pleaded together except that the plea of guilty cannot be pleaded with any other plea to the same charge.

(3) The accused may plead and except together.

(4) Any person who has once been called upon to plead to any indictment or summons shall, except as is specifically provided in this Act or in any other law, be entitled to demand that he be either acquitted or found guilty:

Provided that in a magistrate's court, by leave of the court and for reasons to be stated on the record of the proceedings, the prosecution may withdraw the case at any time before the close of the case for the prosecution, in which case the accused person shall be discharged without prejudice to his being charged again for the same offence; the prosecutor may withdraw the case at any time after the close of the case for the prosecution before judgment by leave of the court and for reasons to be noted on the said record in which case the accused shall be acquitted and discharged.

151. Truth of defamatory matter to be specially pleaded

(1) A person charged with the unlawful publication of defamatory matter, who sets up as a defence that the defamatory matter is true and that it was for the public benefit that the publication should be made, shall plead that matter specially, and may plead it with any other plea except the plea of guilty.

(2) Notice of such plea shall, unless waived, be given as provided in section 148.

152. Person committed or remitted for sentence

(1) When a person has been committed to the High Court by a magistrate's court for sentence, or his case has been remitted by the Director of Public Prosecutions to a magistrate's court for sentence, he shall be called upon to plead to the indictment or summons in the same manner as if he had, in the case of such committal, been committed for trial, and, in the case of such remittal, as if he were being tried summarily, and may plead either that he is guilty of the offence charged, or with the concurrence of the prosecutor, of any other offence of which he might be convicted on the indictment or summons.

(2) If he pleads that he is not guilty, the court shall, upon being satisfied that he duly admitted before the magistrate's court that he was guilty of the offence charged, and was so guilty, direct a plea of guilty to be entered or enter such plea notwithstanding his plea of not guilty.

(3) A plea so entered has the same effect as if it had been actually pleaded.

(4) If the court is not so satisfied, or if notwithstanding that the accused pleads guilty it appears upon an examination of the depositions of the witnesses that he has not in fact committed the offence charged or any other offence of which he might be convicted on the

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indictment or summons, the plea of not guilty shall be entered and the trial shall proceed as in other cases when that plea is entered.

153. Accused refusing to plead

If the accused, when called upon to plead to an indictment or summons, will not plead or answer directly thereto, the court may, if it thinks fit, order a plea of not guilty to be entered on behalf of the accused. A plea so entered has the same effect as if it had been actually pleaded.

154. Statement of accused sufficient plea of former conviction or acquittal

In any plea of a former conviction or acquittal it shall be sufficient for an accused to state that he has been lawfully convicted or acquitted (as the case may be) of the offence charged.

155. Trial on plea to the jurisdiction

Upon a plea to the jurisdiction of the court, the court shall proceed to satisfy itself in such manner and upon such evidence as it thinks fit, whether it has jurisdiction or not.

156. Issues raised by plea to be tried

If the accused pleads any plea or pleas, other than the plea of guilty or a plea to the jurisdiction of the court, he is, by such plea without any further form, deemed to have demanded that the issue raised by such plea or pleas shall be tried by the court.

PART XII
Procedure in Case of the Insanity or Other Incapacity of an Accused Person (ss 157-175)

157. Interpretation in Part XII

For the purposes of this Part unless the context otherwise requires-

"a medical practitioner" means the medical officer attached to any place of safe custody or any medical practitioner from whom a judicial officer requires an opinion; and

"a place of safe custody" means any mental or other hospital, prison or any other place of safe custody.

158. Inquiry by court as to lunacy of accused

(1) When in the course of a trial or preparatory examination the judicial officer has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, he shall inquire into the fact of such unsoundness.

(2) If the judicial officer is of opinion that the accused is of unsound mind, and consequently incapable of making his defence, he shall postpone further proceedings in the case.

(3) If the case is one in which bail may be granted, the judicial officer may release the

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accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person and for his appearance before the judicial officer or such other officer as the judicial officer may appoint in that behalf.

(4) If the case is one in which bail may not be granted or if sufficient security is not given the judicial officer may remand the accused in custody.

(5) In either of the cases mentioned in subsections (3) and (4) the officer shall report, in the case of a magistrate's court, to the High Court which shall report to the President, and, in the case of the High Court, to the President direct.

(6) On consideration of a report made to him in terms of subsection (5) the President may order the accused to be confined during his pleasure in a place of safe custody or may take such other course as seems to him proper in the circumstances.

159. Defence of lunacy at preparatory examination

When the accused person appears to be of sound mind at the time of a preparatory examination, the magistrate, notwithstanding that it is alleged that, at the time when the act was committed, in respect of which the accused person is charged, he was by reason of unsoundness of mind incapable of knowing the nature of the act or that it was wrong or contrary to law, shall proceed with the case, and if the accused person ought, in the opinion of the magistrate otherwise to be committed for trial, the magistrate shall so commit him.

160. Defence of lunacy at trial

(1) Where an act or omission is charged against any person as an offence and it is given in evidence on the trial of such person for that offence that he was insane so as not to be responsible for his action at the time when the act was done or omission made, then, if it appears to the court before which such person is tried that he did the act or made the omission charged but was insane as aforesaid at the time when he did or made it, the court shall return a special finding to the effect that the accused was guilty of the act or omission charged, but was insane as aforesaid when he did the act or made the omission.

(2) Where a special finding is returned in a magistrate's court such court shall report to the High Court which shall report further to the President and, where a special finding is returned in the High Court, the High Court shall report direct to the President and in either case the court returning such finding shall meantime order the accused to be kept in custody as a criminal lunatic in such place and in such manner as it shall direct.

(3) The President may order such person to be confined during his pleasure in a place of safe custody.

161. Resumption of examination or trial

(1) Whenever any preparatory examination or trial is postponed under section 158, the court may, at any time, resume the preparatory examination or trial and require the accused person to appear or to be brought before the judicial officer, and if the judicial officer considers him

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capable of making his defence, the preparatory examination or trial shall proceed.

(2) If the judicial officer considers the accused to be still incapable of making the defence, he shall act as if the accused were brought before him for the first time.

162. Certificate of medical practitioner as to sanity to be admissible in evidence

If an accused person is confined in a place of safe custody under the provisions of section 158 and a medical practitioner certifies that such person is capable of making his defence, he shall be taken before a judicial officer at such time as the judicial officer appoints to be dealt with according to law and the certificate of such medical practitioner shall be receivable in evidence.

163. Procedure when accused does not understand proceedings

If the accused, though not insane, cannot be made to understand the proceedings, the judicial officer may proceed with the preparatory examination or trial, and, if the examination results in a committal for trial, or where the trial is before a magistrate's court and results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances, and the High Court shall make thereon such order as it thinks fit.

164. Inquiry in absence of accused

Any inquiry into the fact of the unsoundness of mind of any person under this Part may be held in the absence of the accused person if the judicial officer is satisfied that owing to the state of the accused's mind it would be in the interests of the safety of the accused or of other persons or in the interests of public decency that he should be absent.

165. Transfers from place of safe custody

Subject to any contrary direction that may in any particular case be given by the President, any person confined under the provisions of this Part may be transferred from a place of safe custody to a place of safe custody which is a mental or other hospital with the consent of the Director of Health Services, and from a place of safe custody to a place of safe custody which is a prison with the consent of the Commissioner of Prisons.

166. Notification of confinement and transfer

(1) Whenever an order is made by the President under section 158(6) or section 160(3) that a person be confined in a place of safe custody which is a mental or other hospital, a copy of such order shall be transmitted to the Master of the High Court (hereafter referred to as the "Master") and to the Director of Health Services.

(2) Whenever an order is made by the President under the provisions mentioned in subsection (1) that a person be confined in a place of safe custody which is a prison, a copy of such order shall be transmitted to the Master, Director of Health Services and the Commissioner of Prisons.

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(3) Whenever a person confined by virtue of an order made under any of the provisions mentioned in subsection (1) is transferred from one place of safe custody to another the person in charge of the former place shall notify the Master of such transfer.

167. Inquiry into continued confinement

(1) Any person confined in a place of safe custody under the provisions of this Part may directly or through a *curator-ad-litem* apply, and the husband, wife or any other relative or any friend of a person so confined may apply, and the Master may apply, to the President for an inquiry into the mental condition, and the desirability of the continued confinement, of such person.

(2) On consideration of any such application the President shall have power to direct that such an inquiry be held by a judge of the High Court.

(3) The judge holding such inquiry may, after the conclusion thereof-

(*a*) in the case of any person so confined, make recommendations for the consideration of the President respecting the release or further confinement of such person; or

(*b*) in the case of a person confined under the provisions of section 158, order that the postponed proceedings be resumed, subject to the provisions of section 161(2), in a court, and within a period, to be specified in the order.

(4) On consideration of recommendations made in pursuance of paragraph (*a*) of subsection (3) the President may make such order, and attach thereto such conditions, as he thinks fit.

(5) A copy of any order made under subsection (4) shall be transmitted to the Master and the Director of Health Services and, if it relates to a person confined in a place of safe custody which is a prison, to the Commissioner of Prisons.

(6) An inquiry held under this section shall be held at such time and place as the judge holding it may determine.

(7) The Chief Justice may, by statutory instrument, make rules to regulate the conduct of inquiries under this section.

168. Appointment of *curator bonis* of person confined

(1) Whenever any person (in this section referred to as "the person confined") is confined in a place of safe custody under the provisions of this Part, the Master may, of his own motion or at the instance of any person, appoint a *curator bonis* for the care or custody of any property of the person confined, and where it appears to the Master desirable that provision should be made for the maintenance and other necessary purposes or requirements of the person confined, or any member of his family, out of any cash or available securities belonging to him in the hands of his bankers or of any other person, the Master may authorize and require such banker or other person to pay to the *curator bonis* or the person in charge of the place of safe

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custody in which the person confined is confined such sums as may be deemed necessary and may give instructions as to the application thereof for the benefit of the person confined or the relief of his family.

(2) The Master shall transmit notice of any appointment made or authorization given under subsection (1) to the person in charge of the place of safe custody in which the person confined is confined and, when such place is a mental or other hospital, to the Director of Health Services and, when such place is a prison, to the Commissioner of Prisons.

(3) Any authorization given in terms of subsection (1) may be reviewed by the High Court at any time on application by the Master or any person able to show *locus standi* and may be varied, cancelled or replaced, as the Court thinks fit.

(4) The Chief Justice may, by statutory instrument, make rules respecting applications for review in terms of the last preceding subsection.

169. Reports on persons confined

(1) Whenever a person is confined in a place of safe custody under the provisions of this Part the person in charge of such place shall transmit in the prescribed form annually to the Director of Health Services a report on the mental and physical condition of the person confined, and shall transmit a copy of such report to the Master.

(2) The Director of Health Services, if not satisfied with such report, may call for such further information as he may require, or may himself visit and examine the person confined in reference to his mental condition or instruct some other medical practitioner to examine the person confined and report on his mental condition.

(3) The person in charge of any place of safe custody shall give notice forthwith-

(*a*) of the death of any person confined under the provisions of this Part to-

(i) the President;

(ii) the District Commissioner;

(iii) the District Registrar of Births and Deaths;

(iv) the Director of Health Services;

(v) the Master; and

(vi) in the case of a person confined in a prison, the Commissioner of Prisons;

(*b*) of the escape of a person so confined to-

(i) the District Commissioner;

(ii) the nearest police station;

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(iii) the Director of Health Services;

(iv) the Master; and

(v) in the case of a person confined in a prison, the Commissioner of Prisons.

170. Cessation of mental disorder, etc., of criminal lunatic

(1) Where two medical practitioners have certified, or the Mental Health Board has certified, to the Director of Health Services in such manner as may be prescribed that a person confined under the provisions of section 160 is no longer a mentally disordered or defective person, the Director, after making such inquiry into the matter as he may think fit may report to the President who, on consideration of such report and such certificate, may make such order concerning-

(*a*) the continued confinement;

(*b*) the release; or

(*c*) the conditions governing or affecting the confinement or release,

of the person so confined, as he may think fit.

(2) A copy of any order made under subsection (1) shall be transmitted to the Master and the Director of Health Services and, if it relates to a person confined in a place of safe custody which is a prison, to the Commissioner of Prisons.

171. False statements

Every person is guilty of an offence who makes any wilful mis-statement of any material fact in any application, statement of particulars, report or certificate made, submitted or given under this Part.

172. Ill-treatment of persons confined

Any person in charge of, or any officer, medical officer, nurse, attendant, servant or other person employed or performing duties at a place of safe custody who ill-treats or wilfully neglects any person confined under the provisions of this Part is guilty of an offence.

173. Conniving at escape of person confined

Any person who wilfully assists or permits or connives at the escape or attempted escape of any person confined under the provisions of this Part or who secretes or harbours such a person who has escaped is guilty of an offence.

174. Employment of male persons in custody of females

(1) Subject to the provisions of subsection (2), it shall not be lawful to employ any male person in any place of safe custody to exercise the personal custody or restraint of any female

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person confined therein, and any person employing a male person contrary to this section is guilty of an offence.

(2) This section shall not prohibit the employment of male persons on such occasions of urgency as may, in the opinion of the person in charge of the place of safe custody, render such employment necessary.

175. Penalties

Any person convicted of an offence under section 171, 172, 173 or 174 shall be liable to a fine not exceeding P500 or to imprisonment for a term not exceeding 12 months, or to both.

PART XIII
Procedure after Commencement of Trial (ss 176-197)

A. IN THE HIGH COURT AND MAGISTRATES' COURT (ss 176-184)

176. Separate trials

When two or more persons are charged in the same indictment or summons, whether with the same offence or with different offences, the court may, at any time during the trial on the application of the prosecutor or any of the accused, direct that the trial of the accused or any of them shall be held separately from the trial of the other or others of them, and for that purpose may abstain from giving a judgment as to any of such accused.

177. Defence by counsel, etc.

Every person charged with an offence is entitled to make his defence at his trial and to have the witnesses examined or cross-examined by his counsel, or other legal representative:

Provided that upon his trial before a magistrate's court, an accused person under the age of 16 years may be assisted by his natural or legal guardian, and any accused person who in the opinion of the court requires the assistance of another person may, with the permission of the court, be so assisted.

178. Presence of accused

(1) Every criminal trial shall take place, and the witnesses shall, except where otherwise expressly provided by this Act or any other law, give their evidence *viva voce*, in open court in the presence of the accused, unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable. In that event the court may order him to be removed and may direct the trial to proceed in his absence.

(2) If the accused absents himself during the trial without leave, the court may direct a warrant to be issued to arrest him and bring him before the court forthwith.

(3) The court may, at any time during the trial, order that any or every person who is to be called as a witness (other than the accused himself) shall leave the court and remain absent

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until he is called and that he shall remain in court after his evidence has been given.

(4) The High Court may, whenever it thinks fit, and any magistrate's court, may, if it appears to that court to be in the interest of good or public morals or of the administration of justice, direct that a trial shall be held within closed doors; and the court may direct that all or any persons, not being members or officers of the court or parties to the case, their legal representatives, or persons otherwise directly concerned with the case, be excluded from the court during the trial.

(5) Without prejudice to the provisions of subsection (4), any trial in relation to any of the following offences under the Penal Code, namely rape, attempted rape, indecent assault on any woman or girl, defilement of a girl under the age of 16 years, and indecent assault on a boy under the age of 14 years, shall be held within closed doors.

(6) Where any trial is held within closed doors in accordance with the provisions of subsection (5), the court shall direct that no person shall be present at the sitting of the court except-

(*a*) members and officers of that court;

(*b*) parties to the case before the court, their legal representatives, and witnesses and other persons directly concerned in the case;

(*c*) such other persons as the court may specially authorise to be present.

(7) No newspaper report of the proceedings shall reveal the name, address, or any particulars calculated to lead to the identification of the victim or complainant of the offence, and no picture of the victim or complainant of the offence shall be published in any newspaper.

(8) Nothing in this section shall prohibit the printing or publishing of any matter in a *bona fide* series of law reports or in a newspaper or periodical of a technical character *bona fide* intended for circulation among members of the legal or medical professions.

179. No information of trial of certain offences to be published

(1) If an accused is tried upon a charge referred to in section 70(5) no person shall at any time (subject to the provisions of subsection (3)) publish by radio or any document produced by printing or any other method of multiplication any information relating to the said trial or any information disclosed thereat, unless the judge or officer presiding at such trial has, after having consulted the person against or in connection with whom the offence charged is alleged to have been committed (or if he is a minor, his guardian), given his consent, conveyed in a document signed by himself or by the Registrar or clerk of the court, to such publication.

(2) Any person contravening subsection (1) shall be guilty of an offence and liable to a fine not exceeding P100 or to imprisonment for a term not exceeding three months, or to both.

