e-MANTSHI

A KZNJETCOM Newsletter

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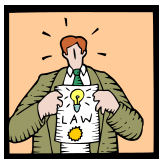
Welcome to the hundredth and ninth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Transport intends to amend the National Road Traffic Regulations, 2000, and acting in terms of section 75 (6) of the National Road Traffic Act, 1996 (Act No. 93 of 1996) published the regulations comments. This notice was published in Government Gazette no 38772 dated 11 May 2015. All interested parties who have any objections, inputs or comments to the proposed amendments are called upon to lodge their objections, inputs or comments, within four weeks from the date of publication of the Notice to : motsatsj©dot.gov.za

2. In Government Gazette no 38794 dated 15 May 2015 the Minister of Social Development has in terms of Section 56 (3) (a) of the Child Justice Act, 2008 (Act No. 75 of 2008) published particulars of accredited diversion service providers and diversion programmes. The notice covers diversion programmes and diversion service providers that are granted an accredited status.

Recent Court Cases

1. S v HELM 2015 (1) SACR 550 (WCC)

It was incumbent upon judicial officers to constantly bear in mind that bona fide efforts to do justice could be misconstrued by one or other of the parties as undue partisanship and that the right balance had to be found between undue judicial passivism and undue judicial intervention.

The appellant was charged in a regional magistrates' court with eight counts of assault with intent to do grievous bodily harm and one count of contravening s 30(2) of the former Child Care Act 74 of 1983, in that she had taken up children in a place of care without the facility being properly registered. There were also alternative counts to the eight counts of assault, namely contraventions of s 50(3) of the Child Care Act, in that she had maltreated the children in question. The principal witness for the state was the appellant's employee who testified that she had been regularly instructed by the appellant to orally administer a potion to the children which the appellant had prepared by grinding tablets with a spoon and then dissolving them in water. She explained how the appellant had become increasingly stressed and irritated with the children at the crèche that she ran and how the almost daily administration of the potion to the children put them to sleep, thus enabling the appellant to get on with her Bible study and other preferred activities at home. A number of expert witnesses were called, who testified on the pharmacological effects of certain of the supposed substances involved in the potion, on the forensic analysis of samples seized by the police at the crèche and on the calibration and accuracy of equipment used in the analysis of the samples and the condition of the children upon medical examination. On 2 August 2010, upon conclusion of argument on both sides, the magistrate postponed the matter for two months to enable her to prepare her judgment. The case was then again postponed until 21 January 2011, when the magistrate informed those present at court of her decision to call two further witnesses in terms of the provisions of s 186 of the Criminal Procedure Act 51 of 1977 (CPA). The matter was then postponed to 14 February 2011, on which day the magistrate called the two witnesses in question, one of whom was an employee from the pathology laboratory, on the calibration, accuracy and use of the machines used by the firm. This witness's name had not previously been mentioned in the evidence and it appeared that the magistrate must have made her own enquiries to establish her ability and availability to testify. The other witness called by the magistrate was employed by the state's Forensic Chemistry Laboratory in Woodstock, who testified

in contradiction to the state's earlier witness that she and not the state's witness had analysed the samples in question. The magistrate convicted the appellant on the main count of assault with intent to do grievous bodily harm in respect of the eight children, as well as on the charge relating to the non-registration of her crèche. She sentenced the appellant to five years' direct imprisonment under the provisions of s 276(1)*(i)* of the CPA for the assaults, and to a fine of R1000 or six months imprisonment in respect of the count relating to the non-registration of her crèche. On appeal against the conviction and sentence it was contended on behalf of the appellant that the regional magistrate had acted irregularly in calling the two witnesses.

Held, that there was an obvious tension between the need to fulfil the role of a judicial officer and the need to avoid conduct which was irregular, and which could result in a failure of justice in the context of the exercise of the discretion by a judicial officer under s 186 to call additional evidence. It was incumbent upon judicial officers to constantly bear in mind that bona fide efforts to do justice could be misconstrued by one or other of the parties as undue partisanship and that the right balance had to be found between undue judicial passivism and undue judicial intervention. (Paragraph [100] at 567*h* – 568*a*.)

