e-MANTSHI

A KZNJETCOM Newsletter

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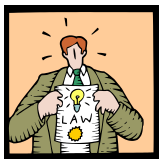
Welcome to the hundredth and thirteenth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Maintenance Amendment Act, Act 9 of 2015 has been published in Government Gazette no 39183 dated 9 September 2015.The purpose of the Act is to amend the Maintenance Act, 1998, so as to further regulate the lodging of complaints relating to maintenance and the jurisdiction of maintenance courts; to further regulate the investigation of maintenance complaints; to further regulate the securing of witnesses for purposes of a maintenance enquiry; to further regulate maintenance enquiries in order to make provision for the granting of interim maintenance orders; to further regulate the making of maintenance orders; to further regulate the making of maintenance orders by consent; to further regulate the circumstances in which maintenance orders may be granted by default; to further regulate the granting of cost orders; to regulate the effect a maintenance order made by a maintenance court has on a maintenance order made by another court; to further regulate the transfer of maintenance orders; to regulate the reporting of a maintenance defaulter to any business which has as its object the granting of credit or is involved in the credit rating of persons; to further regulate the attachment of emoluments; to increase the penalties for certain offences; to create certain new

offences; to further regulate the conversion of criminal proceedings into maintenance enquiries; and to provide for matters connected therewith.

2. A Draft Constitution Eighteenth Amendment Bill is to be introduced by a private member's bill in Parliament and has been published in Government Gazette no 39224 dated 21 September 2015. One of the proposed amendments is an amendment to section 174 of the Constitution to read as follows:
"*(a)* Any person who is appropriately qualified and a fit and proper person may be appointed as a judicial officer.
(b) The determination whether a person is—
(i) appropriately qualified must be made with due regard to their competency to perform judicial functions; and
(ii) A fit and proper person for judicial office must be made with due regard to their professional conscientiousness, personal integrity and commitment to constitutional values.".

Recent Court Cases

1. S v QHEKISI (166/2015) [2015] ZAFSHC 182

In a contravention of the Domestic Violence Act 116 of 1998 the maximum penalty of five years imprisonment can be imposed in district magistrates' courts.

KRUGER, J
[1] This case was sent on special review under section 304(4) of the Criminal Procedure Act 51 of 1977. The accused was charged with a contravention of section 17(a) of the Domestic Violence Act 116 of 1998, a contravention of a protection order on 2 April 2009 instructing him not to assault, threaten, insult or verbally abuse the complainant (his mother).
[2] The complainant testified that on 26 March 2015 the accused came to her house and asked for sugar. She told him she did not have any, and even showed him the empty sugar packet. Accused got angry and hit her at the back of her head with the cup he was carrying. The impact caused a bump at the back of her head. The accused swore at her calling her by her and her mother's private parts, saying she is a bitch and he wants to kill her. The complainant testified that what hurt her the most was that accused burnt everything that was in the house:

"I am hurting because I do not do anything to him and he keeps on hurting me. I am doing everything for him, I am feeding him, I am doing everything for him but he keeps on hurting me."
"Every time when he is around I am always scared, always afraid, I am even now suffering from high blood."
[3] The accused was legally represented. He pleaded not guilty. After the evidence of the complainant his attorney asked for an adjournment. After the adjournment the accused changed his plea to one of guilty. There was no cross-examination of the complainant. In her address the legal representative of the accused admitted that he threatened the complainant and hit her with a mug in contravention of the protection order that was issued against him on 2 April 2009.
[4] The magistrate convicted the accused as charged and heard argument on sentence. The accused has a previous conviction for the contravention of the same protection order against the same complainant. He was convicted of that offence on 11 October 2014 and was given a wholly suspended sentence. That sentence did not deter the accused from committing the same offence on 26 March 2015. The magistrate sentenced the accused to five years' imprisonment, the maximum allowed in terms of section 17 of the Domestic Violence Act 116 of 1998.
[5] The magistrate who is the judicial head at Ladybrand sent the matter on special review under section 304 (4) of Act 51 of 1977 because in her view the trial magistrate exceeded her punitive jurisdiction of three years. She says there is nothing in the Domestic Violence Act which allows a magistrate to go beyond its punitive jurisdiction. For the reasons that follow we believe that the judicial head is wrong.
[6] District magistrates' courts derive their punitive jurisdiction from section 92(1) of the Magistrates' Courts Act 32 of 1944:
"Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence-
(a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division; "
[7] There are other statutes, referred to by the judicial head, that allow for higher sentences to be imposed in district magistrates' courts:
(i) The Drugs and Drug Trafficking Act 140 of 1992 provides in section 64:
"A magistrates' court shall have jurisdiction –
(a) to impose any penalty mentioned in section 17, even though that penalty may exceed the punitive jurisdiction of a magistrate's court."
(ii) The National Road Traffic Act 93 of 1996 provides in section 89(7):
"Notwithstanding anything to the contrary in any law contained, a magistrate's court shall be competent to impose any penalty provided for in this Act."
(iii) Further, the Firearms Control Act 60 of 2000, section 151 provides:
"Despite any law to the contrary, any magistrates' court has jurisdiction to impose any penalty provided for in terms of this Act."

