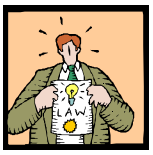
e - M A N T S H I

A KZNJETCOM Newsletter

July 2006: Issue 5

Welcome to the fifth 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 faxed to 031-368 1366.



New Legislation

1. The **Children's Act 2005 (Act 38 of 2005**) was published in Government Gazette No.28944 of 19 June 2006). The Act will only come into effect on a date to be fixed by the President. This will probably only happen once an Amendment Bill is proclaimed which must be dealt with in terms of section 76 of the Constitution and which will deal with omitted provisions in the Act. Some of the innovations in the new Act are:
    a) A child becomes a major upon reaching the age of 18 years;
    b) Section 7 sets out in detail which factors should be taken into account when the best interests of the child standard must be applied;
    c) Chapter 3, part 1 deals with the acquisition and loss of parental responsibilities and rights while part 3 regulates parenting plans;
    d) Provision is also made in part 3 of Chapter 4 for pre-hearing conferences, family group conferences, other Lay-forums and settling matters out of court;
    e) In Chapter 7 provisions is made for a National Child Register which has the purpose of keeping a record of abused children and also to keep a record of persons who are unsuitable to work with children;
    f) Chapter 16 now regulates inter-country adoptions and enforces the provisions of the Hague Convention on Inter-Country adoptions;

g) In Chapter 17 effect is given to the Hague convention on International Child Abduction;

h) Surrogate motherhood is regulated in Chapter 19.

Recent Court Cases

1. S v. VAN WYK 2006(2) SACR 22 NCD

Held, on automatic review, that despite the fact that the unrepresented accused had indicated that he could not understand the court procedures, the magistrate had convicted him without giving any reasons for her decision. It was improper for a court to find an accused, especially an unrepresented accused, guilty without giving reasons for the decision. To do so precluded the accused from deciding which facts or factors should be put before the court in mitigation of sentence, and might result in a violation of the right to a fair trial. (Paragraphs [5] and [6] at 23*g* -24*b*.)

2. S v. RAMOKOKA 2006(2) SACR 57 WLD

The accused was charged with one count of assault with intent to commit grievous bodily harm. At trial the accused and his brother informed the court that he was 'mentally unsound'. He was referred for observation in terms of s 77 of the Criminal Procedure Act 51 of 1977, and the resulting report concluded that he was unable to appreciate the wrongfulness of his actions or to follow the proceedings against him. The magistrate accordingly directed that the accused be detained at Sterkfontein Hospital pending a decision of a Judge in Chambers in terms of s 77(6) of the Act, and thereafter referred the matter to the High Court on special review. It appeared that only one psychiatric report had been obtained, and that the magistrate's decision had been based solely on that report. However, it was a binding requirement of s 79 that at least two reports by the medical practitioners specifically referred to must be obtained. The magistrate's order of detention in terms of s 77(6) had therefore to be set aside, but, in order to prevent a potentially dangerous person from being released into society; it would be ordered that he be brought before the magistrate immediately upon his discharge from the psychiatric hospital. (Paragraphs [25] -] 29] at 62*d* - *j*.)

3. S v. KAROLIA 2006(2) SACR 75 SCA

The appeal in this matter comprised three aspects of which one was an alleged irregularity which arose from the fact that the trial court had called further witnesses without notice to the parties and after both the State and the defence had closed their cases.

Held, (per Zulman JA, Patel AJA concurring) that, as far as the special entry was concerned, it was clear from s 186 of the Criminal Procedure Act that the Court *a quo* was entitled at any stage of the proceedings to call witnesses, even if both parties had concluded their arguments, and there was no requirement that notice be given to the parties. The Court had properly attempted to discover the truth in order to arrive at a just decision. There had been, accordingly, no irregularity or failure of justice. (Paragraphs [7]-[10] at 80*g* -81*d.*)

From The Legal Periodicals

1. In the **South African Journal of Criminal Justice** VOL 19 NO 1 2006 the following articles are published:

    a) *The Sentencing guideline system in England and Wales* by Andrew Ashworth;

    b) *Maximum includes financial – even in cases of domestic violence* by Elizabeth R. Husa;

    c) *Evaluating the 'First Report': The persistent problem of evidence and distrust of the complainant in the adjudication of sexual offences* by Karam Singh.

    d) *Pre-recorded videotaped evidence of Child witnesses* by Joanna Simon

    There is also the normal case reviews which reviews cases in the following categories: specific offences, Criminal Procedure, Evidence, Sentencing and Constitutional application.

