E - M A N T S H I

A KZNJETCOM Newsletter

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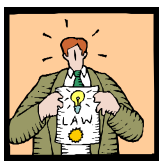
Welcome to the sixteenth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we 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 Executive summary of the recommendations of Remuneration of Public Office Bearers by the Independent Commission for the Remuneration of Public Office Bearers was published in the Government Gazette No. 29759 of 30 March 2007. Apart from the issue of remuneration of magistrates the job profile of a magistrate as described by the Commission also makes very interesting reading.

2. The National Land Transport Transition Amendment Act, Act 26 of 2006 has been published in Government Gazette No. 29753 dated 28 March 2007. The Amendment Act came into operation on the same day. Amongst others the Amendment Act provides anew for the type of vehicles that may be used for public transport services, to extend the disqualifications for the holding of operating licences, to set standards for sealed metres for metered taxis and to empower MECs to determine fare structures for metered taxi services.

3. In terms of section 45(1)(c) of the Constitution of the Republic of South Africa the joint Constitutional Review Committee must review the Constitution every year. The focus this year will be on the role powers and functions of the three tiers of Government. Written representations may be made to the committee before 31 May 2007. These should be sent to zmahapa@parliament.gov.za

4. A notice was published in Government Gazette No. 29831 of 25 April 2007 that the period of operation of section 51 and 52 of the Criminal Law Amendment Act, Act 105 of 1997 has been extended for a further period of two years with effect from 1 May 2007.This is the minimum sentence legislation.

Recent Court Cases

1. S. v. TEMBANI 2007(1) SACR 355 (SCA)

Negligence in administration of medical treatment on a victim not enough to act as a *novus actus interveniens* on a charge of murder

The appellant had been convicted of murder and sentenced to 18 years' imprisonment. The evidence showed that he had shot the victim twice; she had been admitted to hospital where she received inadequate and negligent care before dying, a fortnight later, of septicaemia consequent upon one of the gunshot wounds. On appeal, the appellant submitted that the hospital staff and doctors had been grossly negligent, and that this had broken the chain of causation between his attack and the deceased's death. The trial Court, on the other hand, had found that the medical negligence had not been so overwhelming as to oust the causal connection between the shooting and the death.

Held, that there was no doubt that without the appellant's murderous attack the deceased would not have died; equally, had there been no medical intervention after the attack, the gunshot wound would have proved fatal. What was in issue, therefore, was legal responsibility for the death in the manner in which it ensued. (Paragraph [11] at 361b-d.)

Held, further, that the deliberate infliction of an intrinsically dangerous wound, from which the victim was likely to die without medical intervention, must generally lead to liability for an ensuing death, whether or not the wound was readily treatable, and even if the medical treatment given later was substandard or negligent, unless the victim so recovered that at the time of the negligent treatment the original injury no longer posed a danger to life. (Paragraph [25] at 366e-g.)

Held, further, that this approach was justified on two interconnecting considerations of policy. Firstly, an assailant who deliberately inflicted an intrinsically fatal wound consciously embraced the risk that death might ensue. The fact that others might fail, even culpably, to intervene to save the injured person did not, while the wound remained mortal, diminish the moral culpability of the perpetrator. Secondly, in a country where medical resources were not only sparse, but badly distributed, it was quite wrong to impute legal liability on the supposition that efficient and reliable medical attention would be accessible to the victim, or to hold that its absence should exculpate a fatal assailant from responsibility for death. Improper medical treatment was neither abnormal nor extraordinary and the supervention of negligent treatment did not constitute an intervening cause that exculpated an assailant while the wound was still intrinsically fatal. (Paragraphs [26]-[28], at 366h-367e.)

Held, further, that even gross negligence in the administration of medical treatment would be insufficient to relieve an original perpetrator of criminal liability for an ensuing death, provided that 'gross negligence' did not imply an absence of good faith on the part of those responsible for the treatment. (Paragraph [29] at 367f-i.) Appeal dismissed.

2. S. v. MAKHAYE 2007(1) SACR 369 (NPD)

Confession to priest admissible if not made in confidence and with the intention that it should not be disclosed.