Held, further, that in the present case the additional evidence of the witnesses called by the magistrate really took the state's case no further. And yet, this notwithstanding, the regional magistrate had sought to rely on that evidence in an obvious attempt to fill the gaps in the state's case. It was really that part of her finding which exposed the court a quo's intervention in the proceedings for what in truth it was: undue intervention prompted by undue partiality towards the cause of the state. (Paragraph [101] at 568*c* – *d*.)

The court held on the evidence that the state had not established that the substances had been administered to the children or that it was a noxious substance. (Paragraph [115] at 570*h*.) The appeal against convictions upheld and sentences set aside.

2. S v MTHETHWA 2015 (1) SACR 609 (GP)

It is imperative that judicial officers, presiding in matters where sexual violation is alleged, should exhibit the necessary patience, empathy and sensitivity when dealing with such victims.

The appellant was convicted in a regional magistrates' court of kidnapping and raping an 11-year-old girl and was sentenced to an effective 20 years imprisonment. He appealed against the conviction and sentence. The court held that the state had failed to prove that the complainant had been penetrated, either vaginally or anally, on the day in question, the medical evidence showing, however, that the complainant had previously been penetrated anally. On a conspectus of the evidence, the court

could not confirm the conviction. It remarked, however, that there were concerns as to the welfare of the complainant, as her mother did not seem unduly concerned as to her whereabouts. There were indications that the child may be a child in need and, as the upper guardian of the minor child, the court should initiate an enquiry into the welfare of the child. (Paragraph [25] at 617*f*.)

The court held further that the record showed that the magistrate lacked the necessary sensitivity and empathy for the child complainant and demonstrated a complete lack of appreciation for the constitutional dictates of the paramountcy of the child's interests under all circumstances. The record shows that he was brash, abrasive and overbearing towards the child. The threat that the court would punish her was intimidating and may well have contributed to the incoherence and inconsistency of her evidence. Appearing in court as a witness could be a daunting task for most people, even more so when such a witness was a child complainant, especially in a rape case. It was therefore imperative that judicial officers, who presided in matters where sexual violation was alleged, should exhibit the necessary patience, empathy and sensitivity when dealing with victims of alleged sexual violations. This imperative translated into a duty, on the authority of s 28(2) of the Constitution, where the alleged victim was a minor child. (Paragraphs [29] and [30] at 618*e* – *g*.)

Held, that a part of the record indicating that the presiding officer had had a discussion with a witness off the record was most disturbing. It was not clear what the purpose of the conversation with the witness was, but it was clear that it concerned the evidence of that witness. It was apparent too that the appellant's legal representative did not follow the conversation, as it was conducted in an indigenous language. It was undesirable that a judicial officer should say anything to a witness concerning the case 'off the record'. Everything mentioned in court concerning the case should be on record for all concerned to understand and follow. If anything were said in a language not understood by all concerned, it should be translated for the benefit of those who did not understand that language. (Paragraphs [36] and [37] at 619*h* – 620*a*.)

The court held that the appellant's appeal had to succeed. It was further ordered that the MEC of Social Development in the Mpumalanga Province be directed to cause an enquiry to be conducted into the welfare of the complainant and to report back to court within three months. (Paragraph [39] at 620*c*.)

3. S v MOKGARA 2015 (1) SACR 634 (GP)

Even if an accused is legally represented but failed to prove substantial and compelling circumstances, whether through lack of experience or proper instructions, a legal duty remained on the presiding officer to ensure that all available facts were properly enquired into before sentence was imposed.

[12] The only issue on appeal is whether the magistrate misdirected himself to impose life imprisonment, on the available facts before him. It is contended by counsel for the defence that the evidence before the magistrate was incomplete and so little that it was impossible to exercise a proper judicial discretion on the available information obtained via the appellant's legal representative. It is contended that the magistrate was obliged to obtain further information regarding the appellant's personal circumstances and the reasons for his behaviour. This could have been achieved by making proper enquiries and/or the obtaining of a probation officer's report and/or the calling of witnesses to testify in this matter.