(3) The prohibition contained in subsection (1) shall not apply to the publication in the form of a *bona fide* law report of any information relating to or disclosed at any trial as aforesaid

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which is necessary to report any question of law which was raised during such trial or during any proceeding resulting therefrom, and any decision or ruling given by any court on such question:

Provided that such report does not mention the name of the person tried or of the person against or in connection with whom or the place where the offence in question was alleged to have been committed or of any witnesses at the trial.

180. Conduct of trial

(1) In any trial, before any evidence is given, the prosecutor is entitled to address the court for the purpose of explaining the charge and opening the evidence intended to be adduced for the prosecution, but without comment thereon.

(2) The prosecutor shall then examine the witnesses for the prosecution and put in and read any documentary evidence which may be admissible. He may also, in the case of a trial before the High Court and in a case remitted to a magistrate's court to be dealt with, read any evidence given by the accused as well as his statement made in the presence of the magistrate at the preparatory examination.

(3) If, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged in the indictment or summons, or any other offence of which he might be convicted thereon, it may then return a verdict of not guilty.

(4) At the close of the evidence for the prosecution the proper officer of the court is required to ask the accused, or each of the accused if more than one, or his legal representative, if any, whether he intends to adduce evidence in his defence. If he answers in the affirmative he may by himself or his legal representative address the court for the purpose of opening the evidence intended to be adduced for his defence, but without comment thereon. He or his legal representative shall then examine his witnesses and put in and read any documentary evidence which may be admissible.

181. Summing up by counsel, etc.

After all the evidence has been adduced, the prosecutor shall be entitled to address the court, summing up the whole case; and the accused, or each of the accused if more than one, shall be entitled by himself or his legal representative to address the court. If in his address the accused or his legal representative raises any matter of law, the prosecutor shall be entitled to reply but only on the matter of law so raised.

182. Judgment

After the evidence is concluded and the legal representatives or the accused (as the case may be) have addressed the court or stated that they do not wish to do so, the presiding officer may give judgment or may postpone the same to a future time.

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183. Validity of judgment

(1) The judgment of a court, or other proceedings whatever of a court in a criminal case, is not invalid by reason of it happening on a Sunday.

(2) When by mistake a wrong judgment or sentence is delivered the court may before or immediately after it is recorded, amend the judgment or sentence, and it shall stand as ultimately amended.

184. Judgment as valid as if indictment, etc., had been originally correct

Every judgment which is given after the making of any amendment under this Act shall be of the same force and effect in all respects as if the indictment or summons had originally been in the same form in which it was after such amendment was made.

B. IN CASES REMITTED TO A MAGISTRATES' COURT (ss 185-186)

185. Remittal on confession of the accused

(1) In a case remitted to a magistrate's court on the confession of the accused, the presiding officer shall, when such person is brought before his court, inform him that the preparatory examination in the course of which he voluntarily admitted his guilt, having been transmitted to the Director of Public Prosecutions, has been remitted by that officer to the court, and the provisions of section 152 shall *mutatis mutandis* be observed by the court; and if the accused is convicted such presiding officer shall ask the accused whether he has anything to say why sentence should not then be passed upon him for the offence of which he has been found or confessed himself guilty.

(2) If, in answer to that question, the accused desires to have any witness formerly examined recalled, or any person not yet examined called as a witness, or if the accused states any other ground why sentence should not then be passed upon him, the court shall consider what is urged by the accused in support of his application for further evidence or his objection to be then sentenced and shall pass or postpone sentence as it deems to be most in accordance with real and substantial justice.

(3) If the court in any such case deems it proper to pass sentence at once, a note of the application or objection made by the person accused and of the reasons for the disallowance thereof shall be noted upon the record.

186. Remittal otherwise than on confession of accused

(1) In a case remitted by the Director of Public Prosecutions but not upon the confession of the accused, the accused shall, when brought before the court, be required to plead and the case shall, except as hereinafter provided, be proceeded with in the manner prescribed by law in respect of criminal cases which have not been remitted.

(2) When the officer who presides at the trial of any such case is himself the magistrate before whom such preparatory examination was taken, it shall not be imperative upon him to

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recall any witness who formerly gave evidence in the presence of such magistrate and of the accused, but it shall be competent and sufficient to read as evidence the evidence or deposition of such witness in the presence of the accused; any statement or evidence given by the accused at the preparatory examination shall be read to the accused unless such reading is dispensed with as in the case of a witness, and shall form part of the record of the trial, without prejudice to the accused's rights to make a further statement or give further evidence on oath:

Provided that with the consent of the accused or his representative, the magistrate may dispense with the reading of any such evidence or deposition.

(3) If it appears to the court that the ends of justice might be served by having a witness, formerly examined in the presence of the presiding officer and of the accused, summoned again for further examination, then such witness shall be summoned and examined accordingly.

(4) Except where specially provided in Part XIV or in any law no deposition of any witness not previously examined in the presence of both the presiding judicial officer and such accused person shall be read or used at the subsequent trial, but such witness, if a necessary one, shall be again summoned and be examined in like manner as if he had not been before examined in the case.

(5) In every case where the Director of Public Prosecutions has remitted a case for trial under the powers conferred on him by section 94, the accused shall be entitled, at the time of the trial, to inspect, without fee or reward, all evidence and depositions (or copies thereof) which have been taken and the statement made by him at the preparatory examination.

C. VERDICTS POSSIBLE ON PARTICULAR INDICTMENT OR SUMMONS (ss 187-197)

187. When offence proved is included in offence charged

(1) When a person is charged with an offence consisting of several essential elements, a combination of some only of which constitutes a complete offence (hereinafter referred to as a "minor offence"), and such combination is proved but the remaining essential elements are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

188. Persons charged with any offence may be convicted of attempt

When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt.

189. Charges of certain offences respecting infant and unborn children, and abortion, etc.

(1) When a woman is charged with the murder of her child, being a child under the age of

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12 months, and the court is of the opinion that she is not guilty of murder but is guilty of infanticide, she may be convicted of the offence of infanticide although she was not charged with it.

(2) When a person is charged with the murder or manslaughter of any child or with infanticide, or with an offence under section 160 or section 161 of the Penal Code (relating to the procuring of abortion), and the court is of opinion that he is not guilty of murder, manslaughter or infanticide or of an offence under section 160 or section 161 of the Penal Code, but that he is guilty of the offence of killing an unborn child, he may be convicted of that offence although he was not charged with it.

(3) When a person is charged with killing an unborn child and the court is of opinion that he is not guilty of that offence but that he is guilty of an offence under either section 160 or 161 of the Penal Code (relating to the procuring of abortion), he may be convicted of that offence although he was not charged with it.

(4) When a person is charged with the murder or infanticide of any child or with killing an unborn child and the court is of opinion that he is not guilty of any of the said offences, but that he is guilty of an offence under section 223 of the Penal Code (relating to concealment of birth), he may be convicted of that offence although he was not charged with it.

190. Charge of manslaughter in connection with driving of motor vehicle

When a person is charged with manslaughter in connection with the driving of a motor vehicle by him and the court is of opinion that he is not guilty of that offence, but that he is guilty of an offence under section 48 of the Road Traffic Act (relating to reckless or negligent driving), he may be convicted of that offence although he was not charged with it.

191. Charge of administering oaths

Where a person is charged with an offence under subsection (1) of section 55 of the Penal Code (relating to the taking of unlawful oaths), and the court is of opinion that he is not guilty of that offence but is guilty of another offence under subsection (2) of the said section, he may be convicted of that other offence although he was not charged with it.

192. Charge of rape

When a person is charged with rape and the court is of opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 146, 147, 150, 168 and 246 of the Penal Code (relating to indecent assault on females, defilement of girls under 16 years of age, procuring defilement by threats etc., incest by males and common assault, respectively), he may be convicted of that offence although he was not charged with it.

193. Charge of defilement of a girl under 16 years of age

When a person is charged with the defilement of a girl under the age of 16 years and the court is of opinion that he is not guilty of that offence but that he is guilty of an offence under section 146 of the Penal Code (relating to indecent assault on females), he may be convicted

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of that offence although he was not charged with it.

194. Charge of burglary, etc.

When a person is charged with any offence mentioned in sections 300 to 305 of the Penal Code (relating to burglary, house-breaking and similar offences) and the court is of opinion that he is not guilty of that offence but that he is guilty of any other offence mentioned in those sections or in sections 317 to 320 of the Penal Code, he may be convicted of that other offence although he was not charged with it.

195. Charge of stealing

When a person is charged with stealing anything and-

(*a*) the facts proved amount to an offence under section 317 of the Penal Code (relating to the receiving of stolen property), he may be convicted of that offence although he was not charged with it;

(*b*) it is proved that he obtained the thing in any such manner as would amount, under the provisions of the Penal Code or of any other law for the time being in force, to obtaining it by false pretences, he may be convicted of the offence of obtaining it by false pretences although he was not charged with it.

196. Charge of obtaining by false pretences

When a person is charged with obtaining anything capable of being stolen by false pretences with intent to defraud, and it is proved that he stole the thing, he may be convicted of the offence of stealing although he was not charged with it.

197. Construction of sections 187 to 196

The provisions of sections 187 to 196, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other law and the other provisions of this Act and the provisions of sections 188 to 196, both inclusive, shall be construed as being without prejudice to the generality of the provisions of section 187.

PART XIV
Witnesses and Evidence in Criminal Proceedings (ss 198-277)

A. SECURING THE ATTENDANCE OF WITNESSES (ss 198-209)

198. Process for securing the attendance of witnesses

(1) Either party desiring to compel the attendance of any person to give evidence or to produce any book, papers or documents, in any criminal case, may take out of the office prescribed by rules of court the process of the court for that purpose.

(2) When the accused desires to have any witnesses subpoenaed or warned and satisfies

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the prescribed officer of the court-

(*a*) that he is unable to pay the necessary costs and fees; and

(*b*) that such witnesses are necessary and material for his defence,

the prescribed officer of the court shall subpoena such witnesses or cause them to be warned.

(3) In any case where the prescribed officer of the court is not so satisfied, he shall, upon the request of the accused, refer the application to the officer presiding over the court, who may grant or refuse such application or may defer giving his decision until he has heard the other evidence in the case or any part thereof.

(4) For the purposes of this Part "prescribed officer" means the Registrar, Assistant Registrar, clerk of the court or any officer prescribed by rules of court.

199. Service of subpoenas

Service of subpoenas in criminal cases shall be effected in the manner provided by rules of court.

200. Duty of witness to remain in attendance

Every witness duly subpoenaed or warned to attend and give evidence at any criminal trial shall be bound to attend and to remain in attendance throughout the trial unless excused by the court.

201. Subpoenaing of witnesses or examination of persons in attendance by the court

The court may at any stage subpoena any person as a witness or examine any person in attendance though not subpoenaed as a witness, or may recall and re-examine any person already examined; and the court shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential for the purpose of arriving at a just decision of the case.

202. Powers of court in case of default of witness in attending or giving evidence

(1) Whenever any person appearing either in obedience to a subpoena or warning or by virtue of a warrant, or being present and being verbally required by the court to give evidence, refuses to be sworn or, having been sworn, refuses to answer such questions as are put to him, or refuses or fails to produce any document or thing which he is required to produce, without in any such case offering any just excuse for such refusal or failure, the court may adjourn the proceedings for any period not exceeding eight days, and may, in the meantime, by warrant commit the person so refusing or failing to a gaol, unless he sooner consents to do what is required of him. If such person upon being brought up at the adjourned hearing again refuses or fails to do what is so required of him, the court, if it sees fit, may again adjourn the proceedings and commit him for the like period, and so again from time to time until such

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person consents to do what is required of him.

(2) Nothing contained in this section shall prevent the court from giving judgment in any case or otherwise disposing of the same in the meantime according to any other sufficient evidence taken.

(3) No person shall be bound to produce any document or thing not specified or otherwise sufficiently described in the subpoena unless he actually has it in court.

203. Requiring witness to enter into recognizance

(1) Every court before which a trial is proceeding may lawfully require any witness, either alone or together with one or more sufficient sureties to the satisfaction of the court, to enter into a recognizance under the condition that the witness shall at any time within 12 months from the date thereof appear and give evidence at the trial upon being served with a subpoena or upon being warned at some certain place to be selected by the witness; and if any witness being so required to enter into any such recognizance refuses or fails to do so, the court may commit to and detain in a gaol the witness so refusing or failing, until such recognizance has been entered into as aforesaid.

(2) Every recognizance so entered into shall specify the name and surname of the person entering into it, his occupation or profession (if any), the place of his residence and the name and number (if any) of the street in which that place is, and whether he is an owner or tenant thereof or a lodger therein.

(3) All such recognizances shall be liable to be estreated in the same manner as any forfeited recognizance is by law liable to be estreated by the court before which the principal party thereto was bound to appear.

204. Absconding witness

Whenever any person is bound by recognizance to give evidence or is likely to give material evidence before any court in respect of any offence, any magistrate may, upon information in writing and on oath that such person is about to abscond or has absconded, issue his warrant for the arrest of such person; and, if such person is arrested, any magistrate, upon being satisfied that the ends of justice would otherwise be defeated, may commit him to a gaol until the time at which he is required to give evidence, unless in the meantime he produce sufficient sureties; but any person so arrested shall be entitled on demand to receive a copy of the information upon which the warrant for arrest was issued.

205. Committal of witness who refuses to enter into recognizance

Any witness who refuses to enter into any recognizance as aforesaid may be committed by the court by warrant to the gaol for the place where the trial is to be held, and to be kept there until after the trial, or until the witness enters into such a recognizance as aforesaid before a magistrate having jurisdiction in the place where the gaol is situated:

Provided that, if the accused is afterwards discharged, any magistrate having jurisdiction

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shall order such witness to be discharged.

206. Compelling witness to attend and give evidence

The provisions of section 66 shall *mutatis mutandis* apply in connection with any person subpoenaed or warned to attend any trial as a witness.

207. Witnesses from prison

(1) When the attendance of any person confined in any gaol in Botswana is required in any court of criminal jurisdiction in any criminal case cognizable therein or at a preparatory examination, the court before which such prisoner is required to attend, or the judge of the High Court, may before or during the sittings or session of the court at which the attendance of such person is required, or the magistrate holding the preparatory examination (as the case may be) may make an order upon the gaoler or other person having the custody of such prisoner to deliver such prisoner to the person named in such order to receive him; and the person so named shall, at the time prescribed in the order, convey such prisoner to the place at which such person is required to attend, there to receive and obey such further order as to the said court seems fit.

(2) The judge of the High Court may at any time order to be brought before the court any person confined in any gaol in Botswana for the purpose of taking such evidence as such judge may consider necessary.

(3) Whenever the attendance of any person confined in a gaol is required as a witness on behalf of a private prosecutor or an accused person (other than an accused person to whose defence the evidence of such witness is deemed material and who has not sufficient means to make the deposit) there shall be deposited with the gaoler or other officer having the custody and control of the person so confined such sum as may be necessary to cover the expenses to be occasioned by the person so confined and his necessary escort to and from the court and his maintenance during such period as the person so confined and his escort are likely by reason of the attendance to be detained outside the gaol, and no person shall be required or allowed to obey any such summons unless such a sum has previously been deposited.

(4) The expenses mentioned in subsection (3) shall be determined in accordance with a scale prescribed by the Minister.

208. Service of subpoena to secure the attendance of a witness residing in Botswana outside jurisdiction of court

(1) Whenever a subpoena to give evidence in a criminal case has been issued out of any court and it appears that the person whose attendance is thereby required resides or is for the time being in a district in Botswana outside the area of jurisdiction of that court, a magistrate of that district shall endorse on the subpoena his order that it be served on the person named therein, and the subpoena so endorsed shall, when delivered to the proper officer within that district, be served by him as soon as possible on such person:

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Provided that-

(i) the necessary expenses to be incurred by the person subpoenaed, in going to and returning from the court whereat the subpoena was issued and his detention at the place whereat and for the purpose of which his attendance is required, shall be tendered to him with the subpoena;

(ii) if the subpoena is not sued out by the State a sum sufficient to cover the expenses of serving the subpoena shall be lodged with the Registrar or clerk of the court by the person suing out the subpoena.

(2) If any person who has been served as aforesaid with a subpoena and to whom has been tendered the expenses aforesaid fails, without lawful excuse to attend at the time and place mentioned in the subpoena, a magistrate of the said district may issue a warrant for the apprehension of that person, who shall be liable to be dealt with in the same manner as he might have been dealt with if he had failed to attend without lawful excuse when served with a subpoena to attend a like court in the area wherein he resides or is for the time being.

(3) The return of the proper officer showing that service of the subpoena has been duly effected, together with a certificate under the hand of the Registrar or clerk of the court that the person whose attendance was required by the subpoena failed to attend when called upon, and has established no lawful excuse for the non-attendance, shall be deemed sufficient proof of the non-attendance for the purpose of dealing with the said person under subsection (2):

Provided that, in the case of a warning through a Chief, Sub-Chief or Headman, the court shall satisfy itself that the person concerned was duly warned.

