**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case No: 862/2015

**Reportable**

In the matter between:

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| **SHAMDUTT SINGH** | **FIRST APPELLANT** |
| **ABDUL WAHAB CARRIM** | **SECOND APPELANT** |
| **LALELANI MBANJWA** | **THIRD APPELLANT** |
| **MAZIBONGWE INNOCENT NGOBE** | **FOURTH APPELLANT** |

**and**

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| **THE STATE** | **RESPONDENT** |

**Neutral Citation:** *Shamduth Singh & others v The State* 862/2015 [2016] ZASCA 37 (24 March 2016)

**Coram:** Tshiqi; Swain and Mbha JJA and Tsoka and Victor AJJA

**Heard:** **02 March 2016**

**Delivered:** **24 March 2016**

**Summary:** Undercover operation conducted in terms of s 252A of the Criminal Procedure Act 51 of 1977 – merits of convictions not challenged – challenge based on s 35(5) of the Constitution – fairness of trial conceded – rights violations

challenged on the basis that the conduct of the undercover operation was detrimental to the administration of justice – not alleged that the rights violation affected the appellants themselves – alleged the rights violated were those of the general public – enquiry – no onus of proof – entails a value judgment – entails a balancing of rights in the Bill of Rights and respect for the judicial process – on the facts the undercover operation was aimed at protecting the general public – no flagrant disregard of rights of public.

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**ORDER**

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**On appeal from:** KwaZulu-Natal Local Division of the High Court, Durban (McLaren J sitting as court of first instance):

1. The appeal against the convictions is dismissed.
2. The appeal against the sentences is upheld partially to the extent reflected below:

2.1

First Appellant

(a) the sentence imposed in count 6 is ordered to run concurrently with the sentences in counts 10, 12, 13 and 14;

(b) the sentence imposed in count 1 is ordered to run concurrently with the sentences in counts 5, 16, 17, 18, 19 and 20;

(c) the first appellant is therefore sentenced to an effective term of 20 years imprisonment.

Third Appellant

a) the sentences imposed in counts 6, 7, 8, 10, 11, 14 and 15 are ordered to run concurrently;

b) the sentences imposed in counts 1, 16 and 17 are ordered to run concurrently;

c) the third appellant is therefore sentenced to an effective term of 20 years imprisonment.

Fourth Appellant

a) the sentences imposed in counts 13 and 14 are ordered to run concurrently;

b) the fourth appellant is therefore sentenced to an effective term of 15 years imprisonment.

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**JUDGMENT**

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**Tshiqi JA (Swain and Mbha JJA and Tsoka and Victor AJJA concurring)**

[1] The issues raised in this appeal concern an undercover operation termed 'Operation Texas' (the operation) conducted by the South African Police Service (SAPS) in 2007 and 2008 in terms of s 252A of the Criminal Procedure Act 51 of 1977 (the Act). Its objective was to infiltrate and detect criminal activities of one of the syndicates that were involved in several incidents of hijackings and armed robberies of large 18 wheeler trucks along the N3 highway stretching between Durban and Gauteng. Although there were other syndicates involved in similar criminal activities in the area, the operation targeted the syndicate to which the appellants were members.

[2] The modus operandi in all the incidents involving the appellants was almost the same. Trucks parked along the highway and at truck stops in the evenings were identified as possible targets by the members of the syndicate performing the role of spotters. They were inspected and if their wheels were in good condition the truck driver would be held up at gunpoint and tied up. A member of the syndicate playing the role of a driver would then drive the truck with the assistance of a guard to a safe place where the wheels were removed and loaded on to another truck which would transport them to a specified place. The hijacked truck and its occupants were left at the scene but were deprived of their cell phones so that they were not able to contact

the police and their employers. The wheels would be sold to the co-ordinator of the group who would be contacted once the wheels had been removed to give further instructions on where they would be taken. The members of the syndicate were paid a specific amount for every wheel delivered on the instructions of the co-ordinator and he in turn, sold them to his own unidentified contacts at a higher amount.