The appellant had been convicted in a regional court of murdering his girlfriend and sentenced to ten years' imprisonment, of which five were suspended. A key aspect of the State's case was a statement that the appellant had made to a priest, H, to the effect that he had killed his girlfriend and that he wished to give himself up to the police. H (since deceased) had testified at the trial and had refuted the suggestion that the appellant had merely said that he was a suspect in the murder, and that the true culprit was the victim's ex-boyfriend.

Held, that H had no motive to falsely implicate the appellant and it would be preposterous to suggest that someone of his integrity and stature would do such a thing. It was grossly improbable that H, who had found the experience unusual and striking, could erroneously have believed that the appellant had told him that he had killed his girlfriend, if, in truth, all the appellant had said was that she had been stabbed by her ex-boyfriend. The appellant's version of what he told H was accordingly to be rejected. (At 373b-g.)

Held, further, regarding the appellant's contention that what he had said to H was privileged and therefore inadmissible in evidence against him, that it was quite clear that he had not spoken to H in confidence and with the intention that it should not be disclosed. On the contrary, the appellant had simply explained why he wished to hand himself over to the police. Accordingly, what the appellant had said to H was admissible against him. Furthermore, since the appellant, having admitted to killing his girlfriend, had not raised a defence such as self-defence, his statement to H could be viewed only as a confession to the murder. (At 373h-374i.)

3. S v JOSEPH 2007(1) SACR 496 (WLD)

Factors to be considered in deciding when a case has been unreasonably delayed.

Section 35(3) (d) of the Constitution of the Republic of South Africa, 1996, entrenches an accused person's right to have their trial begin and conclude without un reasonable delay. The object of this provision is to protect the accused's liberty, personal security and trial-related interests.(Paragraph [2] at 1.) *In casu*, the accused had first appeared in court on 20 October 2005.On 2 November 2005 he was referred to a psychiatric hospital for observation in terms of s77 of the Criminal Procedure Act 51 of 1977. Due to the unavailability of beds at the hospital, there

were several postponements over the next seven months and, at a further appearance on 14 June 2006, the matter was struck from the roll. On special review, the question was whether or not a period of eight months amounted to an unreasonable delay, taking into account the reasons therefore. The three most important factors to be considered in such a case were: the nature of the prejudice suffered by the accused; the nature of the case; and the systemic nature of the delay. (Paragraph [10] at 500*a*-*c*.) The delay had been caused by the number of accused persons committed for observation. (Paragraph [12] at 500*f*-*l*.) There was no question of a dereliction of duty; the problem was a systemic one arising from the reality of limited resources. The magistrate should have investigated the reasons for the delay and could have considered a further postponement; alternatively, he could have considered granting bail subject to appropriate conditions. The present predicament of resource limitations hampered the proper administration of justice and, under such circumstances; judicial officers must adopt more creative strategies to protect the rights of accused persons. (Paragraph [13] at 500*i*-501*b*.) In the instant case the delay was a reasonable one and the matter had been struck from the roll prematurely. (Paragraph [14] at 501*c*.)

4. S v TERBLANCHE 2007(1) SACR 545 ©

The meaning of 'use for own purposes' in Section 1 (1) of the General Law Amendment Act 50 of 1956

The appellant was convicted in the magistrate's court of contravening s 1(1) of the General Law Amendment Act 50 of 1956 in that, during the course of conducting his breakdown and towing service, he recovered and removed a damaged vehicle from the scene of a collision without the consent of the owner and 'with the intent to use it for his own purposes'. According to the appellant, he refused to release the vehicle to the owner only because he first required payment of his costs of towing the vehicle from the scene. On appeal, the High Court set aside the appellant's conviction, finding that the interpretation of the word 'use', as it appeared in s 1(1), should be approached on the basis of the maxim *'in poenis strictissima verborum significatio accipienda est',* i e only the strictest meaning of words employed by the Legislature should be accepted. Accordingly, the word 'use' in the subsection did not include mere retention of an article which could not be used for the purpose for which it was designed and/or manufactured; that, where the appellant removed the vehicle from the scene in circumstances in which it was damaged and could therefore not have been driven or used for the purpose for which it was designed and/or manufactured, and was removed for the purpose of keeping it in custody and with the hope of receiving payment for that service, the appellant had not removed the vehicle 'with intent to use if for his own purposes', as contemplated in the section. (Paragraphs [34] and [36] at 555*c*-*j*.)