In support of his contention, appellant's counsel relies on the case of *S v Dlamini* 2000 (2) SACR 266 (T), where it was held by Van der Walt J that:

'Na my mening is daar 'n verpligting op die landdros, al is die appellant verteenwoordig by die verhoor, om self vrae te stel, ondersoek in te stel, en getuies te roep om daardie dwingende omstandighede vas te stel indien enigsins moontlik.'

[13] The principle enunciated in *Dlamini* supra was supported by the SCA in the cases of *S v Samuels* 2011 (1) SACR 9 (SCA) and *S v Van de Venter* 2011 (1) SACR 238 (SCA) where the following was said:

'Despite the fact that the Appellant was represented . . . there nonetheless remained a duty on him to call for such evidence as was necessary to enable him to exercise a proper judicial sentencing discretion . . . .

The natural indignation that the community must feel . . . warrants . . . recognition in the sentence. Nevertheless, that can hardly invite a sentence that is out of proportion to the nature and gravity of the offence.'

C [14] The appellant's counsel contended that it was held, in *S v De Kock* 1997 (2) SACR 171 (T) at 192*h*, that the factors relevant to sentencing and the purpose of punishment must, based on the facts of every case, be placed in particular balance to one another. As the court a quo did not do the necessary investigation, the court misdirected itself by assuming on face value that there were no substantial and compelling circumstances.

[15] In opposition to the appellant's argument, the state submits that the imposition of sentence falls wholly within the discretion of a trial court. The power to interfere with such discretion is very limited. A court of appeal will only do so if the trial court has misdirected itself on the law or the facts in imposing sentence, or it has committed irregularities which vitiate the sentence, or the sentence differs so greatly from a sentence this court would itself have imposed. See *S v Rabie* 1975 (4) SA 855 (A) at 857D – E. The state further contends that the magistrate was correct in his finding that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence.

[16] I have considered both arguments before me, keeping in mind what was said in *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220; [2001] ZASCA 30) at 477*d* – *f* regarding the concept of substantial and compelling circumstances:

'Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy

reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.'

In *S v Vilakazi* 2009 (1) SACR 552 (SCA) (2012 (6) SA 353; [2008] 4 All SA 396; [2008] ZASCA 87) the Supreme Court of Appeal said the following: 'Malgas made it clear that the Act signalled that it was not business as usual when sentencing for the commission of the specified crimes.'

[17] The departure point, in my view, is firstly the nature of the crime; secondly against whom it was committed; and thirdly the public view and perspective of how such offenders should be punished. There can be no doubt that on the limited facts before the court these elements were properly considered and dealt with by the magistrate in his judgment on sentence. The question, however, is, were there enough facts before the court a quo to arrive at a just and fair decision?

[18] In the present case the appellant was legally represented. The normal rule is that, once an accused has placed his or her case in the hands of a legal representative, the representative normally has full control over the case and the accused cannot afterwards repudiate the conduct of the legal representative. See in this regard *R v Matonsi* 1958 (2) SA 450 (A). This incorporates an accused's right to be involved in and to make decisions in connection with all matters at the trial. When there is a disagreement with a legal representative, or an accused insists on acting against the latter's advice, the representative might have to withdraw from the case. It is further common cause that before the start of the trial the appellant was properly warned and was aware that upon a conviction he could be sentenced to life imprisonment, unless he proved substantial and compelling circumstances.

[19] A presiding officer often has to deal with a situation where an accused, whether he is defended or appearing on his own, decides not to give evidence under oath in mitigation of sentence. In cases where a legal representative is present, a presiding officer can only rely on what defence counsel places before him. The presiding officer is not entitled to question the accused directly. In matters where the accused is without legal representation the situation is different. The presiding officer can and is obliged to make the necessary enquiries vis-à-vis the accused to determine if there are facts supporting a finding of substantial and compelling circumstances.

[20] That brings me to the issue of what should be done by a presiding officer if and when an accused's legal representative fails to prove substantial and compelling circumstance, whether it is due to an accused's refusal to give proper instructions as it may jeopardise the chance on appeal on the merits, and/or a lack of taking proper instructions, and/or a lack of experience, or for various other reasons.