[3] In a quest to ensure the conviction of the members of appellants' syndicate, the SAPS, through the Commander: Provincial Crime Intelligence Projects, KwaZulu–Natal, made an application to the office of the Provincial Director, Public Prosecutions, in terms of the Act to conduct the undercover investigation for a period of three months in accordance with the guidelines issued in terms of the Act in order to infiltrate the syndicate. The first appellant was the primary target as the information at the disposal of the SAPS had identified him as the co-ordinator of the targeted syndicate. His only details available to the police at the time were:
Sunil Shamdutt Singh (aka: Shoshova)

ID number: 6605175101088

Employment: Self Employed (owner of a car wash in Ladysmith)

Residential Address: House number: 363, road 736, unit 9, Chatsworth, Durban

Additional Residential Address: in Ladysmith still to be confirmed.

[4] In motivation for the operation the application highlighted that the syndicates operating in the area were already involved in incidents of serious violence, including the murder of two truck drivers and the rape of a woman passenger. Conventional investigation techniques had thus far failed in detecting the crimes and apprehending the main role players. The syndicates were also suspected of being involved in seven other incidents that were under investigation ranging from truck hijackings, armed robbery and attempted murder. Only one armed robbery conviction had been secured.

[5] The main challenge in apprehending the culprits was that the incidents occurred randomly, usually in the evenings, anywhere in a long stretch on the N3 highway, thus making it difficult for the police to know in advance exactly where the

crime would be committed. Although the secondary targets like the spotters, guards and robbers were apprehended on a regular basis, it was difficult to secure the convictions of the main role players because they were not usually physically present at the scene of the crimes, and it was difficult to prove their involvement in the criminal activities. The failure to arrest the main role players meant that the market was not eliminated because those secondary targets were easily replaced once convicted and the syndicate would continue with its activities.

[6] In order to effectively penetrate the syndicate the SAPS wished to utilise an 'in place informer' and a trap agent. The terms of reference were: The agent's simulated role would be to transport the stolen goods. The agent and informer would only be contacted after the incident had occurred and thus would not be aware beforehand of the exact times and dates the incidents were to take place. The trap agent and informer would also not create a new market within the syndicate but would continue with already existing activities. As the syndicates worked mainly after hours, a prior written authorization in terms of s 252A of the Act for each incident would not be obtained, but feedback would be obtained the following day. Captain Ungerer was identified to be the project manager of the operation.

[7] The Director of Public Prosecutions (DPP) approved the application for the operation and issued the following guidelines:

'a) The informer which is currently deployed will not testify and will at a later stage be removed from the investigation.

b) Attempts will be made to secure the services of a second undercover agent.

c) The agent shall be provided with equipment to enable him to request that the members of the team intervene should it appear that the safety of any person is threatened.

d) The agent and the informer shall become involved in pre-existing criminal schemes.

e) The statements and plea agreements of the convicted members of the syndicate will be submitted to me.

f) If and when new information becomes available justifying the continued execution of the undercover operation the same must be submitted to me.

g) The operation was verbally authorised on 16 August 2007 for the period 16 August to 24 August 2007. During this period the agent and informer may transport stolen goods for the members of the syndicate.

h)…'

The initial period was extended on several occasions with certain minor amendments and the operation eventually terminated in February 2008.

[8] Sergeant Smith was chosen to be the agent. A 4 ton truck was obtained and its load area was covered with a canvas. It was fitted with three video recording cameras, one in the cab, one in the loading area and one at the rear. It was also fitted with a Tracker device which was linked to a police computer by means of which the position of the truck could at all times be determined.