(4) The expression "proper officer" as used in this section includes a Sheriff, Deputy-Sheriff, messenger, deputy-messenger, or other officer who by law or rule of court is charged with the duty of serving subpoenas to witnesses in criminal cases.

209. Payment of expenses of witnesses

(1) Any person who has attended any criminal proceedings as a witness for the State shall be entitled to such allowance as may be prescribed by regulations made under subsection (3):

Provided that the officer presiding at such proceedings may if he thinks fit direct that no such allowance or only a part of such allowance shall be paid to any such witness.

(2) Subject to any regulations made under subsection (3), the officer presiding at any criminal proceedings may, if he thinks fit, direct that any person who has attended such proceedings as a witness for the accused shall be paid such allowance as may be prescribed by such regulations, or such lesser allowance as such officer may determine.

(3) The Minister may, by regulations, prescribe a tariff of allowances which may be paid out of public moneys to witnesses in criminal cases and may, by such regulations, prescribe different tariffs for witnesses according to their several callings, occupations or station in life, and according also to the distances to be travelled by them to reach the place of trial,

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preparatory examination or other criminal proceedings, and may, by regulations, further prescribe the circumstances in which any such allowance may be paid to any witness for the accused.

B. EVIDENCE ON COMMISSION (ss 210-213)

210. Taking evidence on commission

(1) Whenever in the course of a trial, preparatory examination or any other criminal proceedings it appears to a court that the examination of a witness is necessary for the ends of justice and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience, which under the circumstances of the case would be unreasonable, such court may dispense with such attendance and may issue a commission to any magistrate or, where the witness is resident outside Botswana, to any person authorized by such court to take evidence on commission in civil cases outside Botswana, within the local limits of whose jurisdiction such witness resides:

Provided that-

(i) in any such application, the specific fact or facts with regard to which the evidence of the witness is required shall be set out, and the court may by its order confine the examination of the witness to those facts, and

(ii) when the application is on behalf of the State, the court may, if it thinks fit to do so, direct as a condition of such order that the expense necessary to the representation of the accused by attorney or counsel at the examination shall be paid by the State.

(2) The magistrate or other person to whom the commission is issued shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner as in the case of an ordinary preparatory examination taken before himself or, where the commission is executed outside Botswana, in the same manner as a commission to take evidence in civil cases is executed.

211. Parties may examine witnesses

(1) Any party to any criminal proceedings in which a commission is issued may transmit any interrogatories in writing which the court directing the commission may think relevant to the issue, and the magistrate or other person to whom the commission is directed shall examine the witness upon such interrogatories.

(2) Any such party may appear before such magistrate or other person by counsel or attorney or, if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

212. Return of commission

(1) After a commission under section 210 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the court which issued it;

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and the commission, the return thereto, and the deposition shall be open at all reasonable times to the inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party and shall form part of the record.

(2) Any deposition so taken may also be received in evidence at any subsequent stage of the case before another court.

213. Adjournment of inquiry or trial

In every case in which a commission is issued under section 210 the trial, preparatory examination, or other criminal proceeding may be adjourned for a specified time, reasonably sufficient for the execution and return of the commission.

C. COMPETENCY OF WITNESS (ss 214-218)

214. No person to be excluded from giving evidence except under this Act

Every person not expressly excluded by this Act from giving evidence shall be competent and compellable to give evidence in a criminal case in any court in Botswana or before a magistrate on a preparatory examination.

215. Court to decide questions of competency of witnesses

It shall be competent for the court in which any criminal case is pending, or in the case of a preparatory examination, the magistrate, to decide upon all questions concerning the competency or compellability of any witness to give evidence.

216. Incompetency from insanity or intoxication

No person appearing or proved to be afflicted with idiocy, lunacy, or insanity, or labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability.

217. Evidence for prosecution by husband or wife of accused

(1) The wife or husband of an accused person is 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 where the accused is charged with the offence of bigamy or incest or 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 section, or where the accused is charged with the offence of abduction or any contravention of any law in force in Botswana in regard to indecency or immorality.

(2) The wife or husband of an accused person is competent but not compellable to give evidence for the prosecution without the consent of the accused person where such person is

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prosecuted for an offence against the separate property of the wife or husband of the accused person.

(3) For the purposes of this section, the expressions "wife" and "husband" include persons married according to customary law recognized within Botswana, and if under such customary law more marriages than one validly existed at the time of the alleged offence, then any of the wives of the accused person shall-

(*a*) be competent and compellable to give evidence for the prosecution under subsection (1) where the alleged offence is against the person of another wife or her children; and

(*b*) be competent but not compellable to give evidence for the prosecution as provided in subsection (2) where the alleged offence is against the separate property of another wife.

218. Evidence of accused and husband or wife on behalf of accused

(1) Every accused person, and the wife or husband (as the case may be) of every accused person, shall be a competent witness for the defence at every stage of the proceedings, whether the accused is charged solely or jointly with any other person:

Provided that-

(i) an accused person shall not be called as a witness except upon his own application;

(ii) the wife or husband of an accused person shall not be called as a witness for the defence, except upon the application of the accused person.

(2) Every accused person called as a witness in pursuance of this section shall, unless otherwise ordered by the court or by the magistrate holding a preparatory examination, give his evidence from the witness box or other place from which the other witnesses give their evidence.

(3) Nothing in this section shall affect any right of the accused person to make a statement without being sworn:

Provided that, if he gives evidence on his own behalf at the preparatory examination, such evidence may be read and put in at his trial by the prosecutor.

D. OATHS AND AFFIRMATIONS (ss 219-221)

219. Evidence to be on oath

Any witness who is or may be required to give evidence before a court shall, before giving such evidence, and unless he is a person described in section 221, or unless he is permitted to make an affirmation in accordance with section 220, be required to take an oath in such form as the Chief Justice may direct.

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220. Affirmations in lieu of oaths

(1) In any case where any person who is, or may be, required to take an oath objects to do so, it shall be lawful for such person to make an affirmation in the following words: "I do truly affirm and declare that" (*here insert the matter to be affirmed or declared*). Such affirmation or declaration shall be of the same force and effect as if such person had taken such oath.

(2) Every person authorized, required, or qualified by law to take or administer an oath shall accept, in lieu thereof, an affirmation or declaration as aforesaid.

(3) The same penalties, punishments and disabilities which are respectively in force and are attached to any neglect, refusal or false or corrupt taking or subscribing of any oath administered in accordance with section 219, shall apply and attach in like manner in respect of the neglect, refusal, and false or corrupt making or subscribing respectively, of any such affirmation or declaration as in this section mentioned.

221. When unsworn or unaffirmed testimony admissible

Any person produced for the purpose of giving evidence who, from ignorance arising from youth, defective education, or other cause, is found not to understand the nature, or to recognize the religious obligations, of an oath or affirmation, may be admitted to give evidence in any court or on a preparatory examination without being sworn or being upon oath or affirmation:

Provided that-

(i) before any such person proceeds to give evidence the presiding officer before whom he is called as a witness shall admonish him to speak the truth, the whole truth, and nothing but the truth, and shall further administer or cause to be administered to him any form of admonition which appears, either from his own statement or other source of information, to be calculated to impress his mind and bind his conscience, and which is not, as being of an inhuman, immoral, or religious nature, obviously unfit to be administered; and

(ii) any such person who wilfully and falsely states anything which, if sworn, would have amounted to the crime of perjury, or any offence declared by any statute to be equivalent to perjury, or punishable as perjury, shall be deemed to have committed that crime or offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that crime or offence.

E. ADMISSIBILITY OF EVIDENCE (ss 222-236)

222. Proof of certain facts by affidavit

(1) Whenever in any criminal proceedings the question arises whether any particular act, transaction or occurrence did or did not take place in any particular department or sub-department or branch thereof or office of the Government or in a particular court of law or

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in a particular bank, or whether any particular officer of the Government did or did not perform any particular act or take part in any particular transaction, a document purporting to be an affidavit made by a person who in that statement alleges-

(*a*) that he is in the service of the Government or of the said bank, as the case may be;

(*b*) that if the said act, transaction or occurrence had taken place in the said department or sub-department or branch thereof or office, court or bank, or if the said official had performed the said act or taken part in the said transaction, it would in the ordinary course of events have come to his, the deponent's knowledge, and a record thereof, available to him, would have been kept;

(*c*) that no such act, transaction or occurrence came to his knowledge or that he satisfied himself that no such record was kept or that no such act, transaction or occurrence took place,

shall on its mere production in those proceedings by any person, but subject to the provisions of subsection (5), be *prima facie* proof that no such act, transaction or occurrence took place.

(2) Whenever in any criminal proceedings the question arises whether any person bearing a particular name did or did not furnish any particular officer in the service of the Government with any particular information or document, a document purporting to be an affidavit made by a person who, in that affidavit, alleges that he is the said officer and that no person bearing the said name furnished him with any such information or document, shall on its mere production in those proceedings by any person, but subject to the provisions of subsection (5), be *prima facie* proof that the said person did not furnish the said officer with any such information or document.

(3) In any criminal proceedings in which the registration of any matter or the recording of any fact or transaction under any law is relevant to the issue, such registration or recording and any matter connected therewith may, subject to the provisions of subsection (5), be proved *prima facie* by the production of a document purporting to be an affidavit made by the person upon whom the said law confers the power or imposes the duty to effect any such registration or to record any such fact or transaction.

(4) Whenever any fact ascertained by any examination or process requiring any skill in bacteriology, biology, chemistry, physics, astronomy, geology, geography, anatomy, pathology, toxicology, or the identification of finger or palm prints is or may become relevant to the issue in any criminal proceedings, a document purporting to be an affidavit made by the person who in that affidavit alleges that he is in the service of the Republic of Botswana or of the Republic of South Africa or a province thereof or in the service of, or attached to, the South African Institute for Medical Research or any university in Southern or Central Africa or any institution designated by the President for the purposes of this section by order published in the *Gazette*, and that he has ascertained any such fact by means of such examination or process, and that he possesses the requisite skill in the relevant subject, shall on its mere production in those proceedings by any person, but subject to the provisions of subsection (5), be admissible to

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prove that fact:

Provided that such affidavit shall not be so admissible in a magistrate's court (if objected to by an accused or his representative, where the affidavit is produced by the prosecutor, or if objected to by the prosecutor or by an accused or his representative where the affidavit is produced by another accused or his representative) unless the objector or his representative has received, not later than three days after the day upon which the accused was summoned or otherwise notified of his trial, a notice in writing that such affidavit will be tendered in evidence at the trial, and has not within three days of the day of the receipt of such notice given notice in writing to the person who gave such first-mentioned notice, that he will object to the production of such affidavit.

(5) The court in which any such affidavit is adduced in evidence may in its discretion cause the person who made it to be summoned to give oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to him for reply, and such interrogatories and any reply thereto, purporting to be a reply from such person, shall likewise be admissible in evidence in such proceedings.

(6) Nothing contained in this section shall affect any provision of any law under which any certificate or other document is made admissible in evidence, and the provisions of this section shall be deemed to be additional to, and not in substitution for, any such provision.

223. Reports by medical and veterinary practitioners

In any proceedings before any court any facts ascertained by a medical practitioner or officer or by an intern or houseman in regard to any injury or the state of mind or condition of body of any person or his opinion as to the cause of death of any person, or any facts ascertained by a veterinary surgeon or officer as to any injury or his opinion as to the cause of death of any animal may be proved by a written report purporting to be signed by such medical practitioner or officer, intern or houseman, or veterinary surgeon or officer and such report shall be *prima facie* evidence of the facts stated therein and such report may be received and accepted as evidence in such proceedings without further proof being given that the signature is that of the medical practitioner or officer, intern or houseman or veterinary surgeon or officer in question unless the contrary be proved:

Provided that the court may, of its own motion or on the application of the prosecution or the accused, in its discretion decline to admit such report in evidence when tendered and require the person who has signed the report to attend the court to give evidence.

224. Inadmissibility of irrelevant evidence

No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact at issue in the case which is being tried.

225. Hearsay evidence

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No evidence which is in the nature of hearsay evidence shall be admissible in any case in which such evidence would be inadmissible in any similar case depending in the Supreme Court of Judicature in England.

226. Admissibility of dying declaration

The declaration made by any deceased person upon the apprehension of death shall be admissible or inadmissible in evidence in every case in which such declaration would be admissible or inadmissible in any similar case depending in the Supreme Court of Judicature in England.

227. Admissibility of depositions at preparatory examination of witness since deceased or kept away by the contrivance of the accused

(1) The deposition of any witness taken upon oath before any magistrate at a preparatory examination in the manner directed and required by section 70 in the presence of any person who has been brought before such magistrate on a charge of having committed an offence, or the deposition of a witness taken in the circumstances described in section 100, shall be admissible in evidence on the trial of the person for any offence charged in an indictment by the Director of Public Prosecutions on a preparatory examination at which the deposition was taken or on that person's trial before a magistrate's court or on the remittal of that person's case by the Director of Public Prosecutions after considering the same preparatory examination:

Provided that-

(i) it shall be proved on oath to the satisfaction of the court that the deponent is dead, or is incapable of giving evidence, or that he is too ill to attend, or that he is kept away from the trial by the means and contrivance of the accused, and that the deposition offered in evidence is the same which was sworn before the magistrate without alteration; and

(ii) it appears on the record or is proved to the satisfaction of the court that the accused, by himself, his counsel or attorney had a full opportunity of cross-examining the witness.

(2) The evidence of a witness given at a former criminal trial shall, under like circumstances, be admissible on any subsequent trial of the same person upon the same charge.

(3) Where the witness cannot be found after diligent search or cannot be compelled to attend or is absent from Botswana and delay or unnecessary expense would arise if he were compelled to attend, the court may, in its discretion, allow his deposition to be read as evidence at the trial subject to the conditions hereinbefore mentioned.

228. Admissibility of confessions by accused if freely and voluntarily made without undue influence and, if judicial, after due caution

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(1) Any confession of the commission of any offence shall, if such confession is proved by competent evidence to have been made by any person accused of such offence (whether before or after his apprehension and whether on a judicial examination or after commitment and whether reduced into writing or not), be admissible in evidence against such person:

Provided that-

(i) such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto,

(ii) if such confession is shown to have been made to a policeman, it shall not be admissible in evidence under this section unless it was confirmed and reduced to writing in the presence of a magistrate or any justice who is not a member of the Botswana Police Force, or

(iii) when such confession has been made on a preparatory examination before any magistrate, such person must previously, according to law, have been cautioned by the magistrate that he is not obliged, in answer to the charge against him, to make any statement which may incriminate himself, and that what he then says may be used in evidence against him.

(2) In any proceedings, any confession which is by virtue of any provision of subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him if he or his representative adduces in those proceedings any evidence, either directly or in cross-examining a witness, of any statement, verbal or in writing, made by the person who made the confession, either as part thereof or in connection therewith, if such evidence is, in the opinion of the officer presiding at such proceedings, favourable to the person who made the confession.

229. Admissibility of facts discovered by means of inadmissible confession

(1) It shall be lawful to admit evidence of any fact otherwise admissible in evidence, notwithstanding that such fact has been discovered and has come to the knowledge of the witness who gives evidence respecting it only in consequence of information given by the person under trial in any confession or deposition which by law is not admissible in evidence against him on such trial, and notwithstanding that the fact has been discovered and has come to the knowledge of the witness against the wish or will of the accused.

(2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial.

230. Confession not admissible against others

No confession made by any person shall be admissible as evidence against any other person.

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231. Admissibility of confessions and other statements made before magistrate or justice

(1) A policeman may take or cause to be taken any person lawfully detained in his custody before a magistrate or any justice who is not a member of the Botswana Police Force and the magistrate or justice shall give that person the opportunity to make a statement to him in respect of any offence that person is alleged to have committed and, if that person elects to make a statement, the magistrate or justice shall record the same in writing in the language in which it is made or in some other language into which it is duly translated while being made.

(2) Before any person makes a statement in terms of this section, the magistrate or justice shall caution him to the effect that he is not obliged to say anything unless he wishes to do so but that should he elect to say anything it will be recorded in writing and may be used in evidence either for or against him.

(3) Every statement recorded in accordance with this section shall, whether it amounts or does not amount to a confession of the commission of any offence, be admissible in evidence either for or against the maker thereof at any subsequent trial or preparatory examination in respect of any offence, to the extent that the contents thereof are sufficiently relevant for the purpose of the trial or preparatory examination.

(4) Notwithstanding subsection (3), a statement recorded in accordance with this section shall not be admissible in evidence against the maker thereof unless it is proved to have been freely and voluntarily made by him in his sound and sober senses and without having been unduly influenced thereto.

