E-MANTSHI

A KZNJETCOM Newsletter

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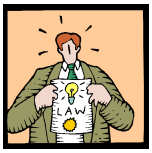
Welcome to the thirty sixth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource. We have received the following feedback recently:

"Thank you very much for such a wonderful thought. We benefit a lot from the publication, I've been acting in Mthatha and just been recently appointed. We have a small library so the publication helps us a lot. I use to get my copy from the senior magistrate. I will be grateful if I can get mine in my mail. What about other newly appointees?

Nwabisa Jumba"

Any comments and suggestions – can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. The Refugees Amendment Act, No. 33 of 2008 has been published in Government Gazette No. 31643 dated 26 November 2008. The main amendment that is of relevance to magistrates is that the Act now has a definition of a court which is defined as a magistrate's court.

   The amended section 29 read as follows:

   "**Restriction of detention**

   29. (1) No person may be detained in terms of this Act for a longer period than is reasonable and justifiable and any detention exceeding 30 days must be reviewed immediately by **[a judge of the High Court of the provincial division]** a court in whose area of jurisdiction the person is detained, **[designated by the Judge President of that division for that purpose]** and such detention must be reviewed in this manner immediately after the expiry of every subsequent period of 30 days of detention.

(2) The detention of a child must be used only as a measure of last resort and for the shortest **[appropriate]** possible period of time, taking into consideration the principle of family unity and the best interest of the child."

The Amendment Act will come into operation on a date to be determined by the President by proclamation in the Gazette.

2. The Minister of Justice and Constitutional Development has, under section 62 of the Sheriffs Act, Act 90 of 1986 amended the Regulations relating to Sheriffs, 1990. Regulation 2C is of relevance to magistrates and now reads as follows (in so far as it relates to magistrates):

"2C. (1) An Advisory Committee shall be established in every province to shortlist, interview and recommend applicants for a vacancy in the post of sheriff in the province in question.

(2) An Advisory Committee contemplated in sub regulation (1) comprises –

(a) a regional magistrate, a chief magistrate or another appropriately experienced magistrate appointed by the Minister after consultation with the Magistrates Commission, which magistrate shall be the chairperson of the Advisory Committee;

(b) the person who occupies the post in the Department of Justice and Constitutional Development of regional head of the province or region in question;

(c) a magistrate who heads the court where the vacancy occurs or will occur, or his or her nominee."

3. The Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, Act 107 of 1985 amended certain of the Magistrates' Courts Rules. The amendments were published in Government Gazette No. 31690 dated 12 December 2008 and came into operation on 12 January 2009. Rule 5 was amended as follows:

"5(1) Subject to the provisions of section 59 of the Act, the process of the court for commencing an action shall be by summons calling upon the defendant to enter an appearance to defend the action within 10 days after service to answer the claim of the plaintiff and warning the defendant of the consequences of failure to do so.".

The other rules amended are Rule 39, 40, 41, 43, 44 as well as the tariffs for Sheriffs who are not officers of the Public Service.

4. A Criminal Law (Forensic Procedures) Amendment Bill, 2008 was introduced in Parliament on 13 January 2009. The purpose of the Bill is as follows:

   To amend the Criminal Procedure Act, 1977, so as to further regulate powers in respect of the ascertainment of bodily features of persons; to provide for the compulsory taking of finger-prints of certain categories of persons; to provide for the taking of prints and samples for investigative purposes; to provide for the taking of specified bodily substances from certain categories of persons for the purposes of DNA analysis; to provide that prints and samples taken under the Act are retained; to further regulate proof of certain facts by affidavit or certificate; to further regulate evidence of prints or bodily features of accused; to amend the South African Police Service Act, 1995, so as to regulate the storing and use of finger-prints, palm-prints, footprints and photographs of certain categories of persons; and to establish and regulate the administration and maintenance of a National DNA Database of South Africa; to amend the Firearms Control Act, 2000, so as to further regulate the powers in respect of body prints and bodily samples; to amend the Explosives Act, 2003, so as to further regulate the powers in respect of prints and samples for investigation purposes; and to provide for matters connected therewith.

