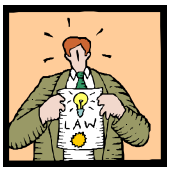
E-MANTSHI

A KZNJETCOM Newsletter

December: 2006: Issue 10

Welcome to the tenth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. The Civil Union Act, Act 17 of 2006 was promulgated on 30 November 2006 in Government Gazette No. 29441. It came into operation on the same day.

2. Regulations in terms of section 15 of the Civil Union Act, 2006 were published in Government Gazette No. 29439 of 29 November 2006. These regulations deal with the designation of marriage officers and the documents needed for registration purposes of such a union.

3. The KwaZulu-Natal Provincial Roads Regulations, 2006 have been promulgated in Provincial Gazette No. 6524 on 23 November 2006. The Regulations are promulgated in terms of section 44 of the KwaZulu-Natal Provincial Roads Act, 2001 (Act No. 4 of 2001). It deals amongst others with access to main and district roads, public right of way, structures and fencings on provincial roads, trading on or adjacent to provincial roads and advertising next to provincial roads.

Recent Court Cases

S v MSELEKU 2006(2) SACR 574 (D+CLD)

After being convicted in a regional court of raping a 12-month-old child, the accused was referred to the High Court for sentencing in terms of s 52 of the Criminal Law Amendment Act 105 of 1997. The indictment made no mention of either the age of the complainant or of

the State's reliance on the sentencing provisions of the Act. The trial court appeared to have relied on the fact that the accused was legally represented for an assurance that he understood that life imprisonment was a possible consequence of being convicted of such a rape.

Held, that the competence of legal representatives could not be assumed, it was not unusual to find inexperienced counsel representing accused persons in such cases, and Judges were frequently required to play an active role in assisting counsel in order to ensure a fair trial. To assume that counsel was competent entailed the risk that an accused could end up spending a lifetime in prison. In any event, it was not possible for a court to assess the competence of counsel at the pleading stage, especially where the court had no prior knowledge of counsel's competence. It was a relatively simple matter for the prosecution to make it known in clear terms in the indictment that it would rely on the minimum sentencing regime. It was not sufficient for the indictment to mention facts that ought to alert the legal representative to the sentencing provisions. *In casu*, while the accused had been informed that the complainant was 12 months old, it ought not to have been assumed that this fact must have led his representative to explain to him the provisions of the Act, especially in circumstances where the foreseeable consequence was the imposition of the most severe sentence possible. (At 578h - 579i).

Held, further, that where reference was made in the indictment to the State's reliance on the minimum sentencing regime, a court might well be justified in assuming that counsel would have drawn this to the accused's attention. However, if no such mention was made in the indictment, then, regardless of the facts alleged therein, the court should pertinently draw the accused's attention to the possibility of a minimum sentence. (At 581d-e.)

S v MAJAKI 2006(2) SACR 590 (TPD)

Having been convicted in a regional court of raping a ten-year-old girl, the accused was referred to the High Court for sentencing in terms of s 52 of the Criminal Law Amendment Act 105 of 1997. The conviction was found to be in accordance with justice, and confirmed. It was argued in mitigation of sentence that the accused was a first offender, that he was 27 years of age, that he was the breadwinner for an extended family and that, cumulatively; these amounted to substantial and compelling reasons for the Court to depart from the prescribed minimum sentence. The Court rejected these submissions and imposed a sentence of life imprisonment. The Court found, further, that the complainant's mother did not have her interests or welfare at heart and that it, as the upper guardian of all minors, was required to step in to protect the child. Section 11 of the Child Care Act 74 of 1983 empowered the Court, in the course of any proceedings before it, to order that the child be taken to a place of safety and brought thereafter before a children's court. Such judicial activism was imperative if the courts were to protect the rights of children enshrined in the Constitution of the Republic of South Africa, 1996. To do otherwise would be to render those rights nugatory and would mean that the Constitution, despite its eloquence, was incapable of protecting children. The Court accordingly held that the complainant was without any visible means of support and protection and ordered that an urgent inquiry be held in terms of s 13(3) of the Child Care Act to determine whether or not the complainant was a child in need of care.