Contributions from Peers

The Majority is not always right – section 57(7) of Act 51 of 1977 and a magistrate's authority

An accused person who was summoned to appear in court on a charge of dealing in liquor without a license pays an admission of guilt fine of R2 000. The procedure prescribed by

section 57(6) of the Act 51 of 1977 was duly followed and the papers were examined by a magistrate in accordance with the provisions of section 57(7) of the same Act. The magistrate saw no reason to take either of the steps authorized by that section, and consequently the conviction and sentence in terms of section 57(6) was unaffected. Subsequently the magistrate receives an affidavit by the accused in which he states that he has been forced to pay the admission of guilt by the SAPS who threatened to have him locked up for a weekend if he did not pay the fine.

The question that arises now is whether the magistrate can again act in terms of section 57(7) or whether he is *functus officio* and has to submit the papers to the High Court on review so that the matter can be dealt with there.

In S v. Shange 1983(4) SA 46 (NPD) the KZN High Court decided that a magistrate in such a situation is not *functus officio* and can himself act in terms of section 57(7). This is the only High Court which holds this view (in my opinion correctly) as all other divisions of the High Court have held that a magistrate in this position is *functus officio*. (See e.g. S v. Marion 1981(1) SA 1216 (T), S v. Louw 1982 (4) SA 556(C), S v. Makhele 1981(4) SA 956 (NC)).

In the Shange case the court emphasizes the following features of section 57(6) and 57(7) (on 47G-48D).

(a) In terms of ss (6) the accused is deemed to have been convicted and sentenced the moment the clerk of the court has entered particulars of the summons, etc., in the criminal record book, and therefore before the papers have been examined by a magistrate under the provisions of ss (7),

(b) Subsection (7) permits a magistrate to act in accordance with its provisions if it appears to him –

  (i) that the "conviction" or the "sentence" is not in accordance with justice;

  (ii) that the "sentence" is not in accordance with a determination made under ss(5);

  (iii) in the absence of such a determination, that the "sentence" is not adequate.

(c) Subject to the proviso to ss (7), the only power which is conferred upon him is to set aside the deemed "conviction" and "sentence" and to direct that the accused be prosecuted in the ordinary course.

As the result of an administrative act performed by a person who is not a judicial officer – the

entry of the particulars of the summons in the criminal record book by the clerk of the court – the accused is deemed to have been convicted and sentenced. Thereafter the magistrate "examines" the documents. In doing so he does not in my view perform any judicial function with regard to which he is required to arrive at any final decision. If he does not set aside the conviction and sentence, then, apart from any question as to the quantum of the fine, all he is in effect saying to himself is that on the information then available to him, he has no reason to believe that the deemed conviction, sustained as the result of an administrative action by the clerk of the court, is not in accordance with justice. He certainly does not decide that the conviction is in accordance with justice. At most he decides that the deemed conviction appears to be in accordance with justice, and that decision adds nothing to, and lends no force whatever to, the deeming provision contained in ss (6)."

The Judge then goes further to state the following at p48 F-G:

> "A factor which is of some importance in my view is that there is nothing, either in the wording of ss (7) or in the spirit of chapter 16 of the Act, which suggests that a magistrate may examine the relevant documents only once. Consequently the real question is whether the function which a magistrate is required by ss (7) to perform is of such a nature that a decision not to set aside the conviction and sentence renders him *functus officio*. Having regard to what I have said already, I am of the view that that function is of a supervisory administrative nature."

After finding that the whole procedure created by s 57 is intended to be of an administrative nature and that the whole spirit of s 57 is the creation of a speedy and simple procedure to dispose of admission of guilt cases without engaging the attention of the counts, the court finds that the magistrate is not *functus officio* if he refrains from acting under the provisions of s 57(7).

In the case example given above a magistrate in Kwazulu-Natal is therefore at liberty to consider the affidavit and if he is satisfied that the fine was paid under duress he can set aside the "conviction" and "sentence" and direct that the accused be prosecuted in the ordinary course.

Gerhard van Rooyen
Magistrate/Greytown

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 by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest for Magistrates

INTERNATIONAL CONFERENCE:
"THE CONTENT OF THE RIGHT TO REMAIN SILENT IN A DEVELOPING CONSTITUTIONAL JURISPRUDENCE"
30 SEPTEMBER TO 3 OCTOBER 2003-09-27
PRETORIA

IF IT AINT BUST...
Limiting delays and other forms of injustice in criminal trials
Johann Kriegler

A. INTRODUCTION

Let me confess at the outset an innate legal conservatism, an instinctive skepticism of legal innovations and a profound suspicion of ostensibly simple solutions to complex systemic problems. More often than not, I venture to suggest, quick fixes turn out to be long term disasters.

