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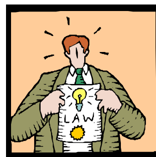
A KZNJETCOM Newsletter

March 2008 : Issue 26

Welcome to the twenty sixth 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 *Renaming of High Courts Bill* was introduced into Parliament on the 5th of March 2008. On explanatory summary of the Bill was published in Government Gazette No. 30799 of 21 February 2008. The purpose of the Bill is to address the undesirable situation where certain High Courts are still referred to by their names under the constitutional dispensation prior to 1994 and to facilitate certainty and uniformity regarding the names of the High Courts.

2. The *Choice on Termination of Pregnancy Amendment Act, 2008* has been published in Government Gazette No. 30790 dated 18 February 2008. The main amendment to the *Choice on Termination of Pregnancy Act, 1996* is that section 3 has been substituted by a new section 3 which relates to the place where the termination of pregnancy may take place. It now makes provision for the member of the Executive Council to get involved in designating and approving facilities in this regard. Section 6 amends section 10 of the principal Act to read as follows:

   "(1) Any person who –

(a) is not a medical practitioner, or a registered midwife or registered nurse who has completed the prescribed training course, and who performs the termination of a pregnancy referred to in section 2(1)(a);

(b) is not a medical practitioner and who performs the termination of a pregnancy referred to in section 2(1)(b) or (c); **[or]**

(c) prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy; or

(d) terminates a pregnancy or allows the termination of a pregnancy at a facility not approved in terms of section 3(1) or not contemplated in section 3(3)(a), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.".

3. The South African Law Reform Commission has published 2 papers for general information and comment on 7 March 2008. An issue paper on the scope of the review of the Law of Evidence gives consideration to the review of the rules of evidence with a view to simplifying this area of the law and to align it to new developments. A Discussion paper on Hearsay Evidence and Relevancy was also published. The closing date for comment in respect of both publications is 30 June 2008. The issue paper and Discussion Paper is available on the internet at www.90j.gov.za/salrc/index.htm

4. A *Reform of Customary Law of succession and regulation of Related Matters.* Bill has been published in Government Gazette No. 30815 of 25 February 2008.

   The Bill emanates from an investigation and report of the South African Law Reform Commission (SALRC). The purpose of the Bill is –

   (i) to abolish the customary rule of primogeniture in as far as it applies to the law of succession in order to bring it in line with the Constitution; and

   (ii) to give effect to the judgment of the Constitutional Court in the case of *Bhe and Others v The Magistrate, Khayelitsha and Others CCT 49/03, Shibi v Sithole and Others CCT 69/03*, which declared the principle of male primogeniture incompatible with the Bill of Rights.

The Bill can be accessed at www.pmg.org.za/bill .

Recent Court Cases

1. S v SCOTT-CROSSLEY 2008(1) SACR 223 (SCA)

A Judicial officer should not to be biased or resort to stereotyping in court:

The appellant was convicted in the High Court on one count of murder, and sentenced to life imprisonment. The charge arose from an incident in which a

former employee of the appellant had been killed and his body thrown into a lion enclosure. Evidence against the appellant was given at the trial by a co-accused and by another of his employees, M, who had been warned in terms of s 204 of the Criminal Procedure Act 51 of 1977. In addition, the trial court admitted into evidence a statement made to the police by a further co-accused whose trial had been separated from that of the appellant. The crucial issue on appeal was whether or not the deceased was already dead at the time when his body had been thrown into the lion enclosure. The appellant's version was that the deceased had died as a result of an assault perpetrated by his two co-accused, and that he had been persuaded by M to dispose of the body by throwing it into the enclosure, in the hope that it would be consumed by the lions. The trial court rejected this version, finding that the deceased had been alive at the relevant time, and that he had been thrown into the enclosure as a way of ensuring his death.

