

PRESIDENT'S OFFICE

No. 1977.

29 November 1996

It is hereby notified that the President has assented to the following Act which is hereby published for general information:-

NO. 85 OF 1996: CRIMINAL PROCEDURE SECOND AMENDMENT ACT, 1996.

GENERAL EXPLANATORY NOTE:

Words in italics indicate insertions in existing enactments.

ACT

To amend the Criminal Procedure Act, 1977, so as to regulate the setting of traps and the engaging in undercover operations; to determine the circumstances under which evidence so obtained will be admissible as evidence; and to provide for matters incidental thereto.

(English text signed by the President.)
(Assented to 6 November 1996.)

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Insertion of section 252A in Act 51 of 1977

1. The following section is hereby inserted in the Criminal Procedure Act, 1977 (Act No. 51 of 1977), after section 252:

"Authority to make use of traps and undercover operations and admissibility of evidence so obtained

252A.(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).

(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors:

(a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions or guidelines issued by the attorney-general

were

adhered to;

(b) the nature of the offence under investigation, including-

- (i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;
 - (ii) the prevalence of the offence in the area concerned; and
 - (iii) the seriousness of such offence;
- or
- (c) the availability of other techniques for the detection, investigation uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area concerned;
 - (d) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the official or his or her agent concerned;
 - (e) the degree of persistence and number of attempts made by the official or his or her agent before the accused succumbed and committed the offence;
 - (f) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;
 - (g) the timing of the conduct, in particular whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity;
 - (h) whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances in order to increase the probability of the commission of the offence;
 - (i) whether the official or his or her agent has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;
 - (j) the proportionality between the involvement of the official or his or her agent as compared to that of the accused, including an assessment of the extent of the harm caused or risked by the official or his or her agent as compared to that of the accused, and the commission of any illegal acts by the official or his or her agent;
 - (k) any threats, implied or expressed, by the official or his or her agent against the accused;
 - (l) whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained upon reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;
 - (m) whether the official or his or her agent acted in good or bad faith; or
 - (n) any other factor which in the opinion of the court has a bearing on the question.
- (3) (a) If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to

allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

(b) When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard to the following factors, if applicable:

(i) The nature and seriousness of the offence, including-

(aa) whether it is of such a nature and of such an extent that the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;

(bb) whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission;

(cc) whether it is so frequently committed that special measures are required to detect, investigate or uncover it or to prevent its commission; or

(dd) whether it is so indecent or serious that the setting of a trap or the engaging of an undercover operation was justified;

(ii) the extent of the effect of the trap or undercover operation upon the interests of the accused, if regard is had to-

(aa) the deliberate disregard, if at all, of the accused's rights or any applicable legal and statutory requirements;

(bb) the facility, or otherwise, with which such requirements could have been complied with, having regard to the circumstances in which the offence was committed; or

(cc) the prejudice to the accused resulting from any improper or unfair conduct;

(iii) the nature and seriousness of any infringement of any fundamental right contained in the Constitution;

(iv) whether in the setting of a trap or the engagement of an undercover operation the means used was proportional to the seriousness of the offence; and

(v) any other factor which in the opinion of the court ought to be taken into account.

(4) An attorney-general may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any official or his or her agent to obtain his or her written approval in order to set a trap or to engage in an undercover operation at any place within his or her area of jurisdiction, and in connection therewith to comply with his or her instructions, written or otherwise.

- (5) (a) An official or his or her agent who sets or participates in a trap or an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence, shall not be criminally liable in respect of any act which constitutes an offence and which relates to the trap or undercover operation if it was performed in good faith.
- (b) No prosecution for an offence contemplated in paragraph (a) shall be instituted against an official or his or her agent without the written authority of the attorney-general.
- (6) If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution: Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence.
- (7) The question whether evidence should be excluded in terms of subsection (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute."

Short title

2. This Act shall be called the Criminal Procedure Second Amendment Act, 1996.