The law is clear and cannot be faulted. In such instances the legal duty remains on the presiding officer to ensure that all available facts are properly enquired into before a decision is made that the ultimate prescribed sentence of life imprisonment can be imposed.

[21] In the present case the only mitigating factors placed before the court were that the appellant was 27 years of age and a first offender. There is no evidence regarding the upbringing of the appellant, his family, whether he went to school or not, is employed, earns a salary, is married, has any dependants, is a sole breadwinner, can be rehabilitated, etc. What is also glaringly absent is the effect of the rape on the complainant. I do not know if she was traumatised as a result of the event, if there was a change in her personality, how she dealt with her ordeal after the event, and what the prognosis is for her future development.

[22] In my view there was simply not enough evidence placed before the magistrate to make an informed decision. In such instances there rests a duty on a presiding officer to put pertinent questions to the appellant's legal representative in order to determine facts that might be relevant to the issue. Depending on what information can be extracted, a presiding officer must also consider obtaining a probation officer's report and/or a victim impact report if necessary. In the present case there is a specific lack of evidence regarding the injuries caused, the level of violence perpetrated and the emotional trauma caused. Nothing is known about the appellant's background, his marital status, whether he was employed and whether he can be rehabilitated. See in this regard *S v Mahomotsa* 2002 (2) SACR 435 (SCA) ([2002] 3 All SA 534) at 441 and 442.

Traditional mitigating factors that are universally applicable in criminal matters can and may in suitable cases establish substantial and compelling circumstances. See in this regard *S v Nkomo* 2007 (2) SACR 198 (SCA) in para 21 where it was held that, even though 'it may be difficult to imagine a rape under much worse conditions . . . the prospect of rehabilitation and the fact that the Appellant is a first offender must be regarded as substantial and compelling circumstances justifying a lesser sentence'.

It seems to me that, in the present case, evidence might be obtained to prove that the appellant can be rehabilitated. In such an event the justification to impose the minimum prescribed sentence cannot be sustained.

[23] The appellant in this matter has been subjected to the risk that there are no substantial and compelling circumstances. This conclusion is based on inadequate or insufficient information/evidence, and accordingly the sentence imposed should be set aside.

I therefore propose the following order:

(1) The conviction on count 1 is confirmed.

(2) The sentence of life imprisonment on count 1 is set aside and the matter is referred back to the magistrate to consider sentence afresh, and after hearing evidence and/or obtaining facts relevant to the imposition of sentence, to impose a proper sentence.

(3) The sentence imposed on count 1 must be antedated to the date of the original sentence.

From The Legal Journals

Schwikkard, P J

"Professional incompetence, voluntariness and the right to a fair trial"

SACJ (2014) 3 293

Reddi, M & Ramji, B

"The pre-trial right to silence whilst exercising the right to access police dockets in South African law: A right too far?"

SACJ (2014) 3 306

Okpaluba, C

"Reasonable suspicion and conduct of the police officer in arrest without warrant: Are the demands of the Bill of Rights a fifth jurisdictional fact?"

SACJ (2014) 3 325

Knoetze, I

"The witness is on the screen- video technology assisting the court process"

De Rebus June 2014 30

Masengu, T & Tilley, A

"Is the appointment of acting judges transparent?"

De Rebus June 2014 24

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

Contributions from the Law School

Authoritative support for criminal sanctions aimed at protecting non-protesters during protests and strikes[1]

During the course of a strike in the security industry in the year 2006, the union SATAWU convened a march in the city of Cape Town to present the demands of its workers. Despite SATAWU having complied with the procedural requirements of the Regulation of Gatherings Act 205 of 1993 (RGA) and having taken several preventative measures to guard against the occurrence of riot damage, the march nonetheless degenerated into a full-scale riot and massive damage to property ensued. The victims instituted legal action against SATAWU in terms of section 11(1) of the RGA. In its defence, SATAWU challenged the constitutional validity of the statutory defence provided for in section 11(2) of the RGA, arguing that the defence was irrational and unintelligible, and that section 11(2) unjustifiably limited the right to freedom of assembly in section 17 of the Constitution. These facts gave rise to the case of *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC). SATAWU's challenge was rejected by the High Court, the Supreme Court of Appeal and the majority of the Constitutional Court, per Mogoeng CJ. It is submitted that the findings of the majority of the Constitutional Court in rejecting in SATAWU's challenge not only hold relevance as far as the liability for riot damage of trade unions, as organisers of demonstrations, is concerned, but such findings arguably provide authority for the constitutional validity of any law, civil or criminal, that serves to protect the rights of the victims of violence (hereinafter referred to as "non-protesters"). Therefore, whilst the *Garvas* case may have arisen in the labour context, the court's findings have broader implications, first, pertaining to constitutional law, in that the findings shape South Africa's post-apartheid assembly jurisprudence and, second, as will be argued below, in that the court's findings also have implications for the criminal law.