Held, amongst others, that the trial court observed that the 'general nature of the relationship' between farm workers and their employers was one of 'docile submissiveness' on the part of the master; and that the employees who had testified were, in this respect, typical. However, co-accused 1 had not testified. In addition, there was evidence to the effect that he, co-accused 2, M and another worker on the scene had been anything but docile when the appellant had arrived and pointed a gun at the deceased. This illustrated the danger of stereotyping, from which unfair and unwarranted generalisations might be made. Such generalisations were to be avoided in judicial reasoning, as they were apt to result in a miscarriage of justice. (Paragraph [25] at 236i-237c.)

Held, the court having reviewed certain questions put to the appellant by the trial judge, that the latter had descended into the arena and had expressed a firm view as to the appellant's credibility while he was still testifying; this was plainly undesirable. An accused was presumed innocent until proven guilty, and was entitled not to incriminate him- or herself. Accordingly, the criticisms expressed by the trial judge were misconceived and his comment that the appellant had 'lied' concerning the identity of the deceased was without foundation in fact or in law. (Paragraph [30] at 240c-h.)

2. S v. SHILUBANE 2008(1) SACR 295 (TPD)

Restorative Justice should be considered as an alternative to direct imprisonment for first offenders.

The accused, a 35-year-old first offender, had pleaded guilty and been convicted in a magistrates' court of the theft of seven fowls to the value of R216,16 and, notwithstanding his expression of genuine remorse and undertaking never again to commit an offence, was sentenced to nine months' imprisonment. On review,

Held, that the sentence of nine months' direct imprisonment is, in the circumstances of this case, disturbingly inappropriate. (Paragraphs [2] and [3], at 296g and 296h, paraphrased.)

Held, further, that, in line with the new philosophy of restorative justice, the

complainant would have been more pleased to receive compensation for his loss. An order of compensation coupled with a suspended sentence would have satisfied the basic triad of sentencing and the primary purposes of punishment. Unfortunately, this option could not be considered as s 300 of the Criminal Procedure Act 51 of 1977 required the consent of the complainant. (Paragraph [4] at 297b.)

Held, further, that the sentence imposed should be replaced with a sentence of a fine of R500 or, in default of payment, to imprisonment for six months, conditionally suspended for a period of three years. (Paragraph [7] at 298b.)

Semble: Unless presiding officers become innovative and proactive in opting for other alternative sentences to direct imprisonment, we will not be able to solve the problem of overcrowding of prisons. Inasmuch as it is critical for the maintenance of law and order that criminals be punished for their crimes, it is important that presiding officers impose sentences which are humane and balanced. There is abundant empirical evidence that retributive justice has failed to stem the ever-increasing wave of crime. It is furthermore counter-productive, if not self-defeating, to expose a first offender to the corrosive and brutalising effect of prison life for such a trifling offence. The price which civil society stands to pay in the end by having him emerge out of prison a hardened criminal far outweighs the advantages to be gained by sending him to jail. Courts must seriously consider alternative sentences like community service as a viable alternative to direct imprisonment, particularly where the accused is not such a serious threat to society that he requires to be taken away from society for its protection. (Paragraphs [5] and [6] 297c-e and 297f.)

From The Legal Journals

1. **Snyman, C R**

" Extending the scope of rape: a dangerous precedent"
SALJ – 2007,v124(4) p 677

2. **Malan, J**

" The inalienable right to take the law into our own hands and faltering state"
TSAR –2007 p 642

3. **Van Heerden, C M and Otto , J M**

" Debt enforcement in terms of the National Credit Act 34 of 2005 "
TSAR—2007 p 655

4. **Snyman, C R**

" Die begrip 'besit' in die strafreg (2)"
THRHR---2008 p 13

5. **Smit, M H**

" Language rights and the best interest of the child"

THRHR –2008 p 38

6. **De Villiers, W P**

" Plea of *autrefouis acquit* following failure of judge to call witness in terms of section 186 of the Criminal Procedure Act 51 of 1977 – Director of Public Prosecutions, Transvaal v. Mtsweni"

THRHR – 2008 p 136

(*A copy of the above articles can be requested from* gvanrooyen@justice.gov.za

Contributions from Peers

SECTION 60 (11) OF ACT 51/77

Since many magistrates still believe that section 60 [including section 60(11)] can be ignored when they apply section 72 of the CPA and release an accused person on warning, the matter should be finally clarified. This article does not aim to do so definitively, but aims at provoking thought and debate on the issue.