[8] The judicial head says there is no provision in the Domestic Violence Act that allows a magistrates' court to go beyond its punitive jurisdiction. The penalty clause of the Domestic Violence Act, section 17 reads as follows:

"Notwithstanding the provisions of any other law any person who –

(a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7;

(b) contravenes the provisions of section 11 (2) *(a)*;

(c) fails to comply with any direction in terms of the provisions of section 11 (2) *(b)*; or

(d) in an affidavit referred to section 8 (4) *(a)*, wilfully makes a false statement in a material respect,

is guilty of an offence and liable on conviction in the case of an offence referred to in paragraph *(a)* to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and in the case of an offence contemplated in paragraph *(b)*, *(c)*, or *(d)*, to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

[9] The Domestic Violence Act defines a court in section 1:

"**'court'** means any court for a district contemplated in the Magistrates' Courts Act, 1944 (Act 32 of 1944)."

The only court that can issue a protection order under section 6 of Act 116 of 1998 is a magistrates' court. It is also only a magistrates' court which can deal with a contravention of a protection order under section 17. The legislature wanted to make it simple for persons to obtain and enforce protection orders, that is why all processes under Act 116 of 1998 are dealt with in the district magistrates' court. To put matters beyond doubt, section 17 of Act 116 of 1998 contains the rider:

"Notwithstanding the provisions of any other law."

The legislature regards domestic violence in a very serious light, and that is why a maximum penalty of five years is allowed. That maximum penalty can be imposed in district magistrates' courts.

[10] The courts regard domestic violence in a serious light. In *Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality, Amicus Curiae*) 2006 (2) SA 289 (CC) the Constitutional Court said:

"[12] The High Court referred to the prevalence of domestic violence in South Africa, the response of the legislature thereto, and the obligation of our country under international law to protect women and families from domestic violence. The amicus and respondents presented detailed arguments in this regard.

[13] The high incidence of domestic violence in our society is utterly unacceptable. It causes severe psychological and social damage. There is clearly a need for an adequate legal response to it. Whereas women, men and children can be victims of domestic violence, the gendered nature and effects of violence and abuse as it mostly occurs in the family, and the unequal power relations implicit therein, are obvious. As disempowered and vulnerable members of our society, women and children are most often the victims of domestic violence.

[14] The criminal justice system has not been effective in addressing family violence, for a range of reasons. The need for effective domestic violence legislation was recognised by the legislature. It thus enacted the Prevention of Family Violence Act 133 of 1993, which preceded the Domestic Violence Act. Aspects of the Prevention of Family Violence Act resulted in a constitutional challenge involving several issues related to the right of an accused person to a fair trial. In overturning the order of the Pretoria High Court declaring section 3(5) unconstitutional, this Court expressed itself on a number of points relevant to the present enquiry."

[11] In *Mudau v State* (547/13) [2014] ZASCA 43 (31 March 2014) the Supreme Court of Appeal said:

"[6] Domestic violence has become a scourge in our society and should not be treated lightly, but deplored and also severely punished. Hardly a day passes without a report in the media of a woman or child being beaten, raped or even killed in this country. Many women and children live in constant fear. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity. This was well articulated in *S v Chapman* 1997 (3) SA 341 (SCA) at 345A-B when this Court said the following:

'Women in this country have a legitimate claim to walk peacefully on the streets to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

See also *S v Baloyi* 2000 (1) SACR 81(CC) at para 11."