From The Legal Journals

Hoctor, SV 'Assessing attempt at the impossible in South African criminal law' 2006 31.2 JJS 130 (Journal for Juridical Science).

Reyneke, JM and Kruger, HB 'Sexual offences courts: better justice for children?' 2006 31.2 JJS 73.

Snyman, CR 'Die erkenning van objektiewe faktore by die verweer van provokasie in die strafreg' 2006 31.2 JJS 57.

Brickhill, J 'Testing affirmative action under the Constitution and the Equality Act: comment on Du Preez v Minister of Justice and Constitutional Development & Others (2006) 27 ILJ 1811 (E)' 2006 ILJ (Industrial Law Journal) 2004.

Kemp, G 'Mutual legal assistance in criminal matters and the risk of abuse of process: a human rights perspective' 123.4 SALJ 730.

(If you would like a copy of any of the above articles please send your request to gvanrooyen@justice.gov.za)

Contributions from Peers

REFERRAL OF CASES FOR SUMMARY TRIAL IN REGIONAL COURTS : SECTION 75(3) ACT 51/77

The practice, whereby cases which cannot be tried in district courts [whether it is due to lack of jurisdiction or because of specific instructions by the DPP to prosecutors] are kept on district court rolls once bail applications have been dealt with and until the investigation has been completed, appears to have recently become a bone of contention and formed the topic of many a heated debate and discussion.

One school of thought [mainly regional court magistrates] advocates that cases

should be kept on district court rolls and only be referred to the regional court once the investigation has been completed and the case is ready for trial, while district court magistrates are of the opinion that, once the bail application has been dealt with, section 75 dictates that the buck should be passed to the proper trial forum in order to ensure effective court and case flow management.

Some of the e-mail debates unfortunately, carry an undertone of enmity between judicial officers instead of addressing the “problem” by sound judicial arguments and reciprocal, practical arrangements.

To my mind the bottom line of the issue is that we are all subject to the same Oath of Office and carry the same responsibilities towards the communities and judicial system we are purported to serve. Therefore the respective courts, whether it be district, regional or high courts, are obliged to take responsibility for their own court rolls and proper case flow management. Nothing more and nothing less!

The clogging of court rolls and unnecessary remands are not restricted to specific courts only – we all face this dilemma on a daily basis and, therefore, should vigorously engage in using the legal tools at our disposal in combating the backlogs. The most powerful tool being Section 342A of the CPA.

One word of warning however: Take a close look at the wording of Section 342A (6).

I would argue that, in matters not specifically mentioned in Section 89(1) of the Magistrates’ Court Act [32/1944 as amended], district court magistrates may utilize Section 342A in “the warming up sessions for the regional court” but most definitely not in those matters where the district court is seized with cases pertaining to murder, rape and treason. In the last mentioned matters only the court having jurisdiction to try the matter may apply Section 342A, *viz,* the High or Regional Court. The only logical inference to be drawn from this fact is that regional courts should take responsibility for these matters as soon as is practicably possible in order to avoid the accused or prosecution resorting to the cumbersome, and further

delaying process of approaching the High Court by way of notice of motion.

Section 75(3) clearly dictates that "The court before whom an accused appears for the 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" [My own emphasis]

District court magistrates who *mero motu* refer accused to the regional court for trial without designation of such court by the prosecutor are, in most cases, doing so in pursuance of polarization by subjecting the prosecution to subservience to the bench and enhancing judicial tantrums amongst regional court magistrates!.