S v ZWEZWE 2006(2) SACR 599 (NPD)

The accused pleaded guilty in a magistrate's court to a charge of assault with intent to do grievous bodily harm. Upon questioning by the court, however, he claimed that his stabbing of the complainant had been accidental; accordingly, his plea was altered to one of not guilty. Only the complainant testified for the State, but neither her evidence nor the contents

of a medico-legal report provided clarity as to whether the stabbing had been intentional or accidental. At the close of the State's case the magistrate failed to advise the accused of his right to apply for a discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977. The accused having been convicted as charged, the matter came before the High Court on automatic review.

Held, that whereas in the past there may have been no rule of practice requiring that an accused person be informed of his or her right to apply for discharge at the close of the State's case, such a rule had evolved, based on the requirement that a judicial officer must assist an unrepresented accused so as to reduce the risk of an unfair trial. Accordingly, the failure of the magistrate to advise the accused of the procedure in terms of s 174 was an irregularity. (At 602-603b).

DIRECTOR OF PUBLIC PROSECUTIONS KWAZULU-NATAL v P 2006(3) SA 515 SCA

The accused had been convicted in the High Court of the murder of her grandmother. She was 12 years old at the time of the commission of the murder and 14 years old upon conviction. The passing of sentence had been postponed on condition that the accused served 36 months' correctional supervision in terms of s 276(1) (h) of the Criminal Procedure Act 51 of 1977. The State appealed against the sentence as being too lenient, given the gravity of the offences committed, and asked that the appeal Court substitute for it a sentence of direct imprisonment.

Held, on the facts, that the accused acted like an 'ordinary' criminal, despite her age and background, and should have been treated as such. (Paragraph [9] at 521I).

Held, further, that the traditional aims of punishment had been affected by the Constitution of the Republic of South Africa, 1996, and, having regard to ss 28(1)(g) and 28(2) of the Constitution and the relevant international conventions, in every case involving a juvenile offender, the ambit and scope of sentencing had to be widened in order to give effect to the principle that a child offender was 'not to be detained, except as a measure of last resort' and, if detention of a child were unavoidable, it should be for 'only the shortest appropriate period of time'. Furthermore, if detention were warranted, the Court would have to give directions that the child be detained separately from persons over the age of 18. (Paragraph [13] and [18] at 522H-523B and 524G-525A).

Held, further, that neither the Constitution nor the international conventions forbade incarceration of children, and it was not inconceivable that there might be cases in which incarceration of a child was required. (Paragraph [19] at 525B-D).

Held, further, that, in imposing sentence, the Court *a quo* failed to have sufficient regard to the gravity of the offence. The sentence imposed left one with a sense of shock and a feeling that justice was not done. Even in the case of child offenders, the sentence had to be in proportion to the gravity of the offence. If any case called for imprisonment of a child, it was the present one. (Paragraph [22] at 526B-D).

Held, further, that, had the appeal Court been sitting as the Court *a quo*, it would have seriously considered imposing a sentence of imprisonment. However, it was too late to impose a sentence of direct imprisonment but the interests of justice would be served by imposing a term of imprisonment and suspending it on certain conditions. That would give due weight to the gravity of the offence and to the interests of society. (Paragraphs [23} and [26] at 526F-G and 527G-H).

Held, accordingly, that the appeal was allowed and the sentence imposed by the Court *a quo* be replaced with a sentence of seven years' imprisonment, conditionally suspended, and 36 months of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act. (Paragraph [28] at 527I-528A).

From The Legal Periodicals

BRICKHILL, J.

"The intervention of *amici curiae* in criminal matters: S v Zuma and S v Basson considered" 2006 123.3 SALJ 391.

NEETHLING, J & POTGIETER, J M.

"Die regsoortuigings van die gemeenskap as selfstandige onregmatigheidskriterium" 2006 3 TSAR 609.

VISSER, P J.

"Gedagtes oor feitelike kousaliteit in die deliktereg" 2006 3 TSAR 581.

DEVENISH, G E.