   A copy of the above Bill can be found on the website of the Parliamentary Monitoring Group at http://www.pmg.org.za .

Recent Court Cases

1. VAN RENSBURG v CITY OF JOHANNESBURG 2009(1) SACR 32 WLD

Where it appears to an arresting officer when executing a warrant of arrest issued for a traffic offence that the accused had not received the summons in question, he is obliged to release the accused on warning.

The 74-year-old plaintiff instituted action against the defendant for damages for his wrongful detention in a police cell for an afternoon consequent upon his lawful arrest at a roadblock for failure to appear at court on several traffic violations.
Held, that the general rule was that the issue of a warrant of arrest by a magistrate was a complete defence to a claim for wrongful arrest and, in the ordinary course of events, would render the ensuing detention lawful. (At 37g.)
Held, further, that, however, an exception to that general rule was created by the proviso to s 55 of the Criminal Procedure Act 51 of 1977, which provided in para (b) that, where it appeared to the person executing the warrant that the accused had not

received the summons in question, he was obliged to release the accused on warning. (At 38i-39d.)
Held, further, that, on the facts of the present case, the arresting officer or officers had done nothing towards fulfilling the duty imposed on them under para (b) of the proviso to s 55, i.e. to establish whether the plaintiff had received the summonses in question. Had they done so, it would have appeared, quite blatantly, that the summonses had not been served on the plaintiff and that they were obliged to release him on warning. It was the arresting officers' reckless dereliction of duty which resulted in the plaintiff's being imprisoned and further detained following his arrest. (At 40d-g.)
Held, further, that, in the circumstances, the arresting officers acted unlawfully in detaining the plaintiff. (At 41b.)
Held, further, as to quantum, that, viewing the facts of the case as a whole, justice would be done if the plaintiff were awarded an amount of R75 000. (At 41i.)

2. S v NTOZINI 2009(1) SACR 42 ECD

It is a prosecutor's function to conduct a case with judicial discretion and to assist the court to arrive at the truth, whether on the merits of the case or on sentence.

It happened frequently, in cases where it was abundantly clear that substantial and compelling circumstances were present, and that a sentence of life imprisonment would never be imposed, that the prosecution persisted in submitting to the contrary. A public prosecutor did not only represent the interests of the State; he or she also had a duty towards the accused to see that an innocent person was not convicted. It was the prosecutor's function to conduct the case with judicial discretion and a sense of responsibility and to assist the court to arrive at the truth. These principles applied also with regard to sentence. The imposition of sentence was one of the most difficult and onerous duties of a judicial officer, and the execution thereof was not made any easier when obviously unsustainable submissions were made by counsel. (At 49d-h.)

3. S v THEMBALETHU 2009(1) SACR 50 SCA

If an accused person is convicted of possession of a semi-automatic firearm the minimum sentence of 15 years imprisonment is applicable.

The appellant was convicted in a regional court of robbery with aggravating circumstances, attempted murder, the unlawful possession of a semi-automatic firearm and the unlawful possession of ammunition. An effective sentence of 25 years' imprisonment was imposed, including a 15-year sentence for the unlawful possession of the firearm. His appeal against this sentence having failed in the High Court, the appellant was given leave to approach the Supreme Court of Appeal.

Held, that s 51(2) of the Criminal Law Amendment Act 105 of 1997, read with Part II of Schedule 2 to the Act, meant that a court, convicting an accused person of any

offence referred to in the Schedule, was obliged to impose a sentence of 15 years' imprisonment unless there were substantial and compelling circumstances present that justified the imposition of a lesser sentence. The phrase 'Notwithstanding any other law' in s 51 (2) clearly applied to all offences listed in Part II of Schedule 2, among which was an offence referred to as the possession of 'a semi-automatic firearm'. Accordingly, once it was proved that an accused had been in unlawful possession of a firearm, and that the firearm was a semi-automatic one, the application of these sentencing provisions was triggered. (Paragraphs [6] and [7] at 53h-f and 53i.)