I am not acquainted with specific guidelines by the DPPs in other jurisdictions, but am aware of the fact that in the Western Cape the DPP, by means of an internal memorandum dated 7th August 2006, issued specific guidelines and instructions in cases destined for the High Court. These instructions, in my opinion, could *mutatis mutandis* be made applicable to cases destined for trial in regional courts to counter the cumbrous and unacceptable practice which we now face.

The following quotations from the memo serve to justify my argument:
" The **major reason** for this decision **is that the management of further investigation could best be done** by the advocates **who might eventually be doing the trial instead of prosecutors in the lower courts**" and
"The **advocate responsible for preparing the matter for trial** in the High Court **must liaise directly with the investigating officer in order to discuss the strategy** to follow **as well as the further investigation to be done**" [My own emphasis and for "advocates" read regional court prosecutors, for "lower courts" read district courts and for "High Court" read regional court].

I would therefore like to suggest that cluster heads, regional court presidents, DPP's, prosecutors and district/regional court magistrates embrace these guidelines as a point of departure in a concerted effort to address the "problem".

I would furthermore like to suggest that the relevant role players consider the following to come up with a judicially sound solution which should be acceptable for all and sundry:

District Court Prosecutors:

1. Should, at first appearance, address the court in terms of **Section 150** and **inform** the court of the **fact that**, and the **reasons why**, the matter must be tried in the regional court [If it is not evident from the charge sheet itself];
2. Should acquaint themselves with the extent of the **outstanding investigation** and **inform** the court **accordingly** at the **conclusion** of the bail proceedings;
3. Should, at court houses where there are **permanent regional courts**, **designate** the appropriate court **without further ado**,
4. Should furnish the regional court control prosecutor with the case docket **immediately**;
5. Should, where regional courts have circuit sessions [e.g. Vredenburg] **acquaint** themselves with the **relevant session dates** and **designate** the court **without further ado**;
6. Should complete an **adjusted J47*** for referral to the regional court and forward a copy thereof to the regional court control prosecutor **together with the case docket immediately**.

District Court Magistrates:

1. Should, where there are permanent regional courts in session, **immediately** after completion of bail applications, refer cases to the **regional court designated** by the prosecutor;
2. Should, where there are only circuit sessions by the regional courts, with consideration of the **outstanding investigation as informed by the prosecutor**, refer cases to the **designated** regional courts for dates **well in advance** in order to accommodate regional court control prosecutors;
3. Should acquaint themselves of the dates on which **circuit sessions have been**

planned and

4. Should meticulously **record all information** supplied by the prosecutor for regional court magistrates to take cognizance of.

Regional Court Prosecutors:

1. Should, as in the case of advocates in the high court, **take control over** and **responsibility for** dockets referred to them, **liaise with investigating officers** and **issue orders for further investigation** to be done;
2. Should be conferred with power **to roll down responsibilities** to the prosecutor[s] for remands for further investigation and / or eventually doing the trial[s];
3. Should, like the existing practice in Vredenburg, arrange dates for further investigation or trial **in consultation** with the presiding regional magistrate as well as counsel for the defense **at first appearance** in the regional court.

Regional Court Magistrates:

1. Should, like their colleagues in the district courts, assume **responsibility for,** and **control of**, the management of their **own court rolls** within the suggested framework pertaining to remands and trials and
2. Would be in a much better [excellent!!] position to **utilize Section 342A** to combat unnecessary delays.

Adjusted J47 forms*:

Whenever I refer cases to the regional court in terms of Section 75(3), I adjust **Part F** on the reverse side of form J47 to read: "The accused is referred to Regional Court …… for **further investigation/determination of trial date** on ……"

I humbly submit that the abovementioned suggestions, once all role players buy in on the idea, could result in a turn for the better in solving the "problem" and will most definitely and ultimately set the "Right Courses for Right Horses" to ensure that all cases are dealt with in accordance with the correct legal processes and in the

correct forums.