[9] Smith indeed infiltrated the syndicate. He was given a pseudonym called Darryl. It was arranged that he would be introduced to one of the members of the syndicate, named Oscar[1] by one Lazarus (called Laz), who was apparently driving a truck on behalf of the syndicate transporting the stolen wheels. It seems Laz had turned against his partners in crime but his motive is immaterial for the purposes of this judgement. Laz indeed introduced Smith to Oscar who was at the time detained at the SAPS in Pinetown. Laz told Oscar that Smith would take over from him as a driver because Laz's wife was complaining about his working hours. Oscar had no problem with the arrangement and in due course contacted Smith and further details of his involvement were discussed at a later date at Oscar's home. On a separate occasion Smith was also introduced to the first appellant.

[10] Through Smith's involvement in the six incidents the appellants were ultimately arrested and indicted on 20 counts ranging from racketeering[2], robbery with aggravating circumstances[3], corruption[4], kidnapping, unlawful possession of a

[1] Oscar and the second appellant are deceased.
[2] Section 2(1)(e) read with ss 1,2(2) and 3 of Prevention of Organised Crime Act 121 of 1998.
[3] Section 1 of the Criminal Procedure Act 51 of 1977 read with provision of s 51(2) of Criminal Law Amendment Act 105 of 1997.
[4] Section 4(1)(b)(iv) read with ss 1,2,4(2),24,25,26(1)(a) of Prevention and Combatting of Corrupt Activities Act 12 of 2004.

firearm, attempted murder and money laundering[5]. They were convicted and sentenced as follows:

First appellant:

Count 1: Racketeering – sentenced to five (5) years imprisonment to run concurrently with the sentences imposed on Counts 6, 10, 13 and 14;

Count 5: Corruption – sentenced to eighteen (18) months imprisonment to run concurrently with the sentences imposed on Counts 6, 10, 13 and 14;

Count 6: Robbery – sentenced to fifteen (15) years imprisonment to run concurrently with the sentence imposed on Count 10;

Count 10: Robbery – sentenced to fifteen (15) years imprisonment to run concurrently with the sentence imposed on Count 6;

Counts 12-14: Robbery – sentenced to fifteen (15) years imprisonment in respect of each count, with the sentences imposed on Counts 12 and 13 to run concurrently and along with ten (10) years of the sentence imposed on Count 14;

Counts 16-20: Money laundering – sentenced to one (1) year imprisonment in respect of each count.

Third Appellant:

Count 1: Racketeering – sentenced to five (5) years imprisonment to run concurrently with the sentence in Count 6;

Count 6: Robbery – sentenced to fifteen (15) years imprisonment;

Counts 7-8: Kidnapping – sentenced to 3 years imprisonment in respect of each count to run concurrently with the sentence in Count 6;

Count 10: Robbery – sentenced to fifteen (15) years imprisonment to run concurrently with the sentence in Count 14;

[5]Section 4 of Act 121 of 1998.

Count 11: Kidnapping – sentenced to three (3) years imprisonment to run concurrently with sentences in Counts 10 and 14;

Count 14: Robbery – sentenced to fifteen (15) years imprisonment to run concurrently with sentence in Count 10;

Count 15: Unlawful possession of a firearm – sentenced to three (3) years imprisonment to run concurrently with the sentences in Counts 10 and 14;

Counts 16-17: Money laundering – sentenced to one (1) year imprisonment on each count to run concurrently with the sentences in Counts and 10 and 14.

Fourth Appellant:
Counts 13-14: Robbery – sentenced to fifteen (15) years imprisonment in respect of each count.

The first appellant was sentenced to an effective term of 35 years imprisonment whilst the third and fourth appellants were sentenced to effective terms of 30 years imprisonment. They now appeal to this Court with leave of the trial court.

**The Convictions**

[11] All the evidence which led to the convictions of the appellants was gathered during the operation. Smith's main role was to convey the wheels that had been removed from the trucks to a specified address and he would be paid for his effort. He did not initiate any of the criminal activities. He disclosed his movements and made several reports to the investigation team whenever he could after each incident, including all the payments given to him for each transaction. At all times during the six incidents the video cameras and the tracking device were activated.