232. Evidence of character: when admissible

Save as is provided in section 249 no evidence as to the character of the accused or as to the character of any woman on whose person any rape or attempt to commit rape or indecent assault is alleged to have been committed shall, in any such case, be admissible or inadmissible if such evidence would be inadmissible or admissible in any similar case depending in the Supreme Court of Judicature in England.

233. Evidence of genuineness of disputed writings

Comparison of a disputed writing with any writing proved to the satisfaction of the court, or of a magistrate holding a preparatory examination, to be genuine shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to the court or magistrate (as the case may be) as evidence of the genuineness or otherwise of the writing in dispute.

234. Certified copy of record of criminal proceedings sufficient without production of record

Whenever it is necessary to prove the trial and conviction or acquittal of any person charged with any offence, it shall not be necessary to produce the record of the conviction or

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acquittal of such person, or a copy thereof, but it shall be sufficient that it is certified or purports to be certified under the hand of the Registrar or clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such Registrar, clerk or other officer, that the paper produced is a copy of the record of the indictment, summons or charge and of the trial, conviction, and judgment or acquittal (as the case may be), omitting the formal parts thereof.

235. *Gazette* evidence in certain cases

(1) Whenever proof is required of the contents of any law, or of any other matter which has been published in the *Gazette*, judicial notice shall be taken of such law or other matter.

(2) A copy of the *Gazette*, or a copy of such law or other matter purporting to be printed under the superintendence or authority of the Government Printer, shall, on its mere production, be evidence of the contents of such law, statutory instrument or other matter as the case may be.

236. Appointment to a public office

Any evidence which would be admissible in any criminal case depending in the Supreme Court of Judicature in England as evidence of the appointment of any person to any public office, or of the authority of any person to act as a public officer, shall be admissible in criminal cases in Botswana and before a magistrate holding a preparatory examination.

F. EVIDENCE OF ACCOMPLICES (ss 237-238)

237. Freedom from liability to prosecution of accomplices giving evidence

(1) Where any person who to the knowledge of the public prosecutor has been an accomplice, either as principal or accessory, in the commission of any offence alleged in any indictment or summons, or the subject of a preparatory examination, is produced as a witness by and on behalf of the public prosecutor and submits to be sworn as a witness, and fully answers to the satisfaction of the court or magistrate all such lawful questions as are put to him while under examination such person shall thereby be absolutely freed and discharged from all liability to prosecution for such offence, either at the public instance or at the instance of any private party; or, when he has been produced as a witness by and on behalf of any private prosecutor who is aware of such person's complicity, from all prosecution for such offence at the instance of any such private prosecutor.

(2) The said court or magistrate shall thereupon cause such discharge to be duly entered on the record of the proceedings:

Provided that such discharge shall be of no force and effect and the entry thereof on the record of the proceedings shall be deleted if, when called as a witness at a re-opening of the preparatory examination or at the trial of any person upon a charge of having committed such offence, the person in respect of whom the discharge was made fails to submit to be sworn as a witness or fully to answer, to the satisfaction of the magistrate holding the preparatory

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examination or of the court trying such charge, all such questions as are put to him while under examination as a witness.

(3) No such accomplice produced as a witness by and on behalf of any private prosecutor shall, in any case, be bound or legally compellable to answer any question whereby he may incriminate himself in respect of any offence alleged in the indictment or summons, or the subject of a preparatory examination, unless there is produced to him, and put on record, a writing under the hand of the officer who by law is entitled to prosecute at the public instance in such court or at the preparatory examination, discharging such accomplice from all liability to prosecution at the instance of the public prosecutor for such offence.

238. Evidence of accomplice not to be used against him if he should thereafter be tried for the offence

Where any accomplice in any offence alleged in any indictment or summons, or the subject of a preparatory examination, has, as described in section 237, been produced as a witness by and on behalf of the public prosecutor, or of any private prosecutor (by whom there has been obtained from such officer as aforesaid, a written discharge of any such accomplice from liability to prosecution) and has given evidence upon a trial or preparatory examination, it shall not be lawful to give in evidence against such accomplice, if he is thereafter tried for such offence, any part of the testimony which has been so given by him at the said trial or preparatory examination:

Provided that nothing contained in this section shall be construed as freeing or exempting any such accomplice who has been guilty of perjury while under examination as a witness in any such trial or preparatory examination from any penalties or forfeitures to which persons guilty of perjury are or shall be liable by law or as rendering incompetent or inadmissible any evidence which would otherwise be competent and admissible in the trial of such accomplice on a charge of perjury on his examination as a witness in any such trial or preparatory examination aforesaid.

G. SUFFICIENCY OF EVIDENCE (ss 239-243)

239. Sufficiency of one witness in criminal cases, except perjury and treason

It shall be lawful for the court by which any person prosecuted for any offence is tried, to convict such person of any offence alleged against him in the indictment or summons on the single evidence of any competent and credible witness:

Provided that it shall not be competent for any court-

(i) to convict any person of perjury on the evidence of any one witness unless, in addition to and independent of the testimony of such witness, some other competent and credible evidence as to the guilt of such person is given to such court, or

(ii) to convict any person of treason except upon the evidence of two witnesses where one overt act is charged in the indictment, or, where two or more such overt acts are

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so charged, upon the evidence of one witness to each overt act.

240. Conviction on single evidence of accomplice

Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice:

Provided that the offence has, by competent evidence, other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed.

241. Conviction of accused on plea of guilty or evidence of confession

(1) If any person arraigned before any court upon any charge has pleaded guilty to that charge or has pleaded guilty to having committed any offence other than the offence with which he is charged but of which he might be found guilty on the indictment or summons and the prosecution has accepted that plea, the court may in its discretion convict and sentence him without hearing any evidence:

Provided that if the court is a magistrate's court, it shall, before convicting and sentencing the accused, comply with such directions as the Chief Justice may from time to time issue for the guidance of magistrates' courts generally, or of magistrates' courts of any particular class, with regard to the taking of pleas of guilty.

(2) Any court which is trying any person arraigned before it may convict him of any offence alleged against him in the indictment or charge by reason of any confession of that offence proved to have been made by him, although the confession is not confirmed by any other evidence:

Provided that the offence has, by competent evidence other than such confession, been proved to have been committed.

242. Admission in writing before trial of minor offence

(1) Whenever a public prosecutor causes an accused person to be summoned (otherwise than in terms of subsection (5) of section 307) to appear in a magistrate's court upon a charge of having committed any offence, and he has reasonable grounds for believing that the court which will try the said charge will, on convicting the accused, not impose a sentence of imprisonment or corporal punishment or a fine exceeding P60, he may attach to such summons to be served therewith upon the accused, a form of declaration for signature by the accused, wherein the latter admits having committed the offence, expresses his intention of pleading guilty to the charge, and agrees to be convicted of the offence charged upon his plea of guilty without the calling of any evidence in support of the charge.

(2) Such form shall contain a notice for the information of the accused that when appearing in court to answer the charge upon which he is summoned he may, in spite of having signed the said declaration, plead not guilty to the charge, and that he will thereupon be tried, upon a

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future date to be determined by the court, as if he had not signed such declaration, and that such declaration will, at such trial, not be admissible in evidence against him.

(3) The said form shall also contain a notice for the information of the accused directing his attention to the provisions of section 307 and setting forth the purport of those provisions.

(4) The person serving such summons shall, if service is upon the accused personally, explain the aforesaid form of declaration to the accused and ascertain from him whether he will or will not sign such declaration, and if the accused signs such declaration the said person shall countersign it and transmit it forthwith to the public prosecutor who caused the summons to be issued.

(5) If the accused, on appearing in court in answer to the summons, pleads guilty to the charge, the court may deal with him in terms of subsection (1) of section 241 or it may direct that evidence be led to prove the commission of the offence charged.

(6) If the accused, on appearing in court as aforesaid, pleads not guilty, or if after having pleaded guilty the court directs that evidence be led to prove the commission of the offence, the court shall, at the request of the public prosecutor or of the accused, postpone the trial of the case to such date as it may fix to enable the public prosecutor (and also the accused, if he so desires) to subpoena witnesses.

(7) If the accused pleaded not guilty as aforesaid, the admission of guilt signed by him shall not be admissible in evidence against him at such trial.

243. Sufficiency of proof of appointment to a public office

Any evidence which would, if credible, be deemed in any criminal case depending in the Supreme Court of Judicature in England to be sufficient proof of the appointment of any person to any public office, or of the authority of any person to act as a public officer, shall, if credible be deemed in criminal cases in Botswana, and before any magistrate holding a preparatory examination, sufficient proof of such appointment or authority.

H. DOCUMENTARY EVIDENCE (ss 244-246)

244. Certified copies or extracts of documents admissible

Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, any copy thereof or extract therefrom shall be admissible in evidence in any court or before a magistrate on a preparatory examination, provided it is proved to be an examined copy or extract, or provided it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted; and such officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same not exceeding 10 thebe for every 100 words.

245. Production of official documents

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Any original document in the custody or under the control of any Government officer by virtue of his office shall only be produced in any criminal proceedings before any court, or before a magistrate on a preparatory examination, upon the order of the Director of Public Prosecutions.

246. Copies of official documents sufficient

(1) Except when the original is ordered to be produced as provided in section 245, it shall be sufficient to produce a copy of or extract from a document described in that section certified as a true copy by the head of the department in whose custody or under whose control such document is.

(2) Such copy or extract so certified shall be admissible in evidence before any court or before a magistrate holding a preparatory examination, and shall be of like value and effect as the original document.

(3) It shall not be necessary for any head of a Government department or office to appear in person to produce any original document in his custody or under his control as such officer, but it shall be sufficient if such document is produced by some person authorized by him to do so. Certified copies or extracts may be handed in to the court by the party who desires to avail himself of the same.

I. SPECIAL PROVISIONS AS TO BANKERS' BOOKS (ss 247-251)

247. Entries in bankers' books admissible in evidence in certain cases

The entries in ledgers, day-books, cash-books and other account books of any bank (including a savings bank) shall be admissible as *prima facie* evidence of the matters, transactions and accounts therein recorded, on proof being given by the affidavit in writing of one of the directors, managers, or officers of such bank, or by other evidence, that such ledgers, day-books, cash-books or other account books are or have been the ordinary books of such bank and that the said entries have been made in the usual and ordinary course of business, and that such books are in or come immediately from the custody or control of such bank.

248. Examined copies also admissible after due notice

(1) Copies of all entries in any ledgers, day-books, cash-books or other account books used by any such bank, may be proved in any criminal proceedings as evidence of any such entries, without production of the originals, by means of the affidavit of a person who has examined the same stating the fact of the said examination and that the copies sought to be put in evidence are correct:

Provided that no ledger, day-book, cash-book or other account book, of any such bank, and no copies of entries therein contained, shall be addressed or received in evidence under this Act unless 10 days' notice in writing, or such other notice as may be ordered by the court or a magistrate holding a preparatory examination, containing a copy of the entries proposed to be

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adduced, and stating the intention to adduce the same in evidence, has been given by the party proposing to adduce the same in evidence to the other party and that such other party is at liberty to inspect the original entries and the accounts of which such entries form a part.

(2) On the application of any party who has received such notice the court or a magistrate holding a preparatory examination may order that such party be at liberty to inspect and take copies of any entry or entries in the ledger, day-books, cash-books, or other account books of any such bank relating to the matters in question in the criminal proceedings, and such orders may be made by such court or magistrate in its or his discretion, either with or without summoning before it or him such bank or the other party, and shall be intimated to such bank at least three days before such copies are required.

(3) On the application of any party who has received notice, the court or a magistrate holding a preparatory examination may order that such entries and copies mentioned in such notice shall not be admissible as evidence of the matters, transactions, and accounts recorded in such ledgers, day-books, cash-books, and other account books.

249. Bank not compelled to produce any books unless ordered by court or magistrate

No such bank shall be compelled to produce the ledgers, day-books, cash-books, or other account books of such bank in any criminal proceedings unless the court or the magistrate holding the preparatory examination specially orders that such ledgers, day-books, cash-books or other account books shall be produced.

250. Inspection of bankers' books by police

(1) Where, on application made on oath by a policeman, a magistrate or a justice who is not a member of the Botswana Police Force is satisfied that the policeman believes there are reasonable grounds to suppose that the ledgers, day-books, cash-books or other account books or other accounting devices used by a bank (including a savings bank) may afford evidence as to the commission of any offence, the magistrate or justice may issue his warrant authorizing the policeman or policemen named therein-

(*a*) to inspect all those ledgers, day-books, cash-books and other account books and other accounting devices carrying written records and make and retain in his or their possession copies or other record of any entries therein or extracted therefrom; and

(*b*) to have access to all those other accounting devices carrying unwritten records and retrieve therefrom any information and make and retain in his or their possession a written or other record of that information.

(2) Any person who resists or hinders or aids, incites or encourages any other person to resist or hinder a policeman in executing a warrant issued under this section shall be guilty of an offence and liable to a fine not exceeding P250.

251. Sections 247, 248 and 249 not to apply to proceedings to which bank is a party

Nothing contained in sections 247, 248 and 249 shall apply to any criminal proceedings to

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which any such bank whose ledgers, day-books or other account books may be required to be produced in evidence is a party.

J. PRIVILEGES OF WITNESSES (ss 252-258)

252. Privileges of accused persons when giving evidence

An accused person called as a witness upon his own application shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or has been convicted of, or has been charged with, any offence, other than that wherewith he is then charged, or is of bad character, unless-

(*a*) he has personally or by his counsel or attorney asked questions of any witness with a view to establishing or has himself given evidence of, his own good character, or unless the nature or conduct of the defence is such as to involve imputation of the character of the prosecutor or the witnesses for the prosecution;

(*b*) he has given evidence against any other person charged with the same offence;

(*c*) the proceedings against him are such as are described in section 264 or 265, and the notice required by those sections has been given to him; or

(*d*) the proof that he has committed or has been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged.

253. Privilege arising out of the marital state

(1) A husband shall not be compelled to disclose any communication made to him by his wife during the marriage, and a wife shall not be compelled to disclose any communication made to her by her husband during the marriage.

(2) A person whose marriage has been dissolved or annulled by a competent court shall not be compelled to give evidence as to any matter or thing which occurred during the subsistence of the marriage or supposed marriage, and as to which he or she could not have been compelled to give evidence if the marriage were subsisting.

254. No witness compellable to answer question which the witness's husband or wife might decline

No person shall be compelled to answer any question or to give any evidence, if the question or evidence is such as under the circumstances the husband or wife of such person, if under examination as a witness, might lawfully refuse and could not be compelled to answer or give.

255. Witness not excused from answering questions by reason that the answer would establish a civil claim against him

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A witness in any criminal proceedings may not refuse to answer a question relevant to the issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit.

256. Privilege of professional advisers

No advocate, attorney or other legal practitioner duly qualified to practise in any court, whether within Botswana or elsewhere, shall be competent to give evidence against any person by whom he has been professionally employed or consulted, without the consent of that person, as to any fact, matter or thing, as to which such legal practitioner, by reason of such employment or consultation, and without such consent would not be competent to give evidence in any similar proceeding depending in the Supreme Court of Judicature in England:

Provided that no such legal practitioner shall, in any proceeding, by reason of any such employment or consultation, be incompetent or not legally compellable to give evidence as to any fact, matter or thing relative to or connected with the commission of any offence for which the person, by whom such legal practitioner has been so employed or consulted, is in such proceeding prosecuted, whenever such fact, matter or thing has come to the knowledge of such legal practitioner before he was professionally employed for or consulted with reference to the defence of such person against such prosecution.

257. Privilege from disclosure of facts on the grounds of public policy

No witness shall, except as in this Act is provided, be compellable or permitted to give evidence in any criminal proceeding as to any fact, matter or thing, or as to any communication made to or by such witness, as to which, if the case were depending in the Supreme Court of Judicature in England, such witness would not be compellable or permitted to give evidence, by reason that such fact, matter or thing, or communication, on grounds of public policy and from regard to public interest, ought not to be disclosed and is privileged from disclosure:

Provided that it shall be competent for any person, in any criminal proceeding, to adduce evidence of any communication alleging the commission of an offence if the making of that communication *prima facie* constituted an offence, and it shall be competent for the officer presiding at such proceeding to determine whether the making of such communication *prima facie* did or did not constitute an offence, and such determination shall, for the purposes of those proceedings, be final.

258. Witness excused from answering questions the answers to which would expose him to penalties, or degrade his character

No witness in any criminal proceeding shall, except as provided by this Act or any other law, be compelled to answer any question which, if he were under examination in any similar case depending in the Supreme Court of Judicature in England, he would not be compelled to answer by reason that his answer might have a tendency to expose him to any pains, penalty,

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punishment or forfeiture, or to a criminal charge, or to degrade his character:

Provided that, anything to the contrary notwithstanding in this section contained, an accused person called as a witness on his own application in accordance with section 217 may be asked any question in cross-examination, notwithstanding that it would tend to incriminate him as to the offence charged against him.