In coming to its conclusion, the court (at para 53) in *Garvas* proffered a generous meaning of the right to assembly set out in section 17 of the Constitution, which is

[1] This contribution is drawn from the LLM dissertation of Mr. Khumalo (LLB *cum laude* (UKZN), Attorney of the High Court)), which has been submitted for examination. Professor Hoctor is the supervisor of Mr. Khumalo's dissertation.

consistent with the treatment of this right and its internal modifiers (peaceful and unarmed) internationally, by restricting the meaning of the word "peaceful". In that regard, the court held that a demonstration does not automatically become non-peaceful (such that the constitutional protection of the right to gather and demonstrate of all the participants is forfeited) simply because other members of the protesting crowd committed some unlawful acts. According to the court, an individual does not forfeit his or her right to demonstrate by participating in a non-peaceful demonstration, provided that individual remains peaceful in his or her intentions and behaviour. This line of reasoning is a new innovation and it goes to shape South Africa's post-apartheid assembly jurisprudence.

The court (at para 57) held further that section 11(2) of the RGA had a "chilling effect" on the right in section 17 of the Constitution, and thereby limits the said right in two ways. First, compliance with section 11(2) requirements increased the costs of organising a demonstration. Second, it had the effect of inhibiting poorly-resourced organisations from embarking on demonstrations. However, upon engaging the inquiry in terms of section 36 of the Constitution, the court (at paras 61 - 84) found that the limitation was justifiable. The court reasoned that the limitation served to protect the rights of the victims of violent protests especially those without the necessary resources to identify and pursue the perpetrators of riot damage in order to claim damages against them. It reasoned further that the limitation would ensure that the victims of violent protests are not left without a viable legal recourse for the protection of their rights. This way, there is a balance between the right to demonstrate and the prevention of injury to property or person.

In essence, the court in *Garvas* upheld the constitutional validity of a civil remedy which is aimed at protecting the rights of non-protesters during protests and strikes. The question which then arises is: what does the *Garvas* case hold for criminal sanctions which are also aimed at protecting the rights of non-protesters? Given that the crime of public violence is the primary measure in place for the maintenance of peace and order as well as for affording protection against the invasion of the rights of other people during protests and strikes, it is submitted that the court's finding in *Garvas* enhances the case for challenging the constitutionality of the crime of public violence on the basis that the apparent failure of the crime to adequately safeguard the rights of non-protesters during protests and strikes means that it falls short of the objectives of section 39(2) of the Constitution and thus requires to be developed in order to promote the spirit, purport and objects of the Bill of Rights.

This proposition finds support in *S v Thebus and Another* 2003 (6) SA 505 (CC) at para [28] where the court held that the common-law rule/provision may be developed either when it is inconsistent with the Constitution, or when it is consistent with the Constitution, but falls short of its spirit, purport and objects. Furthermore, in *Carmichele v Minister of Safety and Security and Another* (*Centre for Applied Legal Studies Intervening*) 2001 (4) SA 938 (CC) at para [40] the court set out a two-stage inquiry to be followed when dealing with the development of a common-law rule/provision that is consistent with the Constitution, but falls short of its spirit, purport and objects. The first leg of the inquiry entails establishing whether the

common-law rule/provision falls short of the objectives of section 39(2) of the Constitution and thus requires to be developed in order to promote the spirit, purport and objects of the Bill of Rights? If so, the next leg of the inquiry entails establishing how the development must take place in order to meet these objectives. In *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), the court held that the purpose of section 39(2) of the Constitution is to ensure that the values of the Constitution are infused throughout the common law, and that the procedure in so doing entails no more than that the common law be understood and applied within the normative framework of the Constitution. (See further *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (5) SA 30 (CC) in regard to the development of the crime of rape).