There are many faults in our criminal justice system. That is common cause and need not detain us. There is consensus on little else, however. In particular, there are sharp differences as to the causes of these systemic ills. Consequently there is divergence of views on what should be done to remedy them. Indeed, I am not sure that there is agreement on the essential nature of the problem. My thesis is that in order to cure a systemic ill, prudence demands meticulous differential diagnosis to establish precisely *what* is wrong and *why* it is wrong. Then there should be conservative remedial treatment of the identified faults before, possibly and as a last resort, turning to radical surgery.

I would argue in the first place that it is a serious misdiagnosis to single out the right to silence as the root cause of the perceived shortcomings of our criminal justice system. It would therefore be an even more serious mistake to sacrifice this elemental safeguard of personal liberty on the altar of the false god of efficiency. The lodestar of the law can never be efficiency.

I speak of a false god because I contend, in the second place, that a resort to radical transplants from other systems onto the body of our criminal procedure is likely to have consequences that, with the best will in the world, cannot be foreseen. That does not mean that we cannot make an intelligent prognosis regarding some of the likely side- effects. On the contrary, anybody who has taken the trouble to examine the causes of the shortcomings in our system, will probably have concluded that

they are generally to be found in human frailty.
Systems malfunction, not only or primarily because they are inherently defective, but because the people who are supposed to operate them, fall short. Thus the vast majority of airplane crashes are the result of pilot error. In South Africa, moreover, we have to cope with our uniquely skewed legacy. Our history has left deep marks on every facet of our society, not least on our system of criminal justice. For centuries the majority of the people of our country were governed and administered and controlled through an increasingly intricate system of laws. The criminal justice system was used and was widely perceived to be used for the enforcement of government policy and therefore suffered a serious loss of legitimacy. That has changed and we are still adjusting rather awkwardly to the change.
For centuries the face of our courts was white, the judicial officers, the prosecutors and the lawyers. That change, too, has caught us unawares. There have been major advances in the national endeavour to transform the judiciary, but these have come at a price in experience and know-how. In a profession as conservative and precedent bound as the law, where seniority plays such a major role, there is serious disruption when one blurs lines of authority and disturbs patterns of seniority, career paths and settled relationships.
The removal of the magistracy from the civil service in the wake of the Hoexter Commission's recommendations was universally applauded in judicial circles. It had long been a cause of concern that the judicial officers bearing the brunt of the criminal justice load often also had to operate as administrators of government policy. But the change was not an unmixed blessing. There were other mixed blessings. The opening of the magistracy to new faces from outside the civil service introduced a welcome breath of fresh air while the formation of a national prosecuting authority deriving its status directly from the Constitution served to support the rule of law.
But neither was free of harmful side-effects. In particular there was a disruption of the line of authority in the lower courts. Previously the magistrate was manifestly the central figure of authority, not only in the courtroom, but generally in the magistrates' offices and the district. He (for it was virtually always a middle-aged white male) was the senior civil servant who held unquestioned authority. If a prosecutor was careless, an interpreter dilatory, a clerk of the court sloppy or even a policeman or prison warder out of line, the magistrate could and often handle it summarily and informally as a minor disciplinary issue. All of this has now changed. Nowadays the lines of authority are much less clear and judicial authority of magistrates has ostensibly been diminished.
It would therefore be gross folly to try, in the midst of this convulsion, to introduce any further major changes. There are many new appointees who are battling to find their way and many old ones who are still adapting more or less painfully to a completely new environment. My earnest plea is to let them get on with it. Let them find their feet on the known paths before they are asked to blaze new courses. Much of what troubles us about the current state of affairs in the criminal courts will pass with the passage of time. The more you complicate the learning process, the longer the adjustment will be.
I repeat, I have the defensive reflex of a conservative, based not only on my own experience over half a century, but on the thousands of years of experience of our peers. My immediate response to a novel proposal is to ask why, if it is such a good

idea, no one has thought about it before. How have we managed without it?. Conversely and more importantly, if we haven't managed with what we know and understand, how can we hope to cope with something unknown and untried? The law progresses by barely perceptible shuffles within the bounds of its myopic vision, not by bold leaps. We hesitate and think of alternatives because the implications of mistakes are awesome — and unforeseeable.

By reason of this reflex, I would much rather we tried our best to make our existing system work. And here, I say without hesitation and with little fear of contradiction, there is a great deal that can and ought to be done, both systemically and in the actual conduct of cases.