"African Christian Democratic Party v Electoral Commission: The new methodology and theory of statutory interpretation in South Africa" 2006 123.3 SALJ 399.

ACKERMANN, L W H.

"Constitutional comparativism in South Africa" 2006 123.3 SALJ 497.

LENTA, P.

"Judicial deference and rights" 2006 3 TSAR 456.

PIENAAR, J M & MOSTERT, H.

"Uitsettings onder die Suid-Afrikaanse grondwet: die verhouding tussen artikel 25(1), artikel 26(3) en die uitsettingswet (slot)" 2006 3 TSAR 522.

HOFFMAN, P.

"Civil Servants can commit contempt of court" De Rebus December 2006 45.

VAN DER MERWE, A.

"Court-appointed experts and the appointment of behavioural expert assessors for sentencing purposes." – THRHR – v 69(4), p 643.

VESSION, M.L.

"The preponderance of the reckless consumer: The National Credit Bill 2006" THRHR –v69

(4), p 64.
If you want to request a copy of any of the above articles please send your request to
gvanrooyen@justice.gov.za

Contributions from Peers

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The Magistrate
GREYTOWN

ITEM FOR PUBLICATION IN e – Mantshi.

[1] This letter is written in my capacity as member of the Provincial C.F.M Judicial Monitoring Committee. The chairperson, regional magistrate Heuer, has sanctioned the publication of the following extract of a document (dated 19/9/06) prepared by himself, in e – Mantshi. I personally feel that the contents may be of mammoth value to district court magistrates, and consequently I request that they be placed in the next issue, if possible:-

"CASE FLOW MANAGEMENT: SECTION 75 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977.

1. ***At a meeting of the judicial committee, concern was raised about a suggestion that cases which are not 100% trial-ready must be removed from the regional court's roll and referred back to the district court for further investigation.***

2. *I am of the opinion that the suggested procedure is irregular and should therefore be discontinued. The provisions of section 75 of the C.P.A are relevant (hereinafter referred to as the Act). Section 75 makes provision for the holding of summary trials, and determines the courts in which trials are to be held. Subject to three exceptions, namely sections 119, 122A and 123 of the Act, an accused to be tried in a court in respect of an offence is to be tried in a summary trial, in one or other of the following courts:*

   (a) a court which has jurisdiction and in which he or she appeared for the first time in respect of such offence in accordance with any method referred to in section 38; or
   (b) a court which has jurisdiction and to which the accused was referred under section 75(2); or
   (c) any other court which has jurisdiction and which has been designated by the Director of Public Prosecutions for the purposes of such summary trial.

   A plain reading of section 75 of the Act does not suggest that the provisions thereof must be complied with only once the investigation in a particular case has been completed. The practice, as I know it, and which I believe has been adopted as a matter of expedience, is that as soon as the district prosecutor is of the opinion that the investigation is complete, he or she then requests that the case be referred to the regional court for trial i.t.o. the provisions of section 75(2) of the Act. This section was, in my view, enacted to cater for an accused who is brought before the wrong court, that is, a court which does not have jurisdiction to try him or her.

   Once the case is on the regional court roll, it must be dealt with by that court, and if further investigation is required, so be it. The case remain on the particular court's roll. It cannot, in my view, be returned to the district court for further investigation.

   The only recourse available to a regional court is the application of the provisions of section 342A of the Act. This section also does not cater for the suggested procedure. In terms of section 342A(3)(c) of the Act, if a case is removed from the roll the court must direct that the prosecution can only be resumed or instituted de novo on the written instruction of the Director of Public Prosecutions.

3. *I am further of the opinion that cases which are obviously regional court material, such as robbery with aggravating circumstances, murder and rape, can, subject to the provisions of section 75(3) of the Act, summarily be referred to the Regional court at the request of the prosecutor.*

   My opinion is upheld by the provisions of section 75(3) of the Act, which provides that:

   'The court before whom an accused appears for purposes of a bail

application shall, at the conclusion of the bail proceedings, or at any stage thereafter, but before the accused has pleaded, refer such accused to a court designated by the prosecutor for purposes of trial.'