The generous meaning of the right in section 17 of the Constitution articulated in *Garvas* excludes from its protective ambit those demonstrators who are not "peaceful", while the rest of the demonstrators remain protected. Therefore, those individuals who are apprehended for committing unlawful acts which amount to the crime of public violence cannot be said to have been exercising their right to demonstrate peacefully, consequently they would forfeit the constitutional protection of their right. Therefore, public violence offenders or any other interested party acting on their behalf cannot invoke the right in section 17 of the Constitution in opposing the development of the crime of public violence.

Even if the foregoing is incorrect and public violence offenders' right to freedom of assembly remains protected, unlike the civil sanctions of the RGA, it cannot even be said that the crime of public violence has a "chilling effect" on the exercise of right to freedom of assembly, thereby limiting the said right. The crime of public violence does not have any cost implications for the organisers of demonstrations, and it does not impose any conditions or restrictions on demonstrations. Consequently, the crime does not inhibit any organisation or person from embarking on a demonstration. The crime only comes into effect when the acts of public violence are being committed. It is therefore reserved only for those individuals who commit the acts of public violence, while the rest of the demonstrators remain unaffected.

Assuming further that the development of the crime of public violence did have the effect of "chilling" the exercise of the right to freedom of assembly, the limitation of the right would, upon application of the inquiry in terms of section 36 of the Constitution, be reasonable and justifiable in an open and democratic society for purposes of protecting the constitutional rights of non-protesters, particularly the rights to life, dignity, equality and freedom and security of the person. The right to freedom of assembly in section 17 of the Constitution is undoubtedly a very important right as expressed in the following *dictum* of the court in *Garvas*:

"The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have a political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of

advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights".

However, the importance of the purpose of the limitation (i.e. the development of the crime of public violence) is also as crucial. The limitation would serve to protect a vulnerable group in society that probably does not have the resources to pursue the organisers of demonstrations for damages, and cannot even identify the actual perpetrators of violence in order to seek recourse against them. On the nature and extent of the limitation, it suffices to state that by no means does the development of the crime of public violence prevent organisations or people in general from embarking on peaceful, yet meaningful and powerful demonstrations. Developing the crime only affords protection to the rights of non-protesters and ensures that they are not left without a viable legal recourse for the protection of their rights, especially when they lack the necessary resources to pursue the organisers of demonstrations, or where they cannot identify the perpetrators of violence. Thus, a proper balance is struck between, on the one hand, the protection of the rights of non-protesters and, on the other hand, the exercise of the right to freedom of assembly. The fact that the civil sanctions in terms of section 11 of the RGA already serve this purpose is no impediment to developing the crime of public violence to balance the scales even more. The crucial balance struck between the right to demonstrate and the protection of the rights of non-protesters cannot be achieved through other less restrictive means.

The crime can be developed by revisiting each of its elements and interpreting them against the backdrop of the values of the Constitution and in the spirit of the purpose of the crime to protect the rights of vulnerable groups in society. This way, the values of the Constitution are infused into the jurisprudence of the crime of public violence. The crime can also be developed by revisiting the sentences imposed on the offenders in order to ensure that they reflect the society's condemnation of the rampant violation of the rights of non-protesters during violent protests and strikes. Logic would dictate that as violent protests become increasingly prevalent and invasive of the rights of other people, the crime becomes more serious in the eyes of society, and the more it is in the interests of society to punish the offenders harshly.

In conclusion, the foregoing discussion bears testimony to the observation that the findings of the court in the *Garvas* case have implications for the constitutional law and the criminal law. In regard to the former, the adoption of the restricted meaning of the word "peaceful" shapes the understanding of South Africa's post-apartheid assembly jurisprudence. The findings of the court in *Garvas* also result in there being a potential case for the development of the crime of public violence in order to adequately protect the rights of non-protesters during protests and strikes.