[12] During the trial the admissibility of the evidence was challenged on grounds that it did not satisfy the requirements of s 252A of the Act[6] and thus fell to be excluded. The challenge was based on the following grounds:

a) The conduct of the DPP in authorising the agent to involve himself in further criminal conduct after the identity of the syndicate members had been established endangered the safety of the public and the maintenance of public order.
b) The conduct of the agent went beyond providing an opportunity to commit an offence.
c) The degree of deceit, trickery and misrepresentation used by the agent was aimed at falsely implicating the accused.
d) The agent failed to adhere to the guidelines set down by the DPP.
e) The original information given to the DPP was misleading.

[13] The trial court found that the operation served the interests of the public at large, which benefit by far outweighed risks to Smith and potential victims of the offences which were committed. The trial court regarded as convincing the evidence of Captain Ungerer that the ordinary methods of investigation and policing were ineffective in dealing with the offences. It dismissed the grounds on which the evidence was challenged, admitted the evidence and convicted the appellants on most of the counts.

[14] In this appeal the appellants do not challenge the merits of the convictions and have since disavowed any reliance on s 252A of the Act. They now concede that

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[6] Section 252A provides:

'(1) Any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).'

Smith was never seriously challenged on grounds that his conduct went beyond providing the appellants with an opportunity to commit an offence. Consequently they concede that the conduct of the agent did not go beyond providing an opportunity to the appellants to commit the offences. The appeal is based solely on s 35(5) of the Constitution which provides:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

[15] The reliance on s 35 (5) of the Constitution is also limited in that it is not submitted that the alleged rights violations rendered the trial unfair. The complaint is restricted to a contention that the alleged violations were detrimental to the administration of justice. Even on that ground, the appellants do not contend that the rights violations affected the rights of the appellants in anyway. Instead the complaint relates to the rights of the public at large. It is alleged that the conduct of the State was detrimental to the administration of justice in that it undertook the operation whilst aware that members of the public had already been exposed to serious violence, and that it continued with the operation whilst aware of a real possibility of further exposure to such violence. In support of that submission the appellants refer to the incidents of violence that had already been perpetrated by the syndicates, where the victims were hijacked and robbed, and where a female victim was raped. The State on the other hand contends that the aim of the undercover operation was to protect the very same public the appellants contend were exposed to danger, by ensuring that all the members of the syndicate, including the main role players would be arrested and convicted.

[16] The use of undercover agents by the police, both for the prevention and the detection of crime, is long established, and is acceptable in our Constitutional democracy. Section 35(5) of the Constitution does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. The enquiry as to whether the admission of evidence would be detrimental to the administration of justice centres around public interest. Since the enquiry is purely a legal question, the question of the incidence and quantum of proof required

to discharge the onus of proof does not arise.[7] It essentially involves a value judgment.[8] In *Key v Attorney - General, Cape Provincial Division* the Constitutional Court stated:

'In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale.'[9] In *Mthembu v The State*[10] this court stated:

'. . . Public policy, in this context, is concerned not only to ensure that the guilty are held accountable; it is also concerned with the propriety of the conduct of the investigating and prosecutorial agencies in securing evidence against criminal suspects. It involves considering the nature of the violation and the impact that evidence obtained as a result thereof will have, not only on a particular case, but also on the integrity of the administration of justice in the long term. Public policy therefore sets itself firmly against admitting evidence obtained in deliberate or flagrant violation of the Constitution. If on the other hand the conduct of the police is reasonable and justifiable, the evidence is less likely to be excluded - even if obtained through an infringement of the Constitution.'