This section was obviously enacted to cater for bail applications in the district court, in cases which are destined for the high court or regional court, for purposes of trial. Once the bail proceedings have been concluded, or at any stage thereafter, the accused can then be referred to the court designated by the prosecutor. There is no mention of further investigation, still less that a prosecutor can designate the appropriate court only if the investigation is complete."

L.P.P. RADYN

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Gerhard,

E – MANTSHI: IS SECTION 75 OF THE CPA A CULPRIT LARGELY HINDERING CASE FLOW MANAGEMENT?

1. **The National Practical Guide on Court and Case Flow Management unambiguously and in very clear terms maintains on page 22 (and many others) that magistrates are solely and directly in control of, and accountable for the conduct of court proceedings. Furthermore it articulates in so many words that "Court and case management of enrolled cases is inherently a judicial function".**

2. **The legacy of the bench being in control of case flow management is undoubtedly the end product of years of negotiation, rubbing of shoulders, relentless debate and obstinate deliberations amongst all stake holders.**

3. **A matter of vast and cosmic concern for purposes of this commentary however is, of course, the reality that although everybody agrees that the magistrate is in full control of the court roll, a case may still only be transferred to a high or regional court if and when such transfer is requested or where such court is designated by the prosecutor.**

4. **Another major stumbling block seems to be the fact that the section (in its entire context) does not seem to be correctly understood by those involved in its interpretation. Section 75(1) (a) establishes the rule that an accused shall be tried at a summary trial in "a court which has jurisdiction". The rest are exceptions, but the exceptions have in practice been made the rule. If a case is clearly a regional court matter or a prosecutor informs the court that a matter is trial ready but a regional court date is not available, a magistrate should refuse further postponement in the district court. A matter should be transferred to the regional court, the sooner the better, because only then can the regional magistrate apply Section 342A of the same Act, which deals with trial delay management by the bench. In any event, the chances are that the quality of a prosecutor driven investigation will be somewhat better if such cases are transferred at the earliest opportunity.**

5. **The question may well be asked: How can the regional court president provide statistics on outstanding cases for the regional court if 90% of these cases are lying in the district courts, awaiting transfer dates?**

6. **There is an old instruction that, if there are two or more regional courts at a specific centre, they will be courts of first appearance. This directive seems to be ignored, because district courts all over the spectrum are being endlessly and needlessly burdened with carrying regional court cases until such time as a date has eventually been procured in some regional court.**

7. **If the legislator is serious about giving effect to the adopted policy of CFM being in the hands of the magistrate, section 75 of the Criminal procedure Act should henceforth be amended accordingly.**

8. **Until the legislator eventually concurs that section 75 should be amended, prosecutors should vigorously be prodded by magistrates to exercise their discretion in terms of this section speedily so as to enable the correct application of section 75(1) (a), thereby reinstating the rule as a general practice.**

Louis Radyn
Vice chair: KZN JETcom

If you have a contribution which may be of interest to other Magistrates could you forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest to Magistrates

RESTORATIVE JUSTICE

In dealing with this subject, I will approach it from three directions and hopefully take you on a journey to the heart of the matter. I have quoted extensively from the authors mentioned and hope I have not done them an injustice in skimming the surface of their work due to time constraints in this talk.

According to the Restorative Justice Centre (www.rsj.co.za):

Restorative justice is a way of thinking about crime and justice that focuses on repairing the harm caused or revealed by criminal behaviour .It seeks to place the needs of victims at the centre of a response and looks at whose obligation it is to address these needs.

The central obligation is to put the wrong right. This means:

- Addressing harms (primarily those of victims, but also those of communities)
- Addressing causes at all levels – personal, interpersonal, environmental and societal

The typical outcomes that are associated with restorative justice include:

- Victim offender conferencing and mediation
- Victim assistance
- Restitution
- Service by an offender to a victim
- Community service by an offender
- Assistance to offenders.

Three principles are at the core of restorative justice:

1. Justice requires that we work to restore those who have been injured by crime.
2. Those most directly involved and affected by crime should have the opportunity to participate fully in the response should they wish.