Held, further, regarding earlier High Court authority to the effect that the prescribed minimum sentencing provisions should not apply to the offence of unlawful possession of a semi-automatic pistol, that it might well be so that the unlawful possession of, for example, a pump-action shotgun would attract a more lenient sentence than the unlawful possession of a semi-automatic small-calibre pistol. However, this did not amount to an absurdity. The singling-out by the legislature of semi-automatic firearms may well have been the result of the frequency with which these weapons were used in violent crimes. Moreover, the fact that there was no such offence under the Arms and Ammunition Act 75 of 1969 as 'unlawful possession of a semi-automatic firearm' did not compel the conclusion that the words of the Criminal Law Amendment Act could not be properly construed. The words 'the possession of an automatic or semi-automatic firearm' in Part II of Schedule 2 of the Criminal Law Amendment Act concerned existing offences relating to the possession of 'arms'. The enhanced penalty jurisdiction was acquired where it was shown that the particular 'arm' was an automatic or semi-automatic one, or that it functioned in that manner. (Paragraph [11] at 56b-1.)

4. S v CELE AND OTHERS 2009(1) SACR 59 NPD

The provisions of section 1(1) of the Intimidation Act 72 of 1982 must be restrictively interpreted.

The three appellants appealed against the convictions and sentences for contravening s 1 of the Intimidation Act 72 of 1982. They were prison warders, and had become involved in a verbal altercation with two of their superiors, G and B, during the course of which one of them had allegedly uttered the words 'we will crucify you'. For purposes of the appeal the court accepted that these words had in fact been used and had been directed at G.

Held, that whereas s 1(1)(a) of the Act created an offence of which intention on the part of the accused was a requirement, the offences created by s 1(1)(b) did not require intention. All that was required was that the accused's conduct either had certain consequences or that it might reasonably be expected to have those consequences. Section 1(1)(b) was an astonishing piece of legislation. The first of the offences created by this subsection could be committed provided the victim harboured the necessary fear, irrespective of the accused's intention or of whether the victim had been reasonable in harbouring the fear. Conversely, the second offence created by the subsection could be committed if, objectively, the conduct

complained of was likely to have caused fear, even if no fear had in fact been felt by the victims or intended by the accused. Given that s 1(1)(b) was so far-reaching, it had to be interpreted restrictively. Accordingly, the offences created by this section could only be committed – in a case involving the use of words – if it were found that the accused intended the words to mean what they were alleged to mean. (Paragraphs [10]-[13] at 63d-64a.)

Held, further, that it was common cause that, while there had recently been considerable internal turmoil at the prison concerned, none of the appellants had been involved in this turmoil. What was to be decided was whether the words 'we will crucify you' constituted, and were intended to constitute, a threat to kill, injure or damage G; and if so, whether they were uttered with the intention of compelling him to abandon his position of authority at the prison. Since it was common cause that the words were not intended literally, it was necessary to decide their meaning in the context in which they had been uttered. (Paragraphs [18]-[23] at 64j-66d.)

Held, further, that there was no evidence to suggest that the appellants wished to associate themselves with the earlier unrest among prison staff. In essence, they were involved in a labour dispute with their superiors, during the course of which a heated confrontation had taken place. Even if the evidence of the State witnesses were accepted, there was nothing to indicate that prior to the words being uttered, the words or actions of the appellants indicated an intention to commit any of the acts referred to in s 1(1)(a)(i) of the Act, or to threaten to do any of the things mentioned in s 1(1)(a)(ii) thereof. The conduct of the appellants amounted to no more than a very angry and heated rejection of the allegations made against them, and a forceful expression of a determination to resist the accusations and prove them false. (Paragraphs [25]-[28] at 66g-67d.)