Section 60(11) of the CPA deals exclusively with offences referred to in schedules 5 and 6 to the Act.

As the section reads:"Notwithstanding any provision of this Act ...." it effectively excludes any argument that its provisions can be ignored in these cases.

The question is: How does it affect section 72 that deals with release on warning and not with bail?

There are two arguments-
The first argument is that section 60(11) means "in spite of "(concise Oxford Dictionary) and therefore the operation of section 72 is nullified or superseded by section 60(11) in its entirety. This implies that section 72 cannot be applied at all where a schedule 5 or 6 offence is concerned. Bail is money put at risk: release on warning does not achieve that. Moreover, constitutional rights can be limited by law of general application and the right to be released on warning in lieu of bail is thus limited by the phrase "in spite of any provision of this Act".

If one follows this argument one would be unable, for instance, to release a 13 year old who is charged with raping a 10 year old on warning and in custody of a guardian. One would have to fix bail once the onus has been discharged (exceptional circumstances).

The second argument is that the Constitution guarantees the right to be released on bail or on warning subject to reasonable conditions. (Section 35(1) (f) of the Constitution)
This implies that it could be unconstitutional to exclude section 72. In such a case one would first have to determine whether the accused would be entitled to bail in the case of an offence mentioned in schedule 5 or schedule 6. Once you have decided he can be released you can move on to section 72 – the above 13 years old can then be released on warning (in custody of his guardian).

One must keep in mind in both these scenarios that the application of section 60 (11) is compulsory since it determines that it should be applied in these cases “notwithstanding any provision of this Act”: this implies the whole Act including all its provisions and including section 72. One cannot escape the fact that evidence must be adduced or that a finding of exceptional circumstances (schedule 6) or whether the interests of justice permit his/her release (schedule.5), must be made. Which argument do you support?

It must also be kept in mind that any offence for which imprisonment of more than 6 months can be imposed can be a schedule 1 offence – (not only the offences specifically listed in the schedule). A schedule 1 offence can become a schedule 5 offence (as a schedule 5 offence can become a schedule 6 offence) in the case of previous convictions or other pending cases. This could have the effect that a police officer who releases a person on warning in terms of section 72(1) or on bail in terms of section 59 of the CPA would apply the section wrongly if the detainee has previous convictions (for a schedule1 offence) as he or she would then circumvent the application of section 60(11).

Would you extend the release on warning or on bail if the accused were to appear before you in the circumstances outlined herein? Only a High Court ruling can clarify these issues, but would the State appeal or seek a review of a wrong decision to obtain clarity?

Louwrens Swanepoel
Magistrate: Emzumbe KZN

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

From: Swanepoel Louwrens

Sent: Wednesday, February 20, 2008 9:57 AM
To: Laue Ron
Cc: Radyn Louis; 'lrad@mweb.co.za'; Van Rooyen Gert
Subject: section 60(11) Act 51/ 1977

I wish to refer to the article in e-Mantshi
I have encountered many magistrates who believe that when they apply section 72 of the CPA (release on warning) , that section 60(11) is not applicable as they are not dealing with section 60 in that instance.
However, section 60(11) reads " Notwithstanding any provision of this Act,….." In my opinion this makes section 60(11) applicable to the whole act where an accused person is detained when charged with a sh.5 or a sh.6 offense and the accused should also adduce evidence before he can be released on warning i.t.o. section 72.
A problem that I foresee is that a Police officer who wishes to release someone i.t.o. section 72(1) may find that he cannot determine if such detainee has previous convictions or pending matters at that stage. This can have the effect that he may believe that he is entitled to release a person as long as its not an offence referred to in Parts II or III of Schedule 2. , yet that detainee may fall within the ambit of a schedule 5 offence due to PC's or pending cases. The police will have to be made aware of section 60 (11) in these instances.
L.D.Swanepoel.