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Matters of Interest to Magistrates

MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION

CONCERNING ITS INVESTIGATION INTO THE REVIEW OF THE EXPUNGEMENT OF CRIMINAL RECORDS (PROJECT 137) DISCUSSION PAPER ON EXPUNGEMENT OF CRIMINAL RECORDS

1. The South African Law Reform Commission has completed its Discussion Paper on the review of the law relating to the expungement of certain criminal records. The request for investigation of the expungement of previous convictions follows from the enactment of the Criminal Procedure Amendment Bill, which was approved by Parliament in 2008 and assented to by the President during February 2009. The Bill (now Act 65 of 2009), *inter alia,* deals with the expungement of certain minor criminal records. The Minister explained that during the deliberations on the Bill a number of stakeholders submitted inputs to the Portfolio Committee on a wide range of matters related to the expungement of criminal records. The Portfolio Committee concluded that the expungement of criminal records is a complex matter that requires a balance between the rights of citizens to be protected against criminals and the recognition that having a criminal record can cause undue hardship for an individual.

2. The Minister requested the Commission to conduct research on the different systems followed in the keeping of criminal records and the expungement of such records. The research must draw, among others, on international best practices and must include consultation with the relevant stakeholders and the public on a broad basis.

3. The Commission's analysis of the relevant legislative provisions includes the legislative provisions specifically dealing with expungement, namely expungement in terms of the Child Justice Act, 32 of 2008 and the Criminal Procedure Act, 51 of 1977. It also includes an analysis of specific legislation directly impacting on expungement in that the provisions of these Acts are included in the expungement legislative scheme in that it is a conditional requirement for an approval of an expungement that the names of applicants included in the registers established in terms the Children's Act (National Child Protection Register) and the register established in terms the Criminal Law (Sexual Offences and Related Matters) Amendment Act (National Sex Offender Register) be removed from these registers. It also includes an evaluation of other relevant provisions in national legislation creating

disqualifications with regard to employment opportunities following a conviction and sentence and how these disqualifications impact on the approval of expungements. The discussion paper also includes an evaluation of expungement of criminal records in foreign jurisdictions and lessons to be learned from these legislative schemes.

4. The discussion paper includes a consideration of the rationale for the legislation enabling expungement which stems from the rights contained in the Constitution. These include two competing rights namely, the right of the community to be protected versus the rights of applicants applying for the expungement of criminal records to equality and dignity.

The discussion paper evaluates the constitutional implications with reference to the existing legislative provisions dealing with expungement and how the principle of the expungement of criminal records should be interpreted having due regard to the constitutional dispensation, in particular having regard to the contents of the competing rights and the principle of limitation of rights as provided for in the Constitution and expanded by the Courts.

5. The Commission concluded that the justification for the legislation enabling expungement of criminal records centres on two issues: on the one hand, the state's duty to promote safety in society and protect citizens from dangerous and dishonest individuals and, on the other hand, an individual's right to equality and the constitutional duty on the state to free the potential of each person. The consideration of these constitutional issues guided the content of the Commission's provisional recommendations in the Discussion Paper.

6. Having due regard to the relevant provisions of the national legislation enabling the expungement of criminal records and the constitutional dispensation within which these provisions operate, the SALRC concluded that:

(i) The provisions in the Criminal Procedure Act 51 of 1977 (CPA) and the Child Justice Act 75 of 2008 (CJA) dealing with expungement, are not aligned, and use different qualifying criteria for the approval of the expungement of criminal records, ie expungement of convictions based on the sentence imposed and the lapsing of a time frame of 10 years for adult offenders (CPA) and expungement of convictions based on lists of offences combined with a time frame of 5 and 10 years depending on the schedules containing the listed offence for juvenile offenders (CJA);

(ii) In practice, the different criteria make expungements in terms of the Child Justice Act more limited for juveniles than expungements for adults in terms of the Criminal Procedure Act.

(iii) The justification for legislation enabling the expungement of previous convictions is the same for juvenile and adult offenders and does not justify the application of different qualifying criteria.