3. The government's role is to preserve a just public order, and the community's is to build and maintain a just peace.

Restorative justice programs are identified by four key values:

1. ENCOUNTER – Create opportunities for victims, offenders and community members who want to do so to meet to discuss the crime and its aftermath.
2. AMENDS – Expect offenders to take steps to repair the harm they have caused.
3. REINTEGRATION: Seek to restore victims and offenders to whole, contributing members of society.
4. INCLUSION – Provide opportunities for parties with a stake in a specific crime to participate in its resolution.

It has been argued that not only does restorative justice diminish some of the drawbacks of the traditional criminal justice system; it also has a number of unique beneficial qualities. Restorative justice takes the concerns of criminal justice very seriously and actually responds better to them than traditional theories do.

It should redress the injustice done by the criminal. The wrongdoer should right the wrong. Punishment should not make the offender a worse person rather a better one.

The State would set the example that constructive problem solving is the appropriate means of dealing with conflict. The State would retain residual powers to assure a fair process.

Bakker points out that

- Restorative justice processes deal with crime in a constructive manner, where satisfaction levels are high.
- Victims and offenders are more likely to feel that the process handled them more fairly than if they were to proceed through the traditional court system.
- Because they are able to communicate directly, victims and offenders have the opportunity to break down stereotypes and to understand the motivations for and the impact of crime.
- Victims have the opportunity to regain some control over their lives
- To express emotions.
- To confront losses.

- Offenders have the opportunity to express remorse.
- To make restitution.
- And to assume responsibility.

We must bear in mind that mostly offenders are not financially sound and this calls for some inventive thinking.

Justice and restorative justice in South Africa

As a result of decades of conflict in South Africa, less than two years after the government of national unity was formed in 1994, the TRC was established. The commission was established so that the violence of the past could be acknowledged and so that hurts suffered by all parties concerned could be dealt with, so that the future could be faced with confidence.

The Truth and Reconciliation Commission's approach is widely considered to be one of restorative justice.

Restorative justice is a form of justice which has not yet been exhaustively defined. According to Robert Cormiera (Canada) there is no single definition of Restorative Justice although a central feature of any definition includes some notion of repairing the harm caused by crime and restoring the parties to the state of wellness or wholeness which was disturbed by the criminal act.

According to Boyare Teshehla, senior researcher, Institute for Security Studies, Pretoria, the integration of restorative justice into the criminal justice system is fraught with difficulties. Its philosophy and practice do not sit comfortably with the conventional criminal justice system here which is accusatorial / adversarial in approach. Moreover, the conventional criminal justice system in South Africa is retributive in nature.

> According to Prof. Julia Sloth-Nielsen restorative justice is a process in which the crime is seen as an event which has harmed relationships between people (which include families and community) and during which to make sure that justice is achieved through the harm caused by the breach in relationships, being put right. Reconciliation is only possible when the offender has accepted and faced up to the

wrongfulness of his deed and making restitution in a practical way of facing the consequences of behaviour, of demonstrating credibility.

What is wrong with the existing system?

(1) There is no opportunity for the offenders to truly accept responsibility.

(2) The sanction has no benefit to the victim.

(3) The victim seldom receives a satisfactory apology.

According to Prof. Sloth –Nielsen

(1) The State steals the conflict.

(2) The causes of the harm are not addressed.

(3) Offenders are not encouraged to take responsibility

(4) It does not provide the offender with insight to his victim.

A word of caution - the victim may not be ready to dialogue with the offender and depending on the seriousness of the case may be still be feeling "bruised".

Restorative justice tries not to send people to prison who should not be there and those that do go there will not go back again afterwards.

Ms Batohi, your Director of Public Prosecutions in KwaZulu –Natal defines insanity as doing the same thing but expecting the same results – but here we want different results so the point she is making is that we must do things differently.

Professor van Zyl Smit states: while punishment does have a deterrent effect, it is the certainty of punishment rather than the severity of sentence that is likely to have the greatest impact.