K. SPECIAL RULES OF EVIDENCE IN PARTICULAR CRIMINAL CASES (ss 259-269)

259. Evidence on charge of treason

On the trial of a person charged with treason, evidence cannot be admitted of any overt act not alleged in the indictment, unless relevant to prove some overt act alleged therein.

260. Evidence on a charge of bigamy

(1) On the trial of a person charged with bigamy, it must be proved that a lawful and binding marriage between the accused and another person existed at the time when the offence is alleged to have been committed:

Provided that it shall be presumed till the contrary is proved that the marriage between the accused and that other person was at the date of the marriage lawful and binding-

(i) in a case where the marriage is alleged to have been solemnized in Botswana, as soon as there has been produced to the court an extract from a marriage register which is either a duplicate, original, or a copy, and which purports to be certified as such by the officer or minister of religion having for the time being the custody of such register, or by an official registrar of marriages;

(ii) in a case where the marriage is alleged to have been solemnized outside Botswana, as soon as there has been produced to the court a document which purports to be an extract from a marriage register kept according to law in the country where the marriage is alleged to have been solemnized, and which also purports to be certified as such by an officer or person having the custody of that register:

Provided that the signature of such officer or person to the certificate is authenticated in accordance with any law or statutory regulations of Botswana governing the authentication of documents executed outside Botswana.

(2) On the trial of a person charged with bigamy, as soon as the fact of a marriage ceremony in Botswana between the accused and another person has been proved, the marriage shall be deemed to have been lawful and binding as between them at the date thereof until it is shown that they were within the prohibited degrees of consanguinity or affinity, or that owing to a then subsisting marriage one of them was incapable of contracting a lawful and binding marriage with the other.

(3) On the trial of a person on a charge of bigamy, as soon as the alleged bigamous marriage, wherever solemnized, has been proved, the fact that shortly before the alleged

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bigamous marriage the accused had been cohabiting with the person to whom the accused is alleged to be lawfully married and had been treating and recognizing such person as a spouse shall, if in addition there be evidence of the performance of a marriage ceremony between the accused and such person, be *prima facie* evidence that there was a lawful and binding marriage subsisting between the accused and such person at the time of the solemnization of the alleged bigamous marriage.

261. Evidence of relationship on charge of incest

(1) On the trial of a person charged with incest-

(*a*) it shall be sufficient to prove that the party on whose person or by whom the offence is alleged to have been committed is reputed to be the grandfather, father, brother, half-brother, son, mother, sister, half-sister or daughter of the other party to the incest;

(*b*) the accused person is, until the contrary is proved, presumed to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

(2) Whenever the fact that any lawful and binding marriage was contracted is relevant to the issue at the trial of a person charged with incest, such fact may be proved *prima facie* in the manner provided in section 260 for the proof of the existence of a lawful and binding marriage of a person charged with bigamy.

262. Evidence as to counterfeit coin

When upon the trial of any person it becomes necessary to prove that any coin produced in evidence against him is false or counterfeit, it shall not be necessary to prove it to be false or counterfeit, by the evidence of any officer of a Mint or other person employed in producing the lawful coin in any Commonwealth country or elsewhere whether the coin counterfeited is current coin of any part of such Commonwealth country, or of any foreign country, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of a credible witness.

263. Evidence of gambling house

(1) When any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game are found in or on any premises suspected to be used as a common gaming house and entered under a warrant or order issued under any law, or about the person of any of those found therein or thereon, it shall be *prima facie* evidence on a prosecution under any statute for keeping a common gaming house that such premises are used as a common gaming house and that the person found in or on those premises were playing therein or thereon, although no play was actually going on in the presence of the person entering the premises under the warrant or order, or in the presence of those persons by whom he is accompanied.

(2) In any prosecution under any enactment for keeping a common gaming house it shall be

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prima facie evidence that those premises are used as a common gaming house-

(*a*) if any policeman authorized to enter upon those premises is wilfully prevented from or obstructed or delayed in entering the same or any part thereof; or

(*b*) if those premises or any part thereof be found fitted or provided with any means or contrivance for unlawful gaming or with any means or contrivance for concealing, removing, or destroying any instruments of gaming.

(3) On the trial of a person charged with an offence mentioned in this section, it shall not be necessary to prove that any person found on any premises playing at any game was playing for any money, wager or stake.

264. Evidence on charge of receiving

(1) When proceedings are taken against any person for having received stolen goods knowing them to be stolen, or for having in his possession stolen property, or anything obtained by means of an offence knowing the same to have been stolen or so obtained, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen or obtained by some such offence as aforesaid within the period of 12 months preceding the time when such person was first charged before a magistrate with the offence in respect of which proceedings are being taken.

(2) Such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen or obtained by some such offence as aforesaid:

Provided that not less than three days' notice in writing has been given to the accused that proof is intended to be given of such other property stolen or obtained by some such offence as aforesaid within the preceding period of 12 months having been found in his possession; and such notice shall specify the nature or description of such other property and the person, if known, from whom the same was stolen or obtained by means of an offence.

265. Evidence of previous conviction on charge of receiving

When proceedings are taken against any person for having received stolen goods knowing them to be stolen, or for having in his possession stolen property or property obtained by means of an offence, and evidence has been given that the stolen property or property obtained by means of an offence, has been found in his possession, then if such person has, within five years immediately preceding the time when such person was first charged before a magistrate with the offence for which he is being proceeded against, been convicted of an offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings and may be taken into consideration for the purpose of proving that the accused knew that the property which was proved to be in his possession was stolen or property obtained by means of an offence:

Provided that not less than three days' notice in writing has been given to the accused that

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proof is intended to be given of such previous conviction.

266. Evidence of counterfeit coin

Upon the trial of any person accused of any offence respecting currency or coin, no difference in the date or year or in any legend marked upon the lawful coin described in the indictment and the date or year or legend marked upon the false coin counterfeited to resemble or pass for such lawful coin, or upon any die, plate, press, tool, or instrument used, constructed, devised, adapted, or designed for the purpose of counterfeiting or imitating any such lawful coin, shall be considered a just or lawful cause or reason for acquitting any such person of such offence; and it shall in any case be sufficient to prove general resemblance to the lawful coin as will show an intention that the counterfeit should pass for it.

267. Evidence on trial for defamation

On the trial of a person charged with the unlawful publication of defamatory matter which is contained in a periodical, after evidence sufficient in the opinion of the court has been given of the publication by the accused of the number or part of the periodical containing the matter complained of, other writings or prints purporting to be other numbers or parts of the same periodical previously or subsequently published and containing a printed statement that they were published by or for the accused, shall be admissible in evidence on either side without further proof of their publication.

268. Evidence on charge of stealing against clerk or servant

(1) At the trial of any person charged with theft, while employed in any capacity in the public service or by the Government, of money or any other property which belonged to Botswana or which came into such person's possession by virtue of his employment, or charged with theft, while a clerk, servant or agent, of money or any other property which belonged to his employer or principal or which came into his possession on account of his employer or principal, an entry in any book of account kept by the accused or kept under or subject to his charge or supervision, purporting to be an entry of the receipt of any money or other property shall be evidence that the money or other property so purporting to have been received was so received by him.

(2) On the trial of a person charged with any such offence it shall not be necessary to prove the theft by the accused of any specific sum of money if, on the examination of the books of account or entries kept or made by him or kept or made in, under, or subject to his charge or supervision, or by any other evidence, there is proof of a general deficiency, and if the court be satisfied that the accused stole the deficient money or any part of it.

269. Evidence on charges relating to seals and stamps

On the trial of a person charged with any offence relating to any seal or stamp used for the purposes of the public revenue or of the Post Office in any Commonwealth country or in any foreign country, a despatch from a representative of the government of the country affected, transmitting to the President any stamp, mark or impression, and stating it to be a genuine

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stamp, mark, or impression of a die, plate or other instrument provided, made, or used by or under the direction of the proper authority of the country in question for the purpose of expressing or denoting any stamp duty or postal charge shall be admissible as evidence of the facts stated in the despatch; and the stamp, mark, or impression so transmitted may be used by the court and by witnesses for the purposes of comparison.

L. MISCELLANEOUS MATTERS RELATING TO EVIDENCE IN CRIMINAL PROCEEDINGS (ss 270-277)

270. Impounding documents

Whenever any instrument which has been forged or fraudulently altered is admitted in evidence, the court or judicial officer who admits the instrument may, at the request of the State or of any person against whom it is admitted in evidence, direct that it shall be impounded and kept in the custody of some officer of the court or other proper person, for such period and subject to such conditions as to the court or judicial officer admitting the instrument seems fit.

271. Unstamped instruments admissible in criminal cases

Every instrument liable to stamp duty shall be admitted in evidence in any criminal proceedings, although it may not be stamped as required by law.

272. Onus of proof in prosecutions under laws imposing licences, etc.

Where a person carries on an occupation or business or performs an act or has in his possession or custody or owns any article or is present at any place and he would commit or have committed an offence by carrying on that occupation or business, or performing that act, or having that article in his possession or custody or owning it, or being present at that place or entering it, if he were not the holder of a licence, permit, permission or other authorization or qualification (hereinafter in this section referred to as the "necessary authorization"), to carry on that occupation or business or to perform that act or to have that article in possession or custody or to own it or to be present at that place or to enter it, he shall, if charged with having committed such offence, be deemed not to have been the holder of the necessary authorization unless the contrary is proved.

273. Admissions

(1) In any criminal proceedings the accused or his representative in his presence may admit any fact relevant to the issue, and any such admission shall be sufficient evidence of that fact.

(2) An admission made by an accused or his representative in his presence at a preparatory examination, which the magistrate presiding thereat noted on the record, may be proved at the subsequent trial of the accused by the production, by any person, of the documents purporting to constitute that record.

274. Impeachment and support of witness's credibility

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It shall be competent to any party in criminal proceedings to impeach or support the credibility of any witness called against or on behalf of such party in any manner and by any evidence in and by which, if the proceedings were depending before the Supreme Court of Judicature in England, the credibility of such witness might be impeached or supported by such party and in no other manner and by no other evidence whatever:

Provided that any such party who has called a witness who has given evidence in any such proceedings (whether that witness is or is not, in the opinion of the judicial officer presiding at such proceedings adverse to the party calling him) may, after the said party or the said judicial officer has asked the witness whether he has or has not previously made a statement with which his testimony in the said proceedings is inconsistent, and after sufficient particulars of the alleged previous statement to designate the occasion when it was made, have been mentioned to the witness, prove that he previously made a statement with which his said testimony is inconsistent.

275. Onus of proof in prosecutions under taxation laws

When a person is charged with any offence whereof failure to pay any tax or impost to the Government, or failure to furnish any information to any officer of the Government is an element, he shall be deemed to have failed to pay that tax or impost or to furnish that information, unless the contrary is proved.

276. Cases not provided for by this Part

In criminal proceedings, in any case not provided for in this Part, the law as to admissibility of evidence and as to the competency, examination, and cross-examination of witnesses in force in criminal proceedings in the Supreme Court of Judicature in England shall be followed in like cases by the courts of Botswana and by magistrates holding preparatory examinations.

277. Saving as to special provisions in any other law

Nothing contained in this Part shall be construed as modifying those provisions of any law whereby in any criminal matter specifically referred to or provided in such law a person is deemed a competent witness, or certain specified facts and circumstances are deemed to be evidence, or a particular fact or circumstance may be proved in a manner specified therein.

PART XV
Discharge of Accused Persons (ss 278-282)

278. Dismissal of charge in default of prosecution

(1) If the prosecutor (whether public or private) in the case of a trial by the High Court, having given notice of trial, does not appear to prosecute the indictment against the accused before the close of the session of that court before which he gave notice of trial or, in the case of a trial by a magistrate's court, does not appear on the court day appointed for the trial, the accused may move the court to discharge him, and the indictment or summons may be dismissed, and, when the accused or any other person on his behalf has been bound by

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recognizance for the appearance of the accused so to take his trial, may further move the court that such recognizance be discharged, and such recognizance may thereupon be discharged.

(2) Where the indictment is at the instance of a private party the accused may move the court that the private prosecutor and his sureties shall be called on their recognizance, and, in default of his appearance, that the same be estreated. The accused may also apply for an order directing that the private prosecutor pay the costs incurred by the accused in preparing his defence.

(3) Nothing in this section shall be construed as depriving the Director of Public Prosecutions, or the public prosecutor with his authority or on his behalf, of the right of withdrawal of any indictment or summons at any time, and lodging a fresh indictment or issuing and serving a fresh summons for hearing before the same or any other competent court:

Provided that the proviso to section 150(4) shall apply *mutatis mutandis* to such withdrawal.

279. Liberation of accused persons

(1) The High Court shall, at the close of each of its criminal sessions, discharge from custody all such accused persons as are then in custody and by law are then entitled to be discharged.

(2) Any person who has been acquitted on any indictment or summons in a magistrate's court or whose case therein has been dismissed for want of prosecution shall forthwith be discharged out of custody.

280. General gaol delivery and returns

For the purposes of sections 133 and 279, the High Court may have regard to any general gaol return delivered under the provisions of the Prisons Act, or any regulations made thereunder.

281. Discharge from imprisonment or expiration of recognizance no bar to trial

Neither discharge from imprisonment nor the expiration of the recognizance shall be a bar to any person being brought to trial in any competent court for any offence for which he was formerly committed to prison or admitted to bail.

282. Accused not brought to trial not obliged to find further bail

No person who has been admitted to bail and who has not been duly brought to trial or who has been discharged from custody pursuant to section 279 shall be obliged to find further bail or shall be liable to be committed to custody either for examination or trial for the same offence in respect of which he was formerly admitted to bail:

Provided that the Director of Public Prosecutions may, notwithstanding the discharge of the accused from custody pursuant to section 279 or the expiration of his bail, at any time before

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the period of prescription for such offence has run out, indict the accused in any competent court, and if the accused, having been duly served with such indictment and notice of trial, fails to appear at the time mentioned in such notice, the court in which he is indicted may, on the application of the Director of Public Prosecutions, issue a warrant for the accused's arrest and detention in prison until he can be brought to trial or until he finds bail for his appearance to stand his trial on the said indictment.

PART XVI
Previous Convictions (ss 283-288)

283. Previous conviction not to be charged in indictment, etc.

It shall not be lawful in any indictment or summons against any person for any offence to allege that such person has been previously convicted of any offence whether in Botswana or elsewhere.

284. Previous conviction not to be proved, etc., except in certain circumstances

Except in circumstances specifically described in this Act, it shall not be lawful to prove at the trial of any person for any offence that he has been previously convicted of any offence, whether within Botswana or elsewhere, or to ask any accused person, charged and called as a witness, whether he has been so convicted.

285. Tendering admission of previous conviction after accused has pleaded guilty, or been found guilty

When any person indicted before the High Court for any offence has been previously convicted of any offence, whether within Botswana or elsewhere, it shall be lawful for the prosecutor, if the accused has under section 80 admitted that he has been so previously convicted and his admission has also been subscribed by the magistrate in accordance with that section, and if further he has pleaded guilty to or been found guilty of the offence, and before sentence is pronounced, to tender the admission in proof of the previous conviction, and such admission shall be received by the court upon its mere production as proof of the previous conviction unless it is shown that the admission was not in fact duly made or that the signatures or marks thereto are not in fact the signatures or marks of the accused and the magistrate respectively:

Provided that if the accused made the admission under section 80 but refused to subscribe the same by signature or mark, a solemn declaration signed by the magistrate and attached to the document signed by him under section 80, stating that the accused did so make the admission but refused to subscribe the same shall, upon its mere production, be sufficient evidence that the accused admitted the previous conviction.

286. Notice that proof of former conviction will be offered

(1) When any person indicted in the High Court for any offence has been previously convicted of any offence, whether within Botswana or elsewhere, it shall be lawful for the

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Director of Public Prosecutions in cases in which the procedure prescribed by section 80 has not been followed to give notice to him, that in the event of his pleading guilty, or being found guilty of the offence for which he is indicted, proof will be given of such previous conviction.

(2) The period of the notice required under this subsection (1) shall not be less than 72 hours.

287. Mode of proof of previous conviction

(1) Whenever notice has been duly served on a person that evidence of a previous conviction will be given against him as provided by section 286 it shall be lawful, if such person pleads guilty, or after he has been found guilty, for the prosecutor before sentence is pronounced to offer to prove such previous conviction, and thereupon the court shall ask such person whether he confesses that he is the person so appearing to have been previously convicted and whether he was so convicted as alleged.

(2) If such person neither confesses that he has been so convicted nor has admitted it at the preparatory examination in manner prescribed in section 80, the court shall itself proceed to determine the truth as to such of the alleged previous convictions as the accused has not confessed or admitted in manner aforesaid.