(iv) Both the Criminal Procedure Act and the Child Justice Act provides for the mandatory expungement of the criminal records concerned once the criteria set out in the Acts have been are and do not provide for a discretion to the approving authority.

(v) Both the Criminal Procedure Act and the Child Justice Act provide for an administrative application process for approval of expungements based on the qualifying criteria listed in the legislation.

(vi) Applying the relevant constitutional principles to the enabling legislation for expungements, as applied and interpreted by our courts the Commission concluded that the provisions in the existing legislation, in both the Criminal Procedure Act and the Child Justice Act are overbroad in respect of both the prescribed process and the listed qualifying criteria, therefore rendering the provisions unconstitutional.

7. The Commission concluded that the constitutionality of the enabling legislation needs to be considered against the State's duties and responsibilities in respect of both rights, namely the right of the community to be protected against crime versus the right of an individual to equality and not to be unfairly discriminated and the extent to which a limitation of the right to equality could be justified having due regard to the State's duties and responsibilities as outlined in the Constitution, national legislation and relevant International Instruments endorsed by the State.

8. Applying the above constitutional principles to the relevant legislation, the Commission proposes that:

(i) In so far as the provisions in the Child Justice Act and the Criminal Procedure Act dealing with expungements contain differences in the qualifying criteria and process these should be aligned where justified;

(ii) The existing prescribed administrative application process should be replaced by a motivated motion application process to a court having jurisdiction;

(iii) The qualifying criteria for an expungement in respect of both adult and juvenile offenders should be broadened to include additional criteria namely, participation and input by the prosecution in the process, consideration of the relevant constitutional rights, consideration of national legislation which inhibits employment opportunities (disqualifications imposed by national legislation); the extent to which an applicant has rehabilitated; an application for expungement should only be viable after serving of the sentences concerned; and a limitation to the number of times an application for expungement could be made;

(iv) Providing for an application for expungement to be viable after a period of 5 years and 10 years in respect of both juvenile and adult offenders; and

(v) The legislation should provide for the inclusion of a provision outlining the consequences resulting from an approval of an expungement.

9. The discussion paper is published in full so as to provide persons and bodies who wish to comment or make suggestions for the reform of this branch of the law with sufficient background information to enable them to place focused submissions before the Commission. The closing date for comment is 31 August 2015.

10. The Discussion Paper is available on the Internet at the following site: http://www.doj.gov.za/salrc/index.htm

11. The contact particulars for more information are: e-mail: advanvuuren@justice.gov.za

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The Project leader for the investigation is Judge J Kollapen.

ISSUED BY THE SECRETARY, SA LAW REFORM COMMISSION, PRETORIA

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A Last Thought

"The first challenge for open justice is the effect of media presence on witnesses. We must guard very carefully against the possibility that witnesses might change their testimony. This might be a simple matter of their memory of events being subconsciously changed by what they see and hear in the media. In the Pistorius trial itself, witnesses all but confessed to being glued to their televisions. I am by no means saying that this will have affected their testimony. The concern, rather, is that we cannot safely say that it did not affect their testimony. There is also the prospect of witnesses consciously changing their tune in response to media presence. The media's presence subjects witnesses to potential intimidation, both from others and from within themselves. Public speaking is, after all, feared by some more than death. And if rumours are to be believed, some may even fear it more than load-shedding.

But these concerns are not enough to warrant closing the courtroom doors to reporters and cameras. To prevent the possibility of witness intimidation, we would quite literally need to bar everyone from the courtroom except the litigants in every trial and subject them to stringent gag orders. Open justice demands quite the opposite.

And there are myriad measures available to protect witnesses. These range from: anonymity orders to protect vulnerable witnesses' identities and allowing witnesses to testify through intermediaries or with the help of a support person, to closing the courtroom so that only certain people are present, or even allowing witnesses to testify from a remote location via closed-circuit television. Other measures might include suppression orders such as that ordered in Multichoice when Judge Mlambo prohibited the media from photographing or broadcasting the testimony of Mr. Pistorius or his witnesses, or even, as the United States has started experimenting with, allowing witnesses to wear disguises in court."

Per DCJ Dikgang Moseneke in a speech entitled: "*The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice".*