Held, further, that despite the manner in which G had interpreted them, the words uttered did not constitute a threat of physical force. They were either used figuratively to indicate that the appellants intended to demonstrate the falsity of the allegations against them, or they were merely a meaningless threat uttered in the heat of the moment. Consequently, the appellants could not be convicted of contravening s 1(1) (a) of the Act. Furthermore, notwithstanding the fact that G had in fact feared for his life, since the appellants had not intended the words to mean what they were alleged to mean, they could not be convicted on the alternative charge of contravening s 1(1) (b). Finally, a conviction in terms of s 1(1) (b) was also not possible for the additional reason that it could not be said, objectively speaking, that the words complained of had the meaning, and therefore were likely to have the consequences, alleged by the State. (Paragraphs [29]-[33] at 67d-68b.)
Appeals upheld. Convictions and sentences set aside.

From The Legal Journals

1. Bekker, J.C.

"The Establishment of Kingdoms and the Identification of Kings and Queens in terms of the Traditional Leadership and governance Framework Act 41 of 2003"

Potchefstroom Electronic Law Journal 2008 VOLUME 3

2. Van der Merwe, D.

"Knowledge is the key to riches. Is the Law (or anything else) protecting it adequately?"

Potchefstroom Electronic Law Journal 2008 VOLUME 4

(In the above article Prof. van der Merwe asks whether the law has kept up with developments in Information Technology in criminal and private law.)

3. Ismail, R.

"Contentious issues arising from payments made in full and final settlement."

Potchefstroom Electronic Law Journal 2008 VOLUME 4

(Electronic copies of any of the above articles can be obtained from gvanrooyen@justice.gov.za)

Contributions from the Law School

Diabetes and the criminal law

Diabetes, a hormone disorder which results in a lack of the hormone insulin, constitutes a serious public-health problem in South Africa, where proper access to adequate social welfare and health systems, and appropriate health information can be problematic (Pullen 2006 51(3) *Diabetes Voice*, last accessed 24/01/09, www.diabetesvoice.org/en/articles/focus-on-the-front-line-diabetes-south-africa). Given that it is estimated that there are approximately 6, 5 million diabetics in South Africa, of whom only 8000 are registered with the national association (Diabetes South Africa (www.health24.com/medical/Condition_centres/777-792-808-1662,35771.asp, last accessed 24/01/09), the scale of the problem becomes evident.

There are two types of diabetes, type 1 (or insulin-dependent) diabetes and type 2 (or non-insulin-dependent) diabetes (for further information, see the Diabetes South Africa web site (www.diabetessa.co.za). In type 1 diabetes the cells in the pancreas

which produce insulin, which regulates blood sugar, are destroyed, as a result of which the sufferer is dependent upon regular injections to obtain insulin. Type 2 sufferers do not make enough insulin, or cannot use it properly. The body cannot move blood sugar into the cells without enough insulin, as a result of which blood sugar builds up in the bloodstream, causing health problems. Apart from causing physical problems, diabetes can give rise to two conditions which affect behaviour: hyperglycaemia (too much sugar in the blood) and hypoglycaemia (too little sugar in the blood). The former condition is the typical condition of the diabetic who lacks insulin, whereas the latter condition arises where the diabetic administers insulin to himself and either overdoses, misses a meal after an injection, engages in strenuous physical activity directly after insulin or is simply unaware of the onset of hypoglycaemia (Joffe and Seftel 'Adult hypoglycaemia' 1987 5 *SA Journal of Continuing Medical Education* 79 at 82). Although hyperglycaemia, which also may result in mental confusion, has on occasion arisen in the context of the criminal law, hypoglycaemia, which may be mistaken for intoxication and which has been associated with violence, is of greater practical significance.