(3) If the trial is before a magistrate's court the prosecutor may, after the accused has pleaded guilty, or has been found guilty, tender evidence of such previous convictions as he may allege in respect of the accused. Thereupon the court shall ask the accused whether he is the person so alleged to have been previously convicted and shall proceed to determine the truth as to such alleged previous convictions as the accused has not confessed or admitted.

(4) If on any trial any previous conviction is lawfully proved against the accused, or if he confesses or has admitted such previous conviction, the court shall take it into consideration in awarding sentence for the offence to which he has pleaded, or of which he has been found guilty.

288. Finger-print record to be *prima facie* evidence of previous conviction

Notwithstanding anything to the contrary in this Act, any finger-print or foot-print records, photographs or documents purporting to be certified under the hand of any officer having charge of criminal records of Botswana or of any other country (whether or not such records, photographs or documents were obtained under any law or regulation made under a law, and the person concerned was unable to prevent their being obtained) shall, whenever under any provision of this Act a previous conviction may be proved, be admissible in evidence before any court in proof of such previous conviction and shall be *prima facie* evidence of the facts stated in such records, photographs or documents:

Provided that such records, photographs and documents shall be produced to the court by a policeman or prisons officer having the custody of the same.

PART XVII

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Judgment on Criminal Trial (ss 289-297)

289. Withdrawing charges

When an indictment or summons containing more counts than one is framed against the same person, and when a conviction has been obtained on one or more of them, the prosecutor may withdraw the remaining charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges unless the conviction be set aside. In that event the court (subject to the order of the court setting aside the conviction) may, upon the application of the Director of Public Prosecutions, proceed with the trial of the charge or charges so withdrawn.

290. Mode of delivering judgment

(1) The judgment in every trial in any criminal court in the exercise of its original jurisdiction shall be pronounced, or the substance of such judgment shall be explained, in open court either immediately after the termination of the trial or at some subsequent time, of which notice shall be given to the parties and their legal representative, if any:

Provided that-

(i) the whole judgment shall be read out by the presiding judge or magistrate if he is requested to do so either by the prosecution or the defence;

(ii) in a case in the High Court any judgment written by a judge may be read by any magistrate or officer of the court if directed to do so;

(iii) in a case in a magistrate's court any judgment written by a magistrate may be read by any other magistrate if directed to do so;

(iv) where a court convicts a person of murder it shall state whether in its opinion there are extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them, but any failure to comply with the requirements of this proviso shall not affect the validity of the verdict of any sentence imposed as a result thereof.

(2) The accused person shall, if in custody, be brought before the court, or, if not in custody, be required by the court to attend, to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted.

(3) No judgment delivered by any court shall be deemed to be invalid by reason only of the absence of any party or his legal representative on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their legal representatives, or any of them, the notice of such day and place.

291. Contents of judgment

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(1) Every such judgment shall be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.

292. Arrest of judgment

(1) A person convicted of an offence before the High Court, whether on his plea of guilty or otherwise, may, at any time before sentence, move that Court that judgment be arrested on the ground that the indictment does not disclose any offence.

(2) Upon the hearing of the motion the Court may allow any such amendments of the indictment as it might have allowed before verdict.

(3) The Court may hear and determine the motion either forthwith or after such adjournment as it may consider necessary.

293. Decision may be reserved

The court before which any person is tried for an offence may reserve the giving of its final decision on questions raised at the trial; and its decision whenever given shall be considered as given at the time of the trial.

294. Sentence in the High Court

(1) If a motion in arrest of judgment is not made or is dismissed, the High Court may either pass sentence upon the offender forthwith or may discharge him on his recognizance, as hereinafter provided, on condition that he shall appear and receive judgment at some future session of the Court or when called upon.

(2) If sentence is not passed forthwith the presiding officer of the Court may, at any subsequent sitting thereof at which the offender is present, pass sentence upon him.

295. Committal to High Court for sentence after conviction in a magistrate's court

(1) Where on the trial by a magistrate's court a person who is not less than the apparent age of 17 years is convicted of an offence, the court if it is of opinion that greater punishment should be inflicted for the offence than it has power to inflict, may, for reasons to be recorded in writing on the record of the case, instead of dealing with him in any other manner, commit him in custody to the High Court for sentence.

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(2) For the purposes of this section, the aggregate of consecutive sentences imposed upon any person, in case of conviction for several offences at one trial, shall be deemed to be a single sentence.

296. Procedure on committal for sentence under section 295

(1) In any case where a magistrate's court commits a person for sentence under the provisions of section 295, the magistrate's court shall forthwith send a copy of the record of the case to the High Court.

(2) Any person committed to the High Court for sentence shall be brought before the High Court at the next convenient sessions thereof or earlier if so directed by that Court.

(3) When any person is brought before the High Court in accordance with the provisions of subsection (2), the High Court shall inquire into the circumstances of the case and, if satisfied from the record of the accused's guilt, shall thereafter proceed as if such person had pleaded guilty before the High Court in respect of the offence for which he has been so committed.

(4) If the High Court, under the provisions of this section, passes any sentence upon any person such person shall be deemed to have been tried and convicted for the offence concerned before the High Court.

297. Provisions applicable to sentences in all courts

(1) The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed.

(2) Every warrant for the execution of any sentence passed in a criminal case by any court may be issued either by the officer who passed the sentence or by any judicial officer of that court, or in the case of the High Court, by the Registrar or Assistant Registrar of that Court.

(3) If, in a magistrate's court, sentence is not passed upon an offender forthwith upon his conviction, or if, by reason of any decision or order of the High Court on appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a magistrate's court, or to pass sentence anew in such court, any judicial officer of that court may, in the absence of the judicial officer who convicted the offender or passed the sentence, as the case may be, pass sentence on the offender after consideration of the evidence recorded and in the presence of the offender.

PART XVIII
Punishments (ss 298-315)

298. Sentence of death upon a woman who is pregnant

(1) Where a woman convicted of an offence punishable with death alleges that she is pregnant, or where the court before which a woman who is so convicted thinks fit to order, the question whether or not the woman is pregnant shall, before sentence is passed on her, be

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determined by the court.

(2) The question whether the woman is pregnant or not shall be determined on such evidence as may be led before the court either on the part of the woman or on the part of the State, and the court shall find that the woman is not pregnant unless it is proved affirmatively to its satisfaction that she is pregnant.

(3) Where in any proceedings under this section the court finds that the woman in question is not pregnant, the woman may appeal to the Court of Appeal and the Court of Appeal, if satisfied that for any reason the finding should be set aside, shall quash the sentence passed on her and, in lieu thereof pass on her a sentence of imprisonment for life.

299. Manner of carrying out death sentences

(1) No sentence of death shall be carried into effect except upon the special warrant of the President, to whom a record of all proceedings in the case shall be forwarded as soon as may be after sentence together with a report upon the case from the officer presiding at the trial.

(2) Such special warrant shall be issued to the Sheriff or his deputy who shall, as soon after the receipt of such special warrant as fitting arrangements for the carrying out of the sentence can be made, execute such special warrant in the place appointed therein:

Provided that the Sheriff or his deputy shall not execute the warrant aforesaid if at any time the President by written notice under his hand to the Sheriff or Deputy-Sheriff intimates that he has decided to grant a pardon or reprieve to the person so sentenced or otherwise to exercise the prerogative of mercy with regard to him. Any notice by the President under this proviso shall be construed for all purposes as a cancellation of the warrant aforesaid.

300. Cumulative or concurrent sentences

(1) When a person is convicted at one trial of two or more different offences, or when a person under sentence or undergoing punishment for one offence is convicted of another offence, the court may sentence him to such several punishments for such offences or for such last offence (as the case may be) as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such punishments shall run concurrently.

301. Conviction of other charges pending

Where an accused person is found guilty of an offence, the court may, in passing sentence, take into consideration any other charge of a similar offence then pending against the accused if the accused admits the other charge and desires it to be taken into consideration and if the prosecutor of the other charge consents.

302. Imprisonment in default of payment of fines

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Whenever a court has imposed upon any offender a sentence of a fine without an alternative sentence of imprisonment, and the fine has not been paid in full or has not been recovered in full by a levy, the court which passed sentence on the offender may issue a warrant directing that he be arrested and brought before the court which may thereupon sentence him to such term of imprisonment as could have been imposed upon him as an alternative punishment in terms of section 29 of the Penal Code or other written law.

303. Recovery of fine

(1) Whenever an offender is sentenced to pay a fine, the court passing the sentence may, in its discretion, issue a warrant addressed to the Sheriff or messenger of the court authorizing him to levy the amount by attachment and sale of any movable property belonging to the offender although the sentence directs that, in default of payment of a fine, the offender shall be imprisoned. The amount which may be levied shall be sufficient to cover, in addition to the fine, the costs and expenses of the warrant and of the attachment, and sale thereunder.

(2) Such warrant when issued by the High Court may be executed anywhere within Botswana.

(3) Such warrant, if issued by a magistrate's court, shall authorize the attachment and sale of the movable property within the local limits of the jurisdiction of such magistrate's court, and also without such limits when endorsed by the magistrate having jurisdiction in the place where the property is found.

(4) If the proceeds of sale of the movable property are insufficient to satisfy the amount of the fine and the costs and expenses aforesaid the High Court may issue a warrant, or in the case of a sentence by any magistrate's court may authorize such magistrate's court to issue a warrant, for the levy against the immovable property of the offender of the amount unpaid.

(5) When an offender has been sentenced to pay a fine only or, in default of payment of the fine, to imprisonment, and the court issues a warrant under this section, it may suspend the execution of the sentence of imprisonment and may release the offender upon his executing a bond with or without sureties as the court thinks fit, on condition for his appearance before such court or some other court on the day appointed for the return to such warrant, such day not being more than 15 days from the time of executing the bond; and in the event of the amount of the fine not having been recovered, the sentence of imprisonment shall be carried into execution at once.

(6) In any case in which an order for the payment of money has been made on non-recovery whereof imprisonment may be awarded and the money is not paid forthwith, the court may require the person ordered to make such payment to enter into a bond as prescribed in subsection (5), and in default of his doing so may at once pass sentence of imprisonment as if the money had not been recovered.

(7) When an offender has been sentenced to pay a fine only or, in default of payment of the fine, to a period of imprisonment, and before the expiry of that period any part of the fine is paid or levied, the period of imprisonment shall be reduced by a number of days bearing as

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nearly as possible the same proportion to the number of days to which such person is sentenced as the sum so paid and levied bears to the amount of the fine. An amount which would reduce the imprisonment by a fractional part of a day shall not be received. No payment of any sum under this section need be accepted otherwise than during the ordinary office hours.

304. Manner of dealing with convicted juveniles

(1) Any court in which a person under the age of 18 years has been convicted of any offence may, instead of imposing any punishment upon him for that offence (but subject to the provisions of section 26(2) of the Penal Code) order that he be placed in the custody of any suitable person designated in the order for a specific period:

Provided that such order may be made in addition to the imposition of corporal punishment; and provided further than no order made in terms of this subsection shall direct that the convicted person shall remain in the custody in which he has been placed after he attains the age of 18 years.

(2) Any person who has been dealt with in terms of subsection (1) and who absconds from the custody in which he was placed may be apprehended without warrant by any policeman and shall be brought as soon as may be before a magistrate of the district in which he was apprehended.

(3) When any person is brought before a magistrate under the provisions of subsection (2) the magistrate shall, after having questioned the absconding person as to the reason why he absconded, order-

(*a*) that he be returned to the custody from which he absconded;

(*b*) that he be placed in the custody of another person for the remaining period of the original order; or

(*c*) that he be committed to prison for the remaining period of the order made under subsection (1).

305. Corporal punishment

(1) When a person is sentenced to undergo corporal punishment such sentence shall be a sentence of caning and shall be in accordance with the following provisions-

(*a*) the caning shall be carried out in a manner and with a cane of a type approved by the Minister, who may approve different types of cane for different classes of person;

(*b*) no caning shall be inflicted on any convicted person until he has been certified by a medical officer to be fit for such punishment; caning shall only be inflicted in the presence of a medical officer, or, if one is not available, in the presence of a magistrate; the medical officer or magistrate shall immediately stop the infliction of further punishment if he considers that the convicted person is not in a fit state of

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health to undergo the remainder thereof and shall certify the fact in writing;

(*c*) whenever under the provisions of paragraph (*b*) any medical officer or magistrate has certified that any prisoner sentenced to undergo caning is not in a fit state of health to undergo the whole or the remainder thereof he shall immediately transmit his certificate to the court which passed the sentence or to a court having jurisdiction which may substitute another punishment in lieu of the sentence of caning; such prisoner may lawfully be kept in custody pending the decision of the court to which the medical officer or magistrate has transmitted his certificate as hereinbefore provided;

(*d*) no sentence of caning shall be carried out by instalments;

(*e*) where at any one sitting of a court more than one sentence of caning is imposed on any person, the sentences so imposed shall be deemed to be one sentence for the purposes of subsection (2) of section 28 of the Penal Code.

(2) Every sentence of corporal punishment shall be carried out privately in a prison:

Provided that in the case of a person under 18 years of age the court before which such person is convicted may direct that the punishment be administered by such person and in such place as it may specify and in such case the parent or guardian of such first mentioned person shall have the right to be present.

(3) The Minister may by statutory instrument make an order specifying such places as he may consider proper for administering corporal punishment in traditional manner with traditional instruments.

306. Recognizances to keep the peace and be of good behaviour

If the conditions upon which any recognizance or security under section 31 of the Penal Code was given are not observed by the person who gave it, the court may declare the recognizance or security to be forfeited and any such declaration or forfeiture shall have the effect of a judgment in a civil action in that court.

307. Payment of fine without appearance in court

(1) When any person has been summoned or warned to appear in a magistrate's court or has been arrested or has been informed by a peace officer that it is intended to institute criminal proceedings against him for any offence, and an officer holding a rank or post to be designated by the Minister from time to time for the purposes of this section by order published in the *Gazette*, has reasonable grounds for believing that the court which will try the said person for such offence will, on convicting such person of such offence, not impose a sentence of imprisonment or corporal punishment or a fine exceeding P200, such person may sign and deliver to such officer a document admitting that he is guilty of the said offence; and-

(*a*) deposit with such officer such sum of money as the latter may fix; or

(*b*) furnish to such officer such security as the latter deems sufficient, for the payment of

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any fine which the court trying the case in question may lawfully impose therefor, not exceeding P200 or the maximum of the fine with which such offence is punishable, whichever amount is the lesser,

and such person shall, subject to the provisions of subsection (8), thereupon not be required to appear in court to answer a charge of having committed the said offence.

(2) Such person may at any time before sentence is passed upon him in terms of subsection (5) submit to any person in charge of the aforesaid document an affidavit setting forth any facts which he desires to bring to the notice of the court in mitigation of the punishment to be imposed for the said offence, and such affidavit shall be submitted together with the said document to the court which is to pass the sentence.

(3) An officer designated as aforesaid, if he is not the public prosecutor attached to the court in which the offence in question is triable, shall, as soon as practicable after receiving a document referred to in subsection (1), transmit it to such public prosecutor.

(4) Whenever such public prosecutor has received any such document he shall transmit it to the clerk of the said court:

Provided that before doing so he may report the matter to the Director of Public Prosecutions and ask him for his directions thereon.

(5) After receiving such document the clerk of such court shall cause it to be numbered and filed consecutively in the records of that court in a file to be known as the criminal record (admission of guilt) file, which file shall for the purposes of any written law be deemed to be a criminal record book of that court and the person in question shall, subject to the provisions of subsection (8), thereupon be deemed to have been convicted by such court of the said offence, and such court shall pass sentence upon such person in accordance with law:

Provided that such court may decline to pass sentence upon him and may direct that he be prosecuted in the ordinary course, and in that case, if the said person has been summoned or warned in terms of subsection (1), he shall be summoned afresh to answer such charge as the public prosecutor may prefer against him.

(6) If the court imposes a fine on such person such fine shall be paid out of any sum deposited in terms of paragraph (*a*) of subsection (1), or if security has been given in terms of paragraph (*b*) of subsection (1) and the fine has not been paid in accordance with the terms of the security, the latter, if corporeal property, may be sold by public auction and the fine paid out of the proceeds of the sale:

Provided that if the whereabouts of such person are known, written notice of the intended sale and of the time and place thereof shall be given to him not less than three days before the sale takes place.

(7) If any balance remains of any such deposit or of the proceeds of any such sale, after payment of such fine, such balance shall be paid over to the person who made such deposit or

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gave such security and if such deposit or such security is insufficient to pay the fine imposed, the balance remaining due shall be recovered from the person upon whom the fine was imposed in the manner provided in this Act.