From: Laue Ron
Sent: Wednesday, February 20, 2008 1:09 AM
To: Swanepoel Louwrens
Cc: Radyn Louis; 'lrad@mweb.co.za'; Van Rooyen Gert; Davis Garth
Subject: RE: section 60(11) Act 51/ 1977
Importance: High

Mr. Swanepoel
Thank you for your comment.
I do not agree with the suggestion that evidence must be adduced in the application of section 72. My understanding of the phrase "Notwithstanding any provision of this Act" (Cf. "in spite of"; Concise Oxford Dictionary) in section 60 (11) is that where a schedule 5 or 6 offence is concerned, the operation of section 72 is nullified or superseded by section 60 (11) in its entirety, with the result that an accused person may be released on bail only, if the onus is discharged. Section 72 cannot be applied at all where a schedule 5 or 6 offence is concerned. The same, incidentally, applies to section 59. But then, judging from the relevant article you refer to and my own observations, the law is applied incorrectly or not at all in some instances, so it might be worth the effort if you were to submit an article on the topic (i.e. whether you agree with me or not) for publication.

From: Swanepoel Louwrens
Sent: Wednesday, February 20, 2008 12:16 PM
To: Laue Ron
Subject: RE: section 60(11) Act 51/ 1977

I believe there are merits in your interpretation. Would the effect then be that no one can be released on warning when charged with a schedule 5 or sch. 6 offense ? . For instance, a 13 year old that is charged with rape of an 11 year old can only be released on bail and can't be released on warning in custody of a guardian ?

From: Laue Ron
Sent: 20 February 2008 12:39
To: Bester Johannes
Subject: FW: section 60(11) Act 51/ 1977
Importance: High

Hi Johan
Do you have any take on this matter? Perhaps you can help Lourens in answering what appears to me to be an obvious rhetorical question.

From: Bester Johannes
Sent: Wednesday, February 20, 2008 1:41 PM
To: Laue Ron
Cc: Swanepoel Louwrens
Subject: RE: section 60(11) Act 51/ 1977

Hi Ron,

Louwrens and I had a fruitful discussion about the matter yesterday.

My view is, briefly stated, that the effect of section 35(1)(f) of the Constitution and sections 50(6), 60 and 72(1) of the CPA is that a court is to consider the release of an accused from detention if the interests of justice permit, subject to reasonable conditions; in other words, release on bail or on warning.

A magistrate cannot simply arbitrarily decide to employ the provisions of section 72(1) without having had regard to the issue of bail. Section 72(1) provides that "If an accused is in custody in respect of any offence and ..a court may in respect of such offence release the accused on bail under section 59 or 60…" (The emphasis is mine).The magistrate consequently has to ask him or herself whether the accused may be released on bail for the particular offence and if so, the magistrate may, in lieu of bail, release the accused on warning.

As soon as the magistrate entertains the question as to whether the accused may be released on bail for that offence, the provisions of section 60(11) circumscribe his or her discretion in this regard. It is significant that in section 60(11) the Legislator commences with the words "Notwithstanding any provision of this Act.." That includes section 72(1).

So, in order to determine whether the accused can be released on bail for an offence such as one which is mentioned in Schedule 6, evidence requires to be adduced by the accused first in order to satisfy the court that exceptional

circumstances exist to justify release on bail. Once that requirement has been satisfied, then, and only then can the magistrate decide whether to act in terms of section 72(1).