Hypoglycaemia has been raised as a defence in a number of cases. The most significant instances will be briefly canvassed. In *S v Stellmacher* 1983 (2) SA 181 (SWA) the murder charge arose out of the following facts: the accused had been on a strict weight-reducing diet for a period of weeks prior to the alleged murder; on the day in question he had eaten nothing, and after performing strenuous physical labour, had gone to the local hotel at about 6pm, where he had consumed at least half a bottle of brandy; thereafter, in consequence of the setting sun reflecting through an empty bottle into his eyes, he had lapsed into an automatic and amnesic condition, during which he shot and killed a prospective customer from behind the counter of the bar, where the accused had been standing. The State (unusually) sought to establish that the accused was mentally ill, but the expert evidence led in the case explained the conduct on the basis of automatism (and concomitant amnesia) caused by fasting hypoglycaemia and/or epilepsy, most likely precipitated by the accused's fasting and drinking. The accused was consequently acquitted.

Courts have, no doubt on the basis of strong policy considerations, been less than generous in respect of negligent driving precipitated by reflexive or automatic conduct. Thus in *S v Lombard* 1964 (4) SA 346 (T) the court was unsympathetic to the accused's plea that the failure to stop resulted from being stung in the face by an insect; the sudden manifestation of a flaming head of a match between the accused driver's legs was held not to be the basis for a defence in *S v Crockart* 1971 (2) SA 496 (RA); the apparent blackout of the accused in *S v Trickett* 1973 (3) SA 526 (T) was not regarded as sufficient in itself to found a defence of sane automatism; and in *S v Erwin* 1974 (3) SA 438 (C) the series of events consisting of a facial bee sting, resulting in an involuntary blow of the head against the car door and the shattering of the accused's glasses causing glass splinters to be close to his eyes, were deemed not to excuse the accused's subsequent driving. However, in *S v Van Rensburg* 1987 (3) SA 35 (T), in the context of hypoglycaemia, the court was more accommodating. The appellant had not been warned, after having had tests at a pathologist, that his low blood sugar could give rise to drowsiness. When this in fact transpired, the appellant consequently failed to brake at a stop street, caused a

collision and was found guilty of negligent driving. On appeal his conviction was however overturned, as the court accepted that the appellant's hypoglycaemia had caused him to act involuntarily, i.e. in a state of sane automatism.

The defence of sane automatism, as a result of hypoglycaemia, has even been pleaded successfully to a murder charge, in *S v Viljoen* 1992 (1) SACR 601 (T). In this case the accused, a type 1 (insulin-dependent) diabetic had injected himself with the necessary medication and had eaten, but according to the expert evidence led in the case, was required to eat six times a day, which had not occurred. The court accepted that it was reasonably possible that the accused had acted in a state of sane automatism when he inflicted the fatal wounds.

It should be noted that although the defence of hypoglycaemia is now well-established in South African law, such defence is constrained by the principles of antecedent liability – that is, where it is the accused's own fault that the state of automatism occurs, criminal liability can nevertheless follow. This principle can be illustrated in the civil case of *Wessels v Hall and Pickles (Coastal) (Pty) (Ltd) and another* 1985 (4) SA 153 (C), where the question in issue was whether a diabetic, who had a hypoglycaemic attack whilst driving, and lost control of his car, which mounted the centre island of the street and collided with a vehicle in the oncoming traffic, could be regarded as having been negligent. The defendant had been an insulin-dependent diabetic for some 22 years. The court heard the evidence, and accepted the following as facts: (i) diabetics can have hypoglycaemic episodes without warning (although such an attack was usually preceded by easily recognizable symptoms); (ii) that the defendant knew this, and in fact had previously suffered a hypoglycaemic episode which led to a motor vehicle collision; (iii) that the defendant knew that his blood sugar level entered a low period between 11am and 1pm (the collision was at 12.30pm) (iv) that the defendant knew how to control his blood sugar, and in particular knew that eating certain foods raised his blood sugar level.

The court held that a reasonable person in the defendant's position would have foreseen the reasonable possibility that, should he not have a mid-morning snack, his blood sugar level might drop unexpectedly while he was driving a motor vehicle, causing him to lose control of the vehicle and injuring other persons or property; and thus that the reasonable person would have taken steps to avoid this happening (by having a snack); which the defendant failed to do. It was therefore decided by the court that the defendant was negligent, and had to pay the damages of the plaintiff.