(8) At any time before sentence has been passed upon the person in question under subsection (5), the Director of Public Prosecutions may direct that no action be taken in the matter under subsections (5), (6) and (7), but that such person be brought to trial in the ordinary manner:

Provided that in that case, if such person has been summoned or warned in terms of subsection (1), he shall be summoned afresh to answer such charge as the Director of Public Prosecutions may direct.

(9) If at the conclusion of the trial referred to in subsection (8) the person tried is sentenced to pay a fine, the provisions of subsections (6) and (7) shall apply.

(10) If at the conclusion of any proceedings against any person under this section, no fine is imposed upon him, the money or security deposited by or on behalf of such person shall be returned to the person who made the deposit.

308. Powers as to postponement and suspension of sentences

(1) Whenever a person is convicted before the High Court or any magistrate's court of any offence other than an offence specified in the Second Schedule, the court may in its discretion postpone for a period not exceeding three years the passing of sentence and release the offender on one or more conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may order to be inserted in recognizances to appear at the expiration of that period, and if at the end of such period the offender has observed all the conditions of the recognizances, the court may discharge the offender without passing any sentence.

(2) Whenever a person is convicted before the High Court or any magistrate's court of any offence other than an offence specified in the Second Schedule, the court may in its discretion pass sentence, but order that the operation of the whole or any part of the sentence be suspended for a period not exceeding three years, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with the provisions respectively of subsections (3) and (4). Such order shall be subject to such conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may specify therein.

(3) The period during which any order for the suspension of a part of a sentence, made under subsection (2) and affecting a sentence of imprisonment shall run, shall commence on the date upon which the person convicted was lawfully discharged from prison in respect of the unsuspended portion of such sentence, or if not then discharged because such person has to undergo any other sentence of imprisonment, such period shall commence upon the date upon which such person was lawfully discharged from prison in respect of such other sentence. If any portion of such other sentence is itself suspended, the periods of suspension

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of all such sentences shall, in the absence of any order to the contrary, run consecutively in the same order as the sentences.

(4) The period during which any order for the suspension of the whole of a sentence of imprisonment shall run, shall commence-

(*a*) where the convicted person is not serving another sentence, from the date from which the sentence wholly suspended was expressed as taking effect, or took effect; and

(*b*) where the convicted person is serving another sentence, from the date of expiration of that sentence including any period thereof which may be subject to an order of suspension.

(5) If during the period of suspension of the whole of a sentence the convicted person is sentenced to imprisonment the portion then remaining of the sentence wholly suspended shall be deemed to be consecutive to the sentence of imprisonment subsequently awarded.

(6) If the offender has, during the period of suspension of any sentence under this section, observed all the conditions specified in the order, the suspended sentence shall not be enforced.

309. Commencement of sentences

Subject to the provisions of section 308, a sentence of imprisonment shall take effect from and include the whole of the day on which it is pronounced unless the court, on the same day that sentence is passed, expressly orders that it shall take effect from some day prior to that on which it is pronounced.

310. Payment of fines by instalments

Whenever a person is convicted before the High Court or any magistrate's court of any offence other than an offence specified in the Second Schedule, the court may in its discretion order that any fine imposed on such person be paid in instalments or otherwise on such dates, and during such period not exceeding 12 months from the date of such order, as the court may fix therein. If on such date or dates the offender has made all payments in accordance with the order of the court, no warrant shall be issued committing the offender to prison to undergo any alternative imprisonment prescribed in the sentence in default of payment of the fine.

311. Consequences of failure to comply with conditions of postponement or suspension of sentence

(1) If the conditions of any order made, or recognizance entered into, under the provisions of section 308 or section 310 are alleged not to have been fulfilled, the local public prosecutor may, without notice to the offender, apply to any magistrate's court within the local limits of whose jurisdiction the offender is known or suspected to be, for a warrant for the arrest of the offender for the purpose of bringing him before the court to show cause why such offender shall not undergo the sentence which has been, or may be, lawfully imposed.

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(2) Any application made under subsection (1) shall be supported by evidence in the form of an affidavit or on oath, that the order or recognizance is still binding upon the offender and that such offender has failed, in a manner to be specified, to observe the conditions thereof.

(3) The court to which application is made under subsection (1) may, if it is satisfied that the offender ought to be called upon to show cause why he shall not undergo the sentence which has been, or may be, imposed, grant a warrant for the arrest of such offender for the purpose of bringing him to court to show cause as aforesaid.

(4) The court, before which any offender appears in consequence of an application under subsection (1), shall read, or cause to be read, to the offender, such application and the evidence given in support thereof, and shall thereupon call upon the offender to say whether he opposes such application.

(5) If such offender does not oppose the application and admits that he has not fulfilled the conditions of the order made, or recognizance entered into, the court may order that the offender shall undergo the sentence which was, or is then, imposed upon him or may make an order under section 312 if the original order was made under section 308(2) or under section 310.

(6) If the offender denies the allegations and opposes the application, the court shall proceed to hear the matter in accordance with the principles generally applicable to criminal trials under this Act, and if it finds that the offender has not fulfilled the conditions of any order made, or recognizance entered into, the court may thereupon order that the offender shall undergo the sentence which was, or is then, imposed upon him, or may make an order under section 312 if the original order was made under subsection (2) of section 308 or under section 310.

312. Further postponement or deferment of sentence

The court before which an offender appears may, if the original order related to the suspension of a sentence under section 308(2), or to the payment of a fine by instalments or otherwise under section 310, and if the offender proves to the court's satisfaction that he has been unable through circumstances beyond his control to fulfil the conditions of such order, in its discretion grant an order further suspending the operation of the sentence or further deferring payment of the fine, subject to such conditions as might have been imposed at the time the original order was made.

313. Magistrates' courts not to impose sentences of less than four days

No person shall be sentenced by a magistrate's court to imprisonment for a period of less than four days, unless the sentence is that the offender be detained until the rising of the court.

314. Discharge with caution or reprimand

Whenever a person is convicted before the High Court or any magistrate's court of any

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offence other than an offence specified in the Second Schedule, the court may in its discretion discharge the offender with a caution or reprimand, and such discharge shall have the effect of an acquittal, except for the purpose of proving and recording previous convictions.

315. Regulations

The President may make regulations, not inconsistent with this Act, as to all or any of the following matters, namely, the appointment, powers and duties of persons (to be known as probation officers) to whom may be entrusted the care or supervision of offenders whose sentences of imprisonment have been suspended under this Act, the circumstances under which courts of law may entrust such care or supervision to probation officers, the conditions which shall be observed by such offenders while on probation and the varying of such conditions, and generally for the better carrying out of the objects and purposes of this Part.

PART XIX
Costs, Compensation and Restitution (ss 316-320)

316. Court may order accused to pay compensation

(1) When any person has been convicted of an offence which has caused personal injury to some other person, or damage to or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon the application of the injured party, forthwith award him compensation for such injury, damage or loss.

(2) For the purposes of determining the amount of compensation or the liability of the accused therefor, the court may refer to the proceedings and evidence at the trial or hear further evidence upon affidavit or verbal or the amount of compensation which may be awarded by the court in accordance with an agreement reached between the person convicted and the person to be compensated.

(3) The court may order a person convicted upon a private prosecution to pay the costs and expenses of such prosecution in addition to the sum (if any) awarded under subsection (1):

Provided that if such private prosecution was instituted after a certificate by the Director of Public Prosecutions that he declined to prosecute, the court may order the costs thereof to be paid by the State.

(4) When a magistrate's court has made any award of compensation, costs or expenses under this section, the award shall have the effect of a civil judgment of that court, and when the High Court has made any such award, the Registrar of that Court shall forward a certified copy of the award to the clerk of the magistrate's court of the district wherein the convicted person underwent the preparatory examination held in connection with the offence in question, and thereupon such award shall have the same effect as a civil judgment of that magistrate's court.

(5) Any costs awarded as aforesaid shall be taxed according to the scale, in civil cases, of the court which made the award.

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(6) Where any moneys of the accused have been taken from him upon his apprehension, the court may order payment in satisfaction or on account of the award, as the case may be, to be made forthwith from those moneys.

(7) Any person against whom an award has been made under this section shall not be liable at the suit of the person in whose favour an award has been so made, and who has accepted the award, to any other civil proceedings in respect of the injury for which compensation has been awarded.

317. Compensation to innocent purchaser of stolen property

When any person has been convicted of theft or of any offence whereby he has unlawfully obtained any property, and it appears to the court by the evidence that he sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the convicted person on his apprehension, the court may, on the application of such purchaser and on restitution of such property to its owner, order that, out of the money so taken from the prisoner and belonging to him, a sum, not exceeding the amount of the proceeds of the sale, be delivered to such purchaser.

318. Restitution of stolen property

(1) If any person is convicted of theft or receiving stolen property knowing it to have been stolen, or otherwise unlawfully obtaining any property, such property may be restored to the owner or his representative on application by him to the court.

(2) In every such case the court before which such person is tried for any such offence shall have power to award from time to time writs of restitution in respect of the said property or to order the restitution thereof in a summary manner.

(3) If it appears, before any award is made, that any valuable security has been *bona fide* paid or discharged by any person liable to the payment thereof or, being a negotiable instrument has been *bona fide* taken or received by transfer or delivery by any person for a just and valuable consideration without notice or without any reasonable cause to suspect that the same had by any offence been stolen or otherwise unlawfully obtained, or if it appears that the property stolen or received as aforesaid or otherwise unlawfully obtained has been transferred to an innocent purchaser for value who has acquired a lawful title thereto, the court shall not award or order the restitution of such security or property.

319. Return of exhibits, etc.

(1) The court may, after the conclusion of any trial and subject to any special provision contained in any law, make a special order as to the return to the person entitled thereto of the property in respect of which the offence was committed or of any property seized or taken under this Act or produced at the trial. If no such order is made the property shall, on application, be returned to the person from whose possession it was obtained (unless it was proved during the trial that he was not entitled to such property) after deduction of the expenses incurred since the conclusion of the trial in connection with the custody of the

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property; but if within a period of three months after the conclusion of the trial no application is made under this section for the return of the property, or if the person applying is not entitled thereto or does not pay the expenses aforesaid, the property shall vest in the State.

(2) The court convicting any person of any offence which was committed by means of any weapon, instrument or other article produced to the court may, if it thinks fit, declare such weapon, instrument or other article to be forfeited to the State.

(3) The court convicting any person of any offence specified in Part I of the First Schedule who was arrested while in possession or custody of any vehicle or receptacle used in the conveyance of or containing any article or substance in connection with which the said offence was committed may, if it thinks fit, declare that vehicle or receptacle, or the convicted person's right thereto, to be forfeited to the State:

Provided that such declaration shall not affect any rights which any person other than the convicted person may have to the vehicle or receptacle in question if it is proved that he did not know that it was being used or would be used for the conveyance of, or as receptacle for, the said article or substance, or that he could not prevent such use.

(4) During the trial resulting in any such declaration of forfeiture and at any time after the making of such declaration, the court which is holding or which held the trial may inquire into and determine any person's rights to the vehicle or receptacle in question; and if such determination is adverse to any person, he may appeal therefrom as if it were a conviction by the court making the determination, and such appeal may be heard either separately or jointly with an appeal against the conviction as a result whereof the forfeiture was declared, or against a sentence imposed as a result of such conviction.

(5) If any such declaration is set aside or varied after the sale, on behalf of the State, of the vehicle or receptacle or rights declared to be forfeited, the person whose rights were upheld by the setting aside or variation of the declaration may, at his option, enforce those rights against any person in possession or custody of the vehicle or receptacle in question, or claim from the Government an amount equal to the value of those rights but not exceeding the proceeds of the sale of those rights.

320. Miscellaneous provisions as to awards or orders under this Part

(1) Any award or order of restitution made under this Part may be made subject to the applicant giving security *de restituendo* in case the award or order be reserved on appeal or review.

(2) The court may in any case refer a party applying for compensation under this Part to his remedy under the ordinary law.

(3) When any such award or order is made against two or more persons it shall be joint and several.

PART XX

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Reconciliation (s 321)

321. Reconciliation in criminal cases

(1) In criminal cases a magistrate's court may, with the consent of the prosecutor, promote reconciliation, and encourage and facilitate the settlement, in an amicable way, of proceedings for assault or for any other offence of a personal or private nature not aggravated in degree, on terms of payment of compensation or other terms approved by such court, and may, thereupon, order the proceedings to be stayed.

(2) If the proceedings are stayed, they shall be stayed for a sufficient length of time to enable the terms of the settlement to be carried out and if the terms be carried out by that date, it shall be recorded on the record to the case and the accused discharged; if the terms have not been carried out, the case against the accused will then proceed unless the proceedings be further stayed.

PART XXI
Appeals (ss 322-326)

322. When execution of sentence may be suspended

The execution of the sentence of a magistrate's court shall not be suspended by reason of any appeal against a conviction, unless-

(*a*) the sentence is that the accused be given corporal punishment, in which case the sentence shall not be executed until the appeal has been heard and decided; or

(*b*) the court from which the appeal is made thinks fit to order that the accused be admitted to bail or, if he is sentenced to any punishment other than simple imprisonment, that he be treated as an unconvicted prisoner until the appeal has been heard and decided:

Provided that-

(i) when the accused is ultimately sentenced to imprisonment, the time during which he is so released on bail shall be excluded in computing the term for which he is so sentenced; and

(ii) when the accused has been detained as an unconvicted prisoner as hereinbefore provided, the time during which he has been detained shall be included or excluded in computing the term for which he is ultimately sentenced as the appellate court may determine.

323. Summary dismissal of appeal

Where an appeal against a conviction or sentence from a magistrate's court has been duly noted, the appellate court, on perusing the record of the case, including the appellant's statement setting out the grounds upon which the appeal is based, and any due notice of

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amendment thereof, and any further document which may have duly become part of the record, may if it considers that there is no sufficient ground for interfering, dismiss the appeal summarily:

Provided that no appeal shall be dismissed unless the appellant or his counsel (if the court has been notified that he has a counsel) has had a reasonable opportunity of being heard in support of the same.

324. Notice of time, place and hearing

If the appellate court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his counsel, and to the Director of Public Prosecutions, or in the case of a private prosecution, to the complainant or his counsel, of the time and place at which such appeal will be heard, and shall furnish the Director of Public Prosecutions or, in the case of a private prosecution, the complainant or his counsel, with a copy of the record of the case, including the appellant's statement setting out the grounds upon which the appeal is based, and any due notice of amendment thereof, and any further document which may have duly become part of the record.

325. Powers of appellate court

In case of any appeal against a conviction or sentence which has not been dismissed summarily under section 323, the appellate court may without prejudice to the exercise by the court of its powers under section 62 of the Magistrates' Courts Act and under section 10 of the High Court Act-

(*a*) confirm the judgment of the court below, in which case if the accused, having been convicted and admitted to bail, is in court, the appellate court may forthwith commit him to custody for the purpose of undergoing any punishment to which he may have been sentenced;

(*b*) order that the judgment shall be set aside notwithstanding the verdict, which order shall have for all purposes the same effect as if the accused had been acquitted;

(*c*) give such judgment as ought to have been given at the trial, or impose such punishment (whether more or less severe than or of a different nature from the punishment imposed by the court below) as ought to have been imposed at the trial; or

(*d*) make such other order as justice may require:

Provided that notwithstanding that the appellate court is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the appellate court that a failure of justice has in fact resulted therefrom.

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326. Order of court to be certified

The order or direction of the appellate court shall be certified under the hand of the presiding judge to the Registrar of the court before which the case was tried, and such order or direction shall be carried into effect and shall authorize every person affected by it to do whatever is necessary to carry it into effect.

PART XXII
Pardon and Commutation (s 327)

327. Conditional remission of sentence by the President

In any case in which the President extends mercy to an offender under sentence of imprisonment he may extend mercy upon condition of the offender entering into a recognizance on condition as in the case of offenders discharged by the court upon suspension of the execution of a sentence. The offender shall thereupon be liable to the same obligations and to be dealt with in all respects in the same manner as a person discharged by the court on recognizance upon such suspension.

PART XXIII
General and Supplementary (ss 328-337)

328. How documents are to be served

(1) Unless some period is expressly provided, any notice or document, except a summons to an accused person, required to be served upon an accused person shall be served by delivering it to the accused 10 days at least before the day specified therein for his trial if his trial is before the High Court, or two days at least (Sundays and public holidays excluded) before that day if his trial is before a magistrate's court, or, when the accused cannot be found, by leaving a copy of the notice or document with a member of his household at his dwelling, or, if no person belonging to his household can be found, then by affixing such copy to the principal outer door of the said dwelling or of any place where he actually resides or was last known to reside.

(2) Where the accused has been admitted to bail any such notice or document may either be served upon him personally or left at the place specified in the recognizance as that at which any notice of trial and service of the indictment or summons may be made.