Most judicial officers in the country would give you a blank stare if you were to raise the topic of caseflow management. Others would reject it as the very kind of newfangled idea that I eschew. The truth, of course, is that caseflow management is an old, tried and tested technique that has fallen on hard times in the hustle and bustle of transformation and is now being revived under a new label. It always made sense to have proper liaison between all the role-layers in the criminal justice system, at all levels down to the individual district courts. That is how the magistrate generally, the JP in his division and the judge on circuit, relying principally but not exclusively on the senior representative of the prosecution planned the court's work programme, anticipating and obviating breakdowns or delays, and having contingency plans in place to meet new developments. Organising a criminal court role is admittedly more complicated and less predictable than planning the run of a grain mill, but there is now mystery or magic about it.

I make no apology for taking time to mention these features of our transition. I do so because I am convinced that the place to start the rebuilding of our criminal justice system is in the hearts and minds of the judiciary itself. Judicial officers must be made aware of their critical role in the new South Africa, of their indispensable part in establishing on the ground the dream expressed in the Bill of Rights. And the point where they must start is in their respective courts. The first step on the road is for judicial officers to resume active control of the proceedings in and intended for their courts.

Since Hepworths case it has been trite that a judicial officer in a criminal court is no mere passive onlooker or umpire. As I will show in a moment, there are innumerable tools at the disposal of a presiding judicial officer who takes this leadership role of the judiciary seriously. It is not the means that are lacking but the requisite judicial will. There is a pervading a hesitance, a diffidence, an inertia on the part of judicial officers, particularly in the lower courts. Instead of taking a case by the scruff of its neck and getting on with it, district magistrates patiently wait in their offices for the invariably delayed summons to enter the court room. Once there much time is taken up with repeated postponements, which are blithely and meekly granted for the asking, generally under the ubiquitous banner of "Further investigation".

Which takes me to practical bugbear No 1: How is it that cases have to be postponed times without number while the accused languishes in custody (costing the taxpayer about RlOO per day and the dependents their daily bread) for further investigation? On what basis was the original arrest then made? More to the point, if the investigation is incomplete, why was the accused arrested at all? Section 38 of the Criminal Procedure Act 51 of 1977 makes provision for a variety of ways of initiating criminal proceedings. Of these arrest is but one. It is decidedly not the only

method and indeed often not the most convenient. Yet police officers, without demur by prosecutors or judicial officers, routinely arrest in the absence of really good and sufficient reason. I know that cases such as Tsose and Kraatz lay down that it is not in itself unlawful for a policeman to choose to arrest rather to warn or summons a suspect, but (a) I suggest those cases be re-examined in the light of constitutional values and (b) that in any event policemen should be encouraged to mend their ways in this regard.

Where the accused was arrested, there is often no reason to keep him or her in custody prior to the first appearance in court. Section 59 allows so-called police bail in quite a number of less serious cases and section 59A makes provision for a prosecutor to grant bail in more serious cases. Once the accused is not in custody pending trial, much of the pressure is taken off the system. Speaking of which, there is a universal custom of routinely postponing cases for 14 days at a time, whether or not there is any hope of the case then being ripe for hearing. Cases awaiting reports from the forensic laboratory usually have to stand over for some four to six months and it makes no sense to have the accused yo-yoing between the prison and the court once a fortnight, using up transport and court cell space and wasting time that could better be spent on the actual hearing of cases.

For some reason that I cannot fathom, there are tens of thousands of awaiting trial prisoners causing Correctional Service staff and Judge Fagan untold trouble. Many of these people could not manage to scrape together the relatively paltry amounts of bail money fixed for them and clog the prisons at enormous cost to society. Why, in heaven's name, if a judicial officer is satisfied that it would be in the interests of justice for an accused to await trial outside prison, can the provisions of section 72 of the CPA not be used.

How many of the endless postponements that seem to pock the course of justice in the district courts are occasioned by problems with legal representation for the accused. Now we all know that the right to legal representation is an inalienable concomitant of a fair trial. We also know that many accused persons are too poor to be able to engage their own lawyer while the publicly funded legal aid system cannot adequately fill the gap. But why must we be shortsighted about it? Every detainee, which includes arrestees, is entitled to be told of the right to legal representation under section 35(2) of the Constitution. Yet there is no nationally implemented system for every arrestee to be told at or shortly after arrest about legal representation and the facilities offered by the legal aid system. Why can public defenders not be attached to police stations to pick up their duties right from the outset? Surely this would go a long way towards eliminating the interminable postponements for this purpose?