[17] What has to be balanced is on the one hand, respect for the Bill of Rights, particularly by law enforcement agencies, and, on the other, respect for the judicial process, particularly by the man in the street. This is a delicate process since over-emphasis of the former would lead to acquittals on what the public would perceive as technicalities whilst over-emphasis on the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated.[11]

[18] A conspectus of the various cases shows that the factors that may be taken into account to determine whether the reception of evidence is detrimental to the administration of justice are the bona fides of the investigation,[12] the nature and seriousness of the violation of the accused's rights,[13] considerations of urgency and public safety,[14] the availability of alternative, lawful means of obtaining the evidence

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[7] D T Zeffert and A P Paizes *The South African Law of Evidence* 2 ed (2009) at 757.
[8] *S v Pillay & others* [2003] ZASCA 129; 2004 (2) SACR 419 at 447H.
[9] *Key v Attorney-General, Cape Provincial Division* [1996] ZACC 25*;* 1996 (4) SA 187 (CC) para 13.
[10] *Mthembu v S* [2008] ZASCA 51; 2008 (2) SACR 407 (SCA at para 26.
[11] *S v Mphala* 1998 (1) SACR 654 (W) at 657 G-H; Zeffert and Paizes at 741; S v Tandwa [2007] ZASCA 34; 2008 (1) SACR 613 (SCA) at para 118.
[12] *Mthembu v S* supra; *S v Tandwa* supra; Zeffert and Paizes at 747.
[13] Mthembu and Tandwa supra; Zeffert and Paizes at 748.
[14] Zeffert and Paizes at 749.

in question,[15] the deterrent function of the courts in excluding improperly obtained evidence,[16] the nature of the evidence,[17] and the fact that the evidence would inevitably have been discovered even if improper means have not been employed.[18] All those factors are merely guidelines and the list is not exhaustive. In the end every case depends on its own facts.

[19] As the State has contended, the appellants' attack on the operation can simply be dismissed on the basis that it was meant to protect the very public alleged to have been exposed to violence. The information at the disposal of the SAPS showed that the crimes perpetrated by the group were becoming increasingly violent. Highway patrols had proven to be ineffective because the crimes were committed at random times and anywhere along the N3 highway, and it proved to be difficult to detect where and when the next crime would be committed. The wheels were not removed at the spot of the hijacking but at secluded places which were impossible to detect beforehand. The crimes were committed at night and the victims would be woken up at gunpoint and instructed not to look at the robbers, thus making it difficult for the victims to identify the perpetrators of the crime. The actions of the syndicate did not only expose the victims of the hijackings to serious criminal conduct, but also had huge implications for the country's economy in that the trucks travelling the major highways of this country, including the N3 are used to convey goods between the manufacturers or suppliers to the several retailers. The delays in the transportation of those goods would in turn affect the consumers who are mostly members of the general public.

[20] The contention that the SAPS should have ceased the operation after the first incident, holds no water because had that occurred, the first appellant who was the master mind of the syndicate would not have been convicted. The trial court acquitted him on the first incident. At the time Smith was appointed, the syndicate was already in operation and there is no evidence on the probabilities that the criminal activities would cease after the first incident if the police had arrested the identified culprits. Importantly, even though the operation continued, Smith did not

[15] Ibid at 751.
[16] Ibid at 752.
[17] Ibid at 755.
[18] Ibid at 755.

initiate any of the offences and did not play any role beyond what had already been planned by the members of the syndicate. He merely followed orders. Someone else had played the role before he infiltrated the syndicate and had he left, he would have been substituted. There was thus no close casual connection between the rights violation and the criminal acts of the syndicate that exposed the members of the public to serious acts of violence. The sophisticated nature of the syndicate is illustrated by the fact that in spite of the lengthy period within which Smith infiltrated it, he was not able to uncover to whom the first appellant sold the wheels.

[21] It is not suggested that the nature of the operation was such that it was conducted in a flagrant disregard of the Constitutional rights of possible victims or other members of the public. On the contrary the evidence shows that the SAPS and the DPP were very cautious. Smith performed his task in terms of guidelines approved by the DPP and under their supervision and that of the investigation team. He was obliged to report his activities to the investigation team and the team was obliged to comply with the guidelines set by the office of the DPP. On the occasions that Smith deviated from the letter of the guidelines, he did so in order to save the integrity of the operation and the investigation team was kept informed of those minor deviations.