ANDRÉ DIPPENAAR
ADDITIONAL MAGISTRATE
VREDENBURG [WC]
10TH APRIL 2007

Matters of Interest to Magistrates

The following is an extract from the judgment of Nkabinde J from the case Masiya v. Director of Public Prosecutions and Another Case CCT 54/06 delivered on 10 May 2007:

Magistrates' power to develop the common law in respect of crimes

[1] *It is necessary to consider whether Magistrates' Courts have the power to develop the common law to bring it in line with the Constitution. The High Court held that the Magistrates' Court is not explicitly excluded from pronouncing upon the constitutional validity of crimes at common law. It is necessary to consider the constitutional jurisdiction of these courts as this Court has so far not considered this question.*[1]

[2] *Section 8(3) of the Constitution obliges a court when applying the provisions of the Bill of Rights, if necessary, to develop rules of the common law to limit the rights, provided the limitation is in accordance with section 36 of the Constitution. Section 39(2) places a positive duty on every court to promote the spirit, purport and objects of the Bill of Rights when developing the common law.*[2] *In terms of section 166*[3] *of*

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[1] See *Carmichele* above n **Error! Bookmark not defined.**.

[2] Id at para 34.

[3] Section 166 states that:

> "The courts are—
> (a) the Constitutional Court;

the Constitution courts in our judicial system include the Magistrates' Courts. However, section 173 explicitly empowers only the Constitutional Court, the Supreme Court of Appeal and the High Courts to develop the common law, taking into account interests of justice. The Magistrates' Courts are excluded.

[3] *The powers of the Magistrates' Courts are regulated by the Magistrates' Court Act 1944.*[4] *Section 110 of this Act prevents magistrates from pronouncing on the validity of any law. It provides as follows:*

> *"(1) A court shall not be competent to pronounce on the validity of any law or conduct of the President.*
> *(2) If in any proceedings before a court it is alleged that—*
> *(a) any law or any conduct of the President is invalid on the ground of its inconsistency with a provision of the Constitution; or*
> *(b) any law is invalid on any ground other than its constitutionality,*
> *the court shall decide the matter on the assumption that such law or conduct is valid: Provided that the party which alleges that a law or conduct of the President is invalid may adduce evidence regarding the invalidity of the law or conduct in question." (Emphasis added.)*

[4] *The wording of section 110 shows that the Magistrates' Courts are under an attenuated duty in relation to the development of the common law. They are however bound to give effect to the constitutional rights as all other courts are bound to do in terms of section 8(1) of the Constitution. Magistrates presiding over criminal trials must, for instance, ensure that the proceedings are conducted in conformity with the Constitution, particularly the fair-trial rights of the accused.*

[5] *Although Magistrates' Courts are at the heart of the application of the common law on a daily basis and, in most instances, courts of first instance in criminal cases, there are legitimate reasons why they are not included under section 173 and why their powers are attenuated. Magistrates are constrained in their ability to develop crimes at common law by virtue of the doctrine of precedent. Their pronouncements on the validity of common-law criminal principles would create a fragmented and possibly incoherent legal order. An effective operation of the development of*

> (b) the Supreme Court of Appeal;
> (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
> (d) the Magistrates' Courts; and
> (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts."

[4] Act 32 of 1944 as amended by the Magistrates' Courts Second Amendment Act 80 of 1997.

[5] An abbreviation of a Latin maxim, *stare decisis et non quieta movere*, which means that one stands by decisions and does not disturb settled points.

[6] See Ex *Parte Minister of Safety and Security and Others: In re: S v Walters and Another* 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC).

[7] Above n 4.

common-law criminal principles depends on the maintenance of a unified and coherent legal system, a system maintained through the recognised doctrine of stare decisis[5] *which is aimed at avoiding uncertainty and confusion, protecting vested rights and legitimate expectations of individuals, and upholding the dignity of the judicial system.*[6] *Moreover, and contrary to the view held by the magistrate in his judgment,*[7] *there does not seem to be any constitutional or legislative mandate for all cases in which a magistrate might see fit to develop the common law in line with the Constitution to be referred to higher courts for confirmation. Such a referral might mitigate the disadvantageous factors discussed above. The suggestion by the High Court that magistrates are empowered to vary the elements of crimes in the light of the Constitution was, to my mind, incorrect."*