Very much along the same lines, why is there no system whereby prosecutors are routinely involved at the earliest possible opportunity in the preparation of cases for their courts. A recent experiment is in point. In order to counteract the enormous workload (largely of petty cases) that mounts up over weekends, a group of prosecutors each took a couple of hours on the Sunday night to review dockets at a local police station. In this way they managed to weed out the worthless cases, releasing the accused concerned and limiting the case rolls for the Monday to the worthwhile cases. Here it is pertinent to note that according to figures released by the National Prosecuting Authority, some 48% of all cases in the district courts are resolved by withdrawals. By eliminating these cases early, the case load of the

courts can therefore be nearly halved.

To the best of my knowledge there is no uniform practice anywhere in the country for someone with the requisite knowledge, authority and experience to do routine classification and channeling of cases. Yet it is fundamental to a proper system of control of a court's roll, that heavy cases, urgent cases, sensitive cases, legally difficult cases and the like are distinguished from the run-of-the-mill. In the cases that I have seen where some kind of sifting is done, it is confined to the age of the case. Now this is commendable but it makes little sense to battle on valiantly with one old and relatively unimportant case while ten newer cases that could have been disposed of are allowed, themselves, to become old.

While on the subject of sifting, why has it become the fashion to charge an accused with each and every charge investigative efforts and prosecutorial ingenuity can put together? Why must a court sit for months or even years to try a man on umpteen charges when the sentence on the most serious will likely determine the overall sentence? I know there is a case to be made for the complainants to be given their day in court, for there to be closure. But often this is not the case, for instance where multiple counts of theft or fraud against the same complainant are involved. I suspect prosecutorial hubris, as I do in the case of theatrical, handcuffed and televised arrests of persons whose presence at court could be assured by a phone call.

At trial, why do judicial officers pussyfoot around section 115? The section is there, it is clear enough in its terms *(pace* Seleke and the literally hundreds of other cases on the section) and no-one has suggested it is unconstitutional. Indeed the reasoning in Thebus would, if anything, show the contrary. I am not ashamed to say that I have always regarded it as proper to take into account the stage at which a defence is disclosed to a court. We have not had juries and have not had to do the North American tightrope about what a jury can be told and what it can work out for itself about inferences from an accused's election not to disclose a defence. Of course, one cannot convict merely because an alibi, for instance, was not disclosed until after the close of the prosecution case, or only because the accused elected not to give evidence. But that the lateness of the disclosure of a defence is a factor legitimately to be put in the scales, I have never doubted. That being the case, I can see no reason why the accused, especially when competently represented, should not be told at the outset that reticence about the nature of the defence will not go unnoticed. That, I believe, is consonant with the section itself and with each of the Constitution's fair trial prescripts.

Judicial officers also pussyfoot around the power given under section 166(3) of the CPA to curtail unreasonably protracted cross-examination. Here there is more justification for caution. It is not always easy to draw the line between what is permissible cross- examination, especially as to credit, and what is not; and often judicial intervention merely serves further to prolong the agony. But there is a line and it ought to be drawn. Where the cross-examination is being conducted by a lawyer it should not be allowed to drift on and on as the way of least judicial resistance and although the first intervention may take time, it sets a useful precedent in the particular case. Aimless or otherwise feckless questioning can never be conducive to a fair trial and should not be suffered.

It does no harm for a judicial officer to become known as fair but firm about time wasting. This applies not only to cutting short interminable cross-examination, but in

other respects as well. Irrespective of the responses under section 115, it should be possible to draw the line sooner rather than later between legitimate testing of the prosecution case and mere ducking and diving. There is nothing wrong with an instruction in open court to the prosecutor and the defence to go out and settle peripheral details of a case. The useful and time-saving provisions of sections 212B and 213 for the written proof of undisputed or formal facts are hardly ever used. If prosecutors don't do their job in this respect, presiding officers should not passively stand by.

Ultimately, of course, the sentencing process should not be allowed unnecessarily to prolong already overly lengthy proceedings. Thus, prosecutors should take timeous steps to ascertain the accused's previous convictions and I cannot understand why the NDPP Policy Manual should instruct prosecutors always to apply for a remand for this purpose. Likewise, timeous steps should be taken to ensure that evidence relating to sentence is readily available. There is no justification for supinely waiting for verdict before initiating these steps.

I conclude where I started. Most of the faults in our criminal justice are attributable to human error, not to defects in the system. Tinkering with the system rather than addressing these mistakes by human beings will do more harm than good. If it aint bust, don't try to fix it.

Society is well governed when its people obey the magistrates, and the magistrates obey the law.
Solon