According to Mike Batley – the Executive Director Restorative Justice Centre, restorative justice outcomes are different but not soft. Restorative justice views crime as less about breaking the law, but more about harming relationships and the community. Here justice is viewed as more about putting the wrong right and focusing on offenders' obligations in doing this which encourages them to take responsibility which is something that the punitive approach is particularly not good at doing. It addresses the harm to the direct victim as well

as the indirect victim which includes the community. Mike Batley makes a strong point when he says that restorative justice makes it possible to hold offenders accountable for the harm that their actions have caused and to address the underlying factors that contribute to the offence or maybe to its re-occurrence. Restorative justice comes in many guises whether it is victim / offender mediation, victim offender conferencing, family group conferencing or any diversionary programmes. It can be applied at various stages viz – Pre-trial level to deal with troublesome local youth at community level and at charge office level – e.g. Guguletu and Khayalitsha peace committees. This applies to the whole field of Diversion using the discretion of the Prosecutor. In his opinion victims are extremely punitive minded unless approached in a proper way.

In the S v Joyce Maluleka and others in a judgment by the Honourable Bertelsmann J, (Case No. CC83/04 delivered on 13/6/2006) the accused was convicted of murder which obviously calls for a severe sentence. The killing emanated from a sustained assault by a number of persons on the deceased who was suspected of having broken into the accused's home in a small village in Limpopo Province.
The State called the victim's mother to inform the court of the hurt and loss that the deceased's family had suffered. In cross-examination, counsel for the defence enquired from her whether she would be prepared to receive a senior representative from the accused's family in order to attempt to restore the broken relationship between the families.
The deceased's mother answered in the affirmative, adding:

"But she must tell me why she killed my child".

This answer enabled the court to involve the community in the sentencing and rehabilitation process.

The court sentenced the accused to 8 (eight) years imprisonment, all of which was suspended for a period of 3 (three) years on condition that, inter alia, the accused apologized according to custom to the mother of the deceased and her family within a month after the sentence having been imposed.

According to the Restorative Justice Institute of South Africa, restorative justice has a place in traditional forms of justice in South Africa. Ubuntu is a fundamental philosophy that

characterizes the African mindset. Some of the core principles of ubuntu are unconditional: (1) acceptance (2) respect (3) human dignity (4) compassion (5) hospitality (6) stewardship.

The new Child Justice Bill, still to come into effect will promote restorative justice.
Before ending my talk I wish to make a plea to all present – those members of the National Prosecuting Authority:
"Faith without deed is useless"
Simply talking about obedience is not enough.
When applying ADR or Restorative Justice, please bear in mind that it was the mindset of the offender that first caused him or her to be arrested and this must be changed plus a commitment to change. There must be intervention.
In ending off I will quote verbatim from the Restorative Justice Institute of South Africa in collaboration with the Department of Correctional Services Canada.

Restorative justice endeavours to build a healthier and safer society through the restoration of communities. It addresses the real needs of those impacted by harmful behaviour and empowers community groups. Ultimately, it encourages a commitment to the humanization of justice that allows victims to continue the healing process and offenders to take ownership for the consequences of their actions. Finally, restorative justice demands that the root causes of harmful behaviour be addressed, including the inequities grounded in racism, poverty, child abuse, and substandard living environments.

All of these goals can only truly be realized through community-based and publicly-funded agencies creatively working together. If restorative justice is to grow, creative partnerships will make that possible. These partnerships will challenge us to move beyond consultation and cooperation and towards collaborative action. While some are trying to address the causes before the cycle of violence starts, others are attempting to respond restoratively after the harm has occurred. By working in isolation, these two groups limit their ability to effect lasting change. Together they make a more compelling argument.
The integration of restorative processes will make a positive difference in the quality of life for all South Africans. We encourage everyone to link with the criminal justice system to

nurture new **creative partnerships with** those with whom we share common interests. Working together through **collaborative actions,** great achievements are within our reach.

I thank you for listening to me.

I wish to acknowledge the South African Journal of Criminal Justice 2004 volume 17 authors Bayane Teshehla as well as authors; Jaquiline Gallinetti, Jean Redpath and Julia Sloth-Nielsen.

J GAR
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