[22] Public opinion is one of the relevant considerations on whether rights violations are detrimental to the administration of justice[19] – and it is unacceptable to the public when courts exclude evidence indicating guilt particularly in the current state of endemic violent crime in all parts of our country[20]. Had Smith not infiltrated the syndicate, the probabilities are that the criminal activities would have continued. I thus do not hesitate to find that the public would baulk at the idea that the law enforcement agencies failed to take bona fide measures aimed at effective detection of such an organised crime syndicate because of the fear that there may be danger to the public, specifically in the present circumstances where the crimes would have taken place irrespective of the operation. Indeed the reaction would be one of 'shock, fury and outrage'.[21] The administration of justice thus outweighed the risk to potential

[19] *S v Tandwa* 2008 (1) SACR 613 (SCA) at 649.
[20] *S v Ngcobo* 1998 (10) BCLR 1248 (N) at 1254G.
[21] S v Ngcobo supra.

victims and the public. The challenge on the rights violations must therefore fail and the convictions stand.

**Sentence**

[23] The task of imposing an appropriate sentence is in the discretion of the trial court. A court of appeal may only interfere if the sentence imposed is shockingly inappropriate. The first appellant appeals against sentence on the basis that the cumulative sentence of 86 and a half years and the effective term of 35 years are out of proportion with the first appellant's wrong doing, are shockingly inappropriate and differ markedly from a sentence this Court would have imposed. It is also submitted that the trial court should have taken into consideration as a mitigating factor the fact that the first appellant was not physically involved in any of the robberies, but simply served as an outlet for the wheels which were stolen from the hijacked trucks.

[24] The first appellant was convicted of 11 of the 20 counts he was facing. Most of the incidents of robbery occurred on different dates. He was not an arm's length purchaser of the wheels as suggested by his counsel but was in contact with the group during the various stages of the crimes and determined where the wheels would be delivered and what amount should be paid to the members of the syndicate. He was the mastermind of the syndicate.

[25] The third appellant was physically involved during the perpetration of most of the offences. The role of the fourth appellant was somewhat limited in that he became involved in the syndicate at a later stage and was consequently only convicted on two counts.

[26] The trial judge was mindful of the cumulative effect of the sentences and the potential severity thereof and he ordered that some of the sentences should run concurrently. He was also mindful of the fact that the racketeering and money laundering charges flow from the various predicate offences. However, the cumulative effect of the respective sentences imposed are, as conceded by the State, disproportionately harsh, such that this Court should interfere. The order to be

granted in this regard accordingly has as its sole objective an amelioration of the cumulative effect of the individual sentences imposed.

[27] I therefore make the following order:

1. The appeal against the convictions is dismissed
2. The appeal against the sentences is upheld partially to the extent reflected below:

2.1

First Appellant

a) the sentence imposed in count 6 is ordered to run concurrently with sentences in counts 10, 12, 13 and 14;
b) the sentence imposed in count 1 is ordered to run concurrently with the sentences in counts 5, 16, 17, 18, 19 and 20;
c) the first appellant is therefore sentenced to an effective term of 20 years imprisonment.

Third Appellant

a) the sentences imposed in counts 6, 7, 8, 10, 11, 14 and 15 are ordered to run concurrently;
b) the sentences imposed in counts 1, 16 and 17 are ordered to run concurrently;
c) the third appellant is therefore sentenced to an effective term of 20 years imprisonment.

Fourth Appellant

a) the sentences imposed in counts 13 and 14 are ordered to run concurrently;
b) the fourth appellant is therefore sentenced to an effective term of 15 years imprisonment.

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ZLL Tshiqi

Judge of Appeal

APPEARANCES

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|---|---|
| For First Appellant: | J E Howse with S Marimuthu |
| Instructed by: | Leo Govender Attorneys, Durban |
| | C/o Honey Attorneys, Bloemfontein |
| | |
| For Respondent: | N Moosa |
| Instructed by: | Director of Public Prosecutions, Pretoria |
| | Director of Public Prosecutions, Bloemfontein |