Diabetes has been regarded as a mitigating factor with regard to sentence (see *S v Mpetha* 1985 (3) 702 (A); *S v Du Toit* 1979 (3) SA 846 (A); *S v Dougherty* 2003 (2) SACR 36 (W)) but it is merely one of the factors which the court will take into account (see, e.g. *S v Runds* 1978 (4) SA 304 (A)). The argument typically raised by defence counsel is that the offender would not receive proper medical care in prison, and so should receive a non-custodial sentence. It seems that similar type of thinking applies in respect of the granting of bail. In *S v Kock* 2003 (2) SACR 5 (SCA) the court decided that appellant would receive better care at home than in prison. The court described diabetes as a 'life-threatening disease', and noted that

the appellant required 5 meals a day, a special diet and controlled medication. But in *S v Van Wyk* 2005 (1) SACR 4 (SCA) the court stated that it was not in the interests of justice that bail be granted, despite the appellant's diabetes for which medication and a special diet was required. It was argued that at times the appellant had not received either in prison, which the prison authorities denied. The court accepted that the truth lay somewhere in between these arguments, but denied bail. The crucial distinction between these cases may lie in the nature of the charge (indecent assault in *Kock*; murder and treason in *Van Wyk*).

Given the prevalence of diabetes, it is essential that courts are aware of the challenges which this condition poses for the criminal law. It is hoped that this short synopsis will provide some guidance in this regard.

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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

MISTAKES IN TESTIMONY- HOW DO THEY ARISE?
"Memory is often less about the truth than what we want it to be" (David Halberstam, author)
Contradictions in witnesses' evidence are commonplace. There is often no apparent reason for these discrepancies. In making findings of fact it is necessary for judicial officers to determine why there are contradictions, whether they are material, which of the conflicting versions is correct, and how the contradictions affect the weight of the evidence. Defence attorneys often argue strenuously that the State version cannot be relied upon and should be rejected due to these discrepancies. Courts usually decide these matters in the light of the totality of the evidence:
"*Experience has shown that two or more witnesses hardly ever gave identical evidence with regard to the same incident or events. It was thus incumbent on the trial court to decide, having regard to the evidence as a whole, whether such differences were sufficiently material to warrant the rejection of the State's version*." (*S v Bruiners* 1998 (2) SACR 432 (SE) at 439).

In S *v Mkohle* 1990 (1) SACR 95 (A) Nestadt JA said "*Contradictions per se do not lead to the rejection of a witness' evidence….they may simply be indicative of an error*". He further quoted from *S v Oosthuizen* 1982 (3) SA 571(T):
"…*it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to take into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence. No fault can be found with his conclusion that what inconsistencies and differences there were, were of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction*."
Courts have thus accepted that contradictions are to be expected and do not necessarily lead to the rejection of a witness' or witnesses' evidence. However, not much attention has been given to the reasons for such discrepancies. Courts have focused rather on the question of whether the contradictions are material, with reference to the evidence presented in the case.
Psychological research has thrown some light on the workings of memory, generally and more pertinently in regard to witnesses in court. An awareness of this research can give the judicial officer a greater understanding of the reason for errors in testimony and thereby aid him or her in the determination of such issues as the reliability and truthfulness of witnesses, and whether contradictions are material or not.
"You can reconstruct the picture from chaos and memory's ruins" (Kay Boyle, author)
"*Memory itself is not like a video-recording, with a moment by moment sensory image. In fact, it's more like a puzzle: we piece together our memories, based on what we actually remember and what seems most likely given our knowledge of the world…our minds' best educated guesses help "fill in the gaps" of memory, reconstructing the most plausible picture of what happened in the past*." ("Blurring the boundary between perception and memory", Scientific American Mind, Dec16, 2008).
"Where all think alike, no one thinks very much" (Walter Lippman, author)
Studies on memory have shown that we often construct our memories after the fact, and that we are susceptible to suggestions from others that help us to fill in the gaps in our memories. It is even possible to create false memories in people's minds by suggestion. Much research has been done in this field by Dr.Elizabeth F.Loftus. She reports that witnesses often seek consensus after an event, which means that disagreements must necessarily be resolved through alteration of conflicting accounts towards consistency. However, even in the absence of such absolute consensus seeking, witnesses' accounts are influenced by those of others. Co-witnesses can influence the accuracy of one another's testimony as well as their confidence in those accounts. (David and Loftus: Internal and External Sources of Misinformation in Adult Witness Memory).
Several witness memory-conformity studies suggest that discussions between co-witnesses have great potential to influence the testimony of all witnesses, with far-reaching consequences. First, co-witnesses can shape one another's initial reports. When police or other investigators suggest information similar to that being conveyed by other witnesses, a target witness will be particularly likely to adopt the suggested account. Further, a witness' first statements have been shown to shape