The issue as to whether section 60(11) supersedes the provisions of section 72(1) is of course debatable. However, if one is to construe section 72(1) the way I have done and furthermore construe the provisions of section 60(11) in favorem libertatis as I believe one should, it should be possible to release an accused on warning (such as the 15 year old charged with rape of a 6 year old child) once exceptional circumstances have been proved.

Regards

Johann

From: Laue Ron
Sent: Wednesday, February 20, 2008 2:05 PM
To: Bester Johannes
Cc: Swanepoel Louwrens; 'basilk@justcol.org.za'; King Basil
Subject: RE: section 60(11) Act 51/ 1977
Importance: High

Johan
Thanks for your comment. I must concede that you and I have differed on issues in the past. Here I remain adamant. Once s. 72 is out it remains out. However, if Lourens were to collate the different approaches and get them published (he has my permission to use mine and no doubt will have yours) – because your approach is certainly attractive and debatable – it would be useful for the magistrates out there.

By the way, Lourens' concern about SAPS and s. 72 should not be a problem because they will have to establish the PCs status where applicable, in each instance, before applying it.

Regards
Ron
From: King Basil
Sent: Thursday, February 21, 2008 4:18 AM
To: Laue Ron; Bester Johannes; Radyn Louis; Van Rooyen Gert
Cc: Swanepoel Louwrens
Subject: RE: section 60(11) Act 51/ 1977

Hi Ron, Johan, Louis, Gerhard and Louwrens
Interesting correspondence indeed.
I did not know there was still a question about this issue. Strange how noone takes issue with an explanation given (in class) but then does something completely differently in his or her court.

I agree with Johan. The question of possible release is to be considered for anyone who appears before court in custody, section 60(1)(c) of the CPA refers.
Section 72's heading, "Accused may be released on warning *in lieu* of bail", then speaks for itself; an accused is only entitled to be considered for release on warning if the police official or court could have granted him/her bail. That consideration basically comes in answer to the second leg of the question relating to possible release, the first leg being – is it in the interests of justice to allow accused to be released, and if so, (the 2nd leg) can he/she afford bail or should the court consider release on warning, *in lieu* of bail?
It was with that idea in mind that the 'Bail annexure' was designed following the 1998 amendment – see the attachment, particularly the "release" order at the foot of page 2. [Nasty aside: *I know this annexure doesn't particularly find favour with all because its time-consuming and magistrates don't have the time to spend on such 'niceties' – as Garth mentions in his article.*)
Louwrens' comment about the opening line in section 60(11), namely: "Notwithstanding any provision of this Act …" has been given another 'interpretation' in some other part of our country, in regard to an accused before court on summons. See the attachment entitled "Interpretation …" for an explanation of what I'm referring to. I might just mention that this 'interpretation' was being adhered to by more than just one magistrate.
In regard to Louwrens' 2nd comment about the police's release, and for that matter so too the prosecutor's consideration, this weird amendment (now nearly 10 years old) never imposed a duty on either of them to concern themselves with the accused's past behaviour, ie his/her previous convictions, prior releasing the accused, whether on bail or in the case of the police, on warning, if entitled to – ie where the alleged offence falls either within a schedule (7) or is 'other than' a scheduled offence (Part II or III of Sch 2)!.
While I'm in the 'gripe' mode, and on bail issues, I still view that disclosure of PC's problematic, a la Hlati [2000(2) SACR 325 (N)], and suggested an amendment in that respect too, (see attachment "Subm-s60-11B").
The fact that I never received the courtesy of a response is something I've learnt to live with and when I raised this with our current deputy Min in about 2002/3 all that happened was that the College had to pay for the cost of a broken coffee table in his hotel room – fortunately I was there at THAT time!
In short, some magistrates close their eyes to Hlati, Singenu (WC) and Tseouw (FS) whilst others just ignore the provisions of the Act. What a wonderful world!
Regards

Basil King
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A Last Thought

Road signs