(3) The officer serving any such notice as aforesaid shall forthwith deliver or transmit to the official from whom he has received the notice or document for service a return of the mode in which service was made, and such return shall be *prima facie* evidence that the service of the notice or document was made in the manner and form as in the return stated.

(4) Members of the Botswana Police Force shall, subject to the rules of court, be qualified to serve any notice or document under this Act as if they had been appointed Deputy-Sheriffs or deputy-messengers or other like officers of the court.

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329. Person making a statement in a criminal case entitled to copy

Whenever a person has made to a peace officer a statement in writing, or a statement which was reduced to writing, relating to any transaction, and criminal proceedings are thereafter instituted in connection with that transaction, any person in possession of such statement shall furnish the person who made the statement, at his request, with a copy of such statement.

330. Mode of proving service of process

Whenever it is necessary to prove service of any summons, subpoena, notice, or other process, or the execution of any judgment or warrant under this Act, the service or execution may be proved by affidavit made before a justice or commissioner of oaths having jurisdiction to take affidavits in the district wherein the affidavit is made or in any other manner in which the service or execution might have been proved if it had been effected in the district or other area wherein the summons, subpoena, notice or other process or judgment or warrant emanated.

331. Transmission of summonses, writes, etc., by telegraph

Any summons, writ, warrant, rule, order, notice or other process, document, or communication, which by any law, rule of court, or agreement of parties is required or directed to be served or executed upon any person, or left at the house or place of abode or business of any person, in order that such person may be affected thereby, may be transmitted by telegraph, and a telegraphic copy served or executed upon such person, or left at his house or place of abode or business, shall be of the same force and effect as if the original had been shown to, or a copy thereof served or executed upon, such person, or left as aforesaid, as the case may be.

332. Liability to punishment in case of offences by corporate bodies, partnerships, etc.

(1) In any criminal proceedings under any enactment against a company, the secretary and every director or manager or chairman thereof in Botswana may, unless it is otherwise directed or provided, be charged with the offence and shall be liable to be punished therefor, unless it is proved that he did not take part in the commission of the offence, and that he could not have prevented it.

(2) In any such proceedings against a local authority, the mayor, chairman, city or town clerk, secretary or other similar officer shall, unless it is otherwise directed or provided, be liable to be so charged, and in like circumstances punished for the offence.

(3) In any such proceedings against a partnership, every member of such partnership who is in Botswana shall, unless it is otherwise directed or provided, be liable to be so charged, and in like circumstances punished for the offence.

(4) In any such proceedings against any association of persons not specifically mentioned in this section, the president, chairman, secretary, and every other officer thereof in Botswana

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shall, unless it is otherwise directed or provided, be liable to be so charged, and in like circumstances punished for the offence.

(5) Nothing in this section shall be deemed to exempt from liability any other person guilty of the offence.

(6) In any criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of the corporate body within the scope of his activities as such director, servant or agent, or any document which was at any time in the custody or under the control of any such director, servant or agent within the scope of his activities as such director, servant or agent, shall be admissible in evidence against the accused.

(7) For the purposes of subsection (6) any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his custody or control shall be presumed to have been made or kept by him or to have been in his custody or control within the scope of his activities as such director, servant or agent, unless the contrary is proved.

(8) In any proceedings against a director or servant of a corporate body in respect of an offence, any evidence which would be or was admissible against that corporate body in a prosecution for that offence, shall be admissible against that director or servant.

(9) In this section the word "director" in relation to a corporate body means any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or where there is no such body or group, who is a member of that corporate body.

333. Provisions as to offences under two or more enactments

Where an act or omission constitutes an offence under two or more enactments, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either enactment, but shall not be liable to more than one punishment for the act or omission constituting the offence.

334. Estimating age of person

If in any criminal proceedings the age of any person is a relevant fact of which no or insufficient evidence is available in those proceedings, the court may estimate the age of such person by his appearance or from any information which may be available, and the age so estimated shall be deemed to be such person's correct age, unless-

(*a*) it is subsequently proved that the said estimate was incorrect; and

(*b*) the person accused in those proceedings could not have been lawfully convicted of the offence with which he was charged if the said person's correct age had been proved.

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335. Binding over of persons to keep the peace

(1) Whenever a complaint on oath is made to a magistrate that any person is conducting himself violently towards or is threatening injury to the person or property of another or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault, then, whether such conduct occurred or such language was used or such threat was made in a public or private place, the magistrate may order such person to appear before him, and if necessary may cause him to be arrested and brought before him.

(2) The magistrate shall thereupon inquire into and determine upon such complaint and may place the parties or any witnesses thereat on oath, and in his discretion may order the person against whom the complaint is made to give recognizances with or without sureties in an amount not exceeding P50 for a term not exceeding six months to keep the peace towards the complainant and refrain from doing or threatening injury to his person or property.

(3) The magistrate may, upon the inquiry, order the person against whom the complaint is made or the complainant to pay the costs of and incidental to the inquiry.

(4) If any person after having been ordered to give recognizances under this section refuses or fails to do so, the magistrate may order him to be committed to gaol for a period not exceeding one month unless such security is sooner found.

(5) If the conditions upon which the recognizances were given are not observed by the person who gave the same, the magistrate may declare the recognizances to be forfeited, and any such declaration of forfeiture shall have the effect of a judgment in a civil action in the magistrate's court of the district.

336. Power of Director of Public Prosecutions to invoke Court of Appeal's decision on point of law

(1) Where the High Court, at any stage of criminal proceedings, gives or makes any decision, ruling, opinion or statement on or in relation to a question of law and the Director of Public Prosecutions has any doubt as to the correctness thereof, he may submit that decision, ruling, opinion or statement to the Court of Appeal and cause the correctness thereof to be argued before the Court of Appeal on behalf of the State in order that the Court of Appeal may determine the correctness thereof for the future guidance of all courts.

(2) For the removal of doubt, it is hereby declared that the application of subsection (1) extends to an opinion or statement which is not essential to the determination of any issue.

337. Finger-prints and other marks

(1) Any member of the Botswana Police Force or any gaoler may take the finger-prints, palm-prints and foot-prints of any person arrested upon any charge, and any such policeman, gaoler or a medical officer may take or cause to be taken such steps as he may deem necessary in order to ascertain whether the body of any such person, not being a woman, bears any mark, characteristic or distinguishing feature, or shows any condition or appearance:

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Provided that-

(i) the finger-prints, palm-prints or foot-prints of any person not guilty of such charge shall be destroyed;

(ii) any print made or taken under this section previous to the occurrence which is the subject of criminal proceedings, whenever no order exists for the destruction of such finger-print or record, may be used as evidence in a criminal trial.

(2) The presiding officer of any court may order that the finger-prints, palm-prints and foot-prints of any person accused before such court of any offence, be taken, and may take all such steps as may by such officer be deemed necessary to ascertain whether the body of the accused bears any mark, characteristic or distinguishing feature, or shows any condition or appearance.

(3) Any record from a finger-print bureau, whether within or outside Botswana, produced by the person appointed to the charge of that bureau which purports to be the record of a finger-print, palm-print, or foot-print of the accused shall be admissible and shall be accepted as *prima facie* evidence of the facts stated in the record.

FIRST SCHEDULE

PART I

Offences in connection wherewith Vehicles and Receptacles may be Seized and Confiscated under Sections 56 and 319

Any offence under any law relating to the illicit possession, conveyance or supply of intoxicating liquor.

Any offence under any law relating to the illicit possession of or dealing in precious metals or precious stones.

PART II

Offences Specified in the Penal Code (Cap. 08:01), Lotteries and Betting Act (Cap. 19:02) and Foreign Enlistment Act (Cap. 21:06) in respect of which Arrests under Part VI shall not be Made without a Warrant

Offences under the Penal Code

SECTION

21. Aiding, abetting, counselling, etc. another to commit an offence

43. Aiding members of the Forces in acts of mutiny

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44. Inducing desertion

45(*b*). Aiding prisoners of war to escape

59. Alarming publications

60. Defamation of foreign princes

89. Challenging to a duel

102. Officers charged with administration of property of special character or with special duties

103. False claims by officials

104. (1) Abuse of office

(2) Abuse of office (if for purposes of gain)

105. False certificate by public officers, etc.

106. Unauthorized administration of oaths

107. False assumption of authority

109. Threat of injury to persons employed in public service

111. Perjury and subornation of perjury

116. Fabricating evidence

117. False swearing

118. Deceiving witnesses

119. Destroying evidence

120. Conspiracy to defeat justice and interference with witnesses

121. Compounding certain serious offences

122. Advertisements for stolen property

129. Frauds and breaches of trust by public officers

130. Neglect of official duty

132. Disobedience of statutory duty

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133. Disobedience of lawful orders

140. Writing or uttering words with intent to wound religious feelings

176. Common nuisance

185. Adulteration of food or drink for sale

186. Sale of noxious food or drink

187. Adulteration of drugs

188. Sale of adulterated drugs

190. Fouling air

191. Offensive trades

192. Definition of criminal defamation

241. Dealing in poisonous substances in negligent manner

245. Danger or obstruction in public way river

246. Common assault

376. Counterfeiting, etc. trade marks

384. Corrupt practice

385. Secret commission on Government contracts

389. Attempt to commit offences (if arrest for the offences attempted may not be made without a warrant)

391. Soliciting or inciting others to commit offence (if arrest for the offence solicited or incited may not be made without a warrant)

392. Conspiracy to commit offence (if arrest for the offence conspired may not be made without a warrant)

393. Other conspiracies

395. Punishment of accessory after the fact (if arrest for the principal offence may not be made without a warrant)

Lotteries and Betting Act

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19. Gaming houses-

(3) Keeping common gaming house

(4) Being found in common gaming house

21. Betting houses

22. Lotteries

(1) Carrying on lottery

(2) Printing or publishing advertisement relating to lottery

Foreign Enlistment Act

3. Illegal enlistment

4. Leaving Botswana for enlistment

5. Inducing enlistment by misrepresentation

6. Taking on board illegally enlisted persons

7. Illegal expeditions

SECOND SCHEDULE
OFFENCES ON CONVICTION WHEREOF THE OFFENDER CANNOT BE DEALT WITH UNDER SECTION 308

Murder.

Rape.

Robbery.

Any offence in respect of which a minimum punishment is by law imposed.

Any conspiracy, incitement or attempt to commit any of the above mentioned offences.

THIRD SCHEDULE
FORMS OF STATING OFFENCES IN INDICTMENTS AND SUMMONSES

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FORMS OF STATING OFFENCES IN INDICTMENTS AND SUMMONSES

(*section 131*)

1-MURDER

Murder, contrary to section 202 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, murdered *C.D.*

2-ACCESSORY AFTER THE FACT TO MURDER

Accessory after the fact to murder, contrary to section 219 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., well knowing that one *C.D.*, did on .... the day of ...., 20 ...., at .... in the .... district, murder *E.F.*, did on the .... day of .... at .... in the .... district, and on other days thereafter receive, comfort, harbour, assist and maintain the said *C.D.*

3-MANSLAUGHTER

Manslaughter, contrary to section 200 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on .... the day of ...., 20 ...., at .... in the .... district, unlawfully killed *C.D.*

4-RAPE

Rape, contrary to section 142 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of ....20 ......, at .... in the .... district, had carnal knowledge of *C.D.*, without her consent.

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5-WOUNDING

FIRST COUNT

Wounding with intent, contrary to section 227 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, wounded *C.D.* with intent to maim, disfigure or disable, or to do some grievous harm, or to resist the lawful arrest of him, the said *A.B.*

SECOND COUNT

Wounding, contrary to section 233 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, unlawfully wounded *C.D.*

6-THEFT

FIRST COUNT

Stealing, contrary to section 271 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, stole a watch, the property of *C.D.*

SECOND COUNT

Receiving stolen goods, contrary to section 317 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, did receive a watch, the property of *C.D.*, knowing the same to have been stolen.

7-THEFT BY CLERK

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Stealing by clerks and servants, contrary to sections 271 and 277 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, being clerk or servant to *C.D.*, stole from the said *C.D.* 4.5 kilograms of sugar.

8-ROBBERY

Robbery with violence, contrary to section 292 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, robbed *C.D.*, of a watch, and at, or immediately before or immediately after, the time of such robbery did use personal violence to the said *C.D.*

9-BURGLARY

Burglary, contrary to section 300, and theft, contrary to section 271 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., in the night of the .... day of .... 20 ......, at .... in the .... district, did break and enter the dwelling-house of *C.D.*, with intent to steal therein, and did steal therein one watch, the property of *E.F.*, the said watch being of the value of P25,00.

10-THREATS

Demanding property by written threats, contrary to section 295 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, with intent to exort money from *C.D.*, caused the said *C.D.* to receive a letter containing threats of injury or detriment to be caused to *E.F.*

11-ATTEMPTS TO EXTORT

Attempts to extort by threats, contrary to section 296 of the Penal Code (Cap. 08:01)

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PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, with intent to extort money from *C.D.*, accused or threatened to accuse the said *C.D.* of an unnatural offence.

12-FALSE PRETENCES

Obtaining by false pretences, contrary to section 308 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, with intent to defraud, obtained from *C.D.* five leopard skins by falsely pretending that the said *A.B.* was a servant to *E.F.*, and that he, the said *A.B.*, had then been sent by the said *E.F.* to *C.D.*, for the said leopard skins and that he, the said *A.B.*, was then authorized by the said *E.F.* to receive the said leopard skins on behalf of the said *E.F.*

13-CONSPIRACY TO DEFRAUD

Conspiracy to defraud, contrary to section 312 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B. and *C.D.*, on the .... day of .... and on divers days between that day and the .... day of ...., at .... in the .... district, conspired together with intent to defraud by means of an advertisement inserted by them, the said *A.B.* and *C.D.* in the *E.F.* newspaper, falsely representing that *A.B.* and *C.D.* were then carrying on a genuine business as trophy dealers at .... , in the .... district, and that they were then able to supply certain trophies to whomsoever would remit to them the sum of P150,00.

14-ARSON

Arson, contrary to section 326 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, wilfully and unlawfully set fire to a house.

15-ARSON AND COUNSELLING OR PROCURING THE SAME

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A.B., Arson, contrary to section 326 of the Penal Code (Cap. 08:01)
C.D., counselling or procuring the same offence.

PARTICULARS OF OFFENCE

A.B., on the .... day of ....
20 ......, at .... in the ....
district, wilfully and unlawfully set fire to a house.

C.D., on the same day, at .... district
did counsel or procure the said *A.B.*, to commit the said offence.

16-DAMAGE

Damaging trees, contrary to section 333 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of ....
20 ......, at .... in the ....
district, wilfully and unlawfully damaged an orange tree there growing.

17-FORGERY

FIRST COUNT

Forgery, contrary to section 345 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of ....
20 ......, at .... in the ....
district, forged a certain will purporting to be the will of *C.D.*

SECOND COUNT

Uttering a false document, contrary to section 348 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of ....
20 ......, at .... in the ....
district, knowingly and fraudulently uttered a certain forged will purporting to be the will of
C.D.

18-COUNTERFEIT COIN

Uttering a counterfeit coin, contrary to section 367 of the Penal Code (Cap. 08:01)

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PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, uttered a counterfeit 10 thebe piece, knowing the same to be counterfeit.

19-PERJURY

Perjury, contrary to section 111 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, being a witness upon the trial of an action in the High Court of Botswana, in which one *C.D.* was plaintiff, and one *E.F.* was defendant, knowingly gave false testimony that he saw one, *G.N.* in the street called the .... on the .... day of ....

20-CRIMINAL DEFAMATION

Publishing defamatory matter, contrary to section 192 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, published defamatory matter affecting *C.E.*, in the form of a (book, pamphlet, picture or as the case may be).

(Innuendo should be stated where necessary)

21-FALSE ACCOUNTING

FIRST COUNT

Fraudulent false accounting, contrary to section 324 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, being clerk or servant to *C.D.*, with intent to defraud, made or was privy to making a false entry in the cash book belonging to the said *C.D.*, his employer, purporting to show that on the said day P2 000 had been paid to *E.F.*

SECOND COUNT

Same as first count

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PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, being clerk or servant to *C.D.*, with intent to defraud omitted or was privy to omitting from a cash book belonging to the said *C.D.*, his employer, a material particular, that is to say, the receipt on the said day of P2 000 from *E.F.*

22-THEFT BY AGENT

FIRST COUNT

Theft by agents and others, contrary to section 271 and section 279 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district of Botswana, stole P2 000 which had been entrusted to him by *C.D.* for him, the said *A.B.*, to retain in safe custody.

SECOND COUNT

Stealing by agents and others, contrary to section 271 and section 279 of the Penal Code (Cap. 08:01)

PARTICULARS OF OFFENCE

A.B., on the .... day of .... 20 ......, at .... in the .... district, stole P2 000 which had been received by him, for and on account of *C.D.*

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