reports during subsequent interviews or court appearances. In other words, once a witness has told his or her version of what happened, that witness is likely to stick with that account in the future. This phenomenon is sometimes referred to as the freezing effect. As time goes by it becomes increasingly difficult for a witness to change or back down from an initial statement or identification.

Discussions with other witnesses may not only contaminate memory, but also inflate confidence in information "confirmed" by others. Luus and Wells (1994), for example, showed that witness confidence in perpetrator identifications was affected by confirming or disconfirming identifications by other witnesses.

Other studies on memory have also shown that there is no significant correlation between the subjective feeling of certainty a person has about a memory and that memory being accurate. Thus, an assertion by a witness that she is "quite sure" does not carry much weight!

Finally, social influence between witnesses may occur because of influence of the information conveyed between them and the potential for motivational distortions in memory created by any desire they may have to avoid rejection, or to help or support other fact witnesses, investigators, or parties to the case (see Asch, 1995). This brings to mind the dictum in *S v Ipaleng* 1993 (2) SACR 185 (T) at 189 c-f: "*It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no onus to provide any such explanation. The true reason a State witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to curry favours with their supervisors: they sometimes need to placate and impress police officers, and on other occasions they nurse secret ambitions and grudges unknown to the accused. It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks: 'Why should the State witnesses have falsely implicated the accused?*'".

To the above quote one could now add: "Sometimes they are unwittingly influenced by other witnesses!" The article by Davis and Shroud above also refers to a case in which the first author served as a memory expert for the case of a certain Mr. Stroud who was accused of robbing a Portland bank. Evidence included a police tape in which an employee of the bank reported the robbery. Having been asked to provide a description of the assailant, the employee responded: "Wait a minute, we're getting a consensus on that." Such consensus-seeking discussions or other influences between witnesses might have a significant effect on memory accuracy.

Research clearly shows that memory can be altered via suggestion. People can be led to remember their past in different ways, and they can even be led to remember entire events that never actually happened to them. When these sorts of distortion occur, people are sometimes confident in their distorted or false memories, and often go on to describe the pseudo memories in substantial detail ("The Formation of False Memories", Elizabeth Loftus, 1995).

"Time and memory are true artists; they remould reality nearer to the heart's desire" (John Dewey, philosopher)

In a study looking at false memories and distorted memories, Elizabeth Kensinger at Harvard University found that our memory is also affected by our emotions and our feelings about what we are witnessing. Two people looking at an event, but having

opposite emotions about what they are witnessing, will go away with two completely different sets of memories about it.

"The camera relieves us of the burden of memory" (John Berger, author; photographer)

Another area fraught with danger is the "recovery" of repressed memory of childhood events. Dutch experimental psychologist Elke Geraerts says: "We did an experiment with children, showing them pictures of when they were four years old. Some were true pictures but there were also fakes, doctored to show the child in a hot-air balloon. It was very easy for the children to get a false memory of being in this balloon." Thus, a computer-manipulated image was all it took to make children remember a hot-air balloon trip that never happened. Dr. Geraerts believes that verbal cues, or suggestions, can similarly lead to the "recovery" of traumatic false memories, such as childhood abuse.

"Reality leaves a lot to the imagination" (John Lennon, Beatle)

Certainly repressed memories of genuine childhood events can later be recovered. However, a therapist may be suggestive, for example using guided imagery in which the patient is asked to imagine being abused. At a certain point, maybe also when hypnosis is also used, the patient may falsely recall these abusive events.

"It doesn't matter who my father was; it matters who I remember he was" (Anne Sexton, poet)

In the UK a woman who falsely accused her father of rape after undergoing a discredited "recovered memory" psychotherapy was awarded a £20 000 payout from a local health authority. Katrina Fairlie claimed a hospital psychiatrist almost ruined her life after he extracted false memories that her father had sexually abused her. (Daily Mail, UK: October 19,2007.)

Researchers say that Courts should not rely on repressed memories recovered with a psychiatrist's help when deciding on criminal cases. All too often verdicts that rely on such testimony defy common sense, contradict physical evidence or have later proved to be wrong. Researchers suggest that Courts should require that any recovered memory be corroborated by physical evidence, testimony of other witnesses or accounts by the victim that were contemporaneous with the crime.

The danger of receiving false or misleading evidence can be overcome to a large extent by a prudent application of the cautionary rules which apply to single witnesses and to young children. In respect of the former De Villiers JP in *R v Mokoena* (1932 OPD 79 at 80) stated:

"*The uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by s 284 of Act 31 of 1917,* but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect*." (*now s208 of Act 51 of 1977)

In respect of young children "*their evidence should be scrutinized with great care. The danger is not only that children are highly imaginative but also that their story may be the product of suggestion by others*". (The South African Law of Evidence, Zeffertt, Pazes, Skeen, 2003). The danger of suggestion was given some attention in *S v M* 1999 (2) SACR 548 (SCA).

The cautionary rule no longer applies in sexual cases. However, as always, the State has to prove its case beyond a reasonable doubt. "*The evidence*", Olivier J A said in *S v Jackson* 1998 (1) SACR 470 (SCA), "*may call for a cautionary approach,*

but that is a far cry from the application of a general cautionary rule". Thus, a cautionary approach may still be warranted where appropriate.

Conclusion.
It must be appreciated that even the most honest and sincere witness cannot be presumed to be entirely accurate. One cannot always process and remember all incoming information accurately, leaving one vulnerable to error. Information may be lost, confused or distorted. Misinformation may also be introduced in different ways. This can lead to errors in memory for events that are actually witnessed, and can lead to the planting of entirely false beliefs or memories. Judicial officers need to be mindful of the potential for error at all times. It is patently clear that contradictions between witnesses do not inevitably lead to the conclusion that someone is being dishonest or that such evidence must be rejected. As Botha AR said in *S v Safatsa and others* 1988 (1) SA 868 (A) at 890F:
"*The trial Court considered this alleged conflict fully and carefully, as appears from the judgment of the trial judge, and found that it did not exist. In my view the reasoning of the trial Court is unassailable. The fallacy in the argument for the accused is that it presupposes that either or both of the witnesses must be untruthful or unreliable simply because their observations did not coincide. Such an approach to the evidence is unsound*."
In the end the Court must treat each case on its merits and look at "*such matters as the nature of the contradictions, their nature and importance, and their bearing on other parts of the witness' evidence.*" (*S v Oosthuizen, supra*). An understanding of how errors arise can assist the Court in determining how to deal with contradictions and thereby assist in the decision-making process.

Kevin Bruorton
Magistrate, Ntuzuma
9 January 2009

A Last Thought

"Judges as members of civil society are entitled to hold views about issues of the day and they may express their views provided they do not compromise their judicial office. But they are not entitled to inject their personal views into judgments or express their political preferences".

Per Harms J A in *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1 (12 Jan 2009)

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