[12] In the Constitutional Court, Judge Sachs said in *S v Baloyi* 2000 (1) SACR 81 (CC):

"[11] All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished."

And in paragraph [12]:

"[12] To the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form."

[13] The Supreme Court of Appeal has alluded to the disturbing prevalence of serious offences rooted in domestic violence (*The Director of Public Prosecutions v Larry Burt Phillips* (271/2011) [2011] ZASCA 192 (14 November 2011)).

"[25] On a reading of the record this case in my view reveals, like others, the disturbing prevalence of serious offences rooted in domestic violence. To my mind the court below over-emphasised the mitigating factors at the expense of aggravating factors."

[14] In *D Mnisi v The State* (391/08) [2009] ZASCA 17 (19 March 2009) Boruchowitz AJA said at par [9]:

"Domestic violence is rife and those who seek solutions to domestic and other problems through violence must be severely punished. Sentences imposed must send a deterrent message."

[15] The Constitutional Court has said that domestic violence brutally offends the values and rights enshrined in the Constitution, see *Omar* (*supra*) par [17]:

"[17] Domestic violence brutally offends the values and rights enshrined in the Constitution. According to section non-sexism is a founding value of our state. In addition, human dignity, the achievement of equality and the advancement of human rights and freedoms are recognised as founding values. Section 12(1)(c) provides that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from public or private sources. This right must be understood in conjunction with the rights to dignity, life, equality (which includes the full and equal enjoyment of all rights and freedoms) and privacy. This Court has recognised the constitutional requirement to deal effectively with domestic violence. In *Carmichele* the Court furthermore pointed out that South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights."

[16] In *S v Moagi* [2005] JOL 14519 (T) De Klerk and Smitt JJ dealt with a matter where the accused was charged with a contravention of section 17(a) of Act 116 of 1998 in that he contravened a protection order and that he assaulted the complainant. The magistrate took the two counts together for purposes of sentence and imposed periodical imprisonment and a further sentence of five years' imprisonment or a fine of R25 000, wholly suspended. On review the judges expressed the view that the taking together of charges for the purpose of sentencing was undesirable. They did not say that the magistrate exceeded the court's jurisdiction by imposing a five year imprisonment sentence.

[17] In *The Director of Public Prosecutions v Larry Burt Phillips* (*supra*) the following was said:

"[26] It goes without saying that a more balanced approach to sentencing was required (See *S v Swart* 2004 (2) SACR 370 (SCA) para 13). A clear message needs to be sent to both the respondent and those who might be minded to disregard protection orders granted in terms of the Domestic Violence Act that such conduct will not be countenanced by our courts. This court's abhorrence of the respondent's conduct in this regard must therefore be reflected in the imposition of an appropriate sentence."

[18] Finally one has to consider the facts of this case. The accused had a previous conviction for contravening the same protection order. The suspended sentence did not deter him. Within less than a year he committed the same offence against the same complainant, his mother. His conduct justified the maximum penalty. The violation of a protection order is a more serious offence than assault. Domestic violence is a problem in this country as is apparent from the preamble to Act 116 of 1998 and statements made by judges of the Constitutional Court and Supreme Court

of Appeal as quoted above. In our view the trial magistrate did not exceed her jurisdiction. There is no basis to interfere with the sentence. The proceedings were in accordance with justice.

ORDER
The conviction and sentence are confirmed.

From The Legal Journals

Ndou, M

"Examining s 40 of the Mental Health Care Act : unlawful arrest and detention"

De Rebus September 2015 34

Karriem, S

"Elevating *culpa* to crime"

De Rebus September 2015 40

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

Contributions from the Law School

Legal Duty to disclose in HIV transmission cases

Introduction

Various common law crimes provide a possible basis for criminal liability in the case of HIV transmission. This author will focus on the offence of rape. The definition of rape refers to 'any act which causes sexual penetration' Van der Bijl "Rape as a materially-defined crime: Could 'any act which causes sexual penetration' include omissions?" (2010) *South African Journal of Criminal Justice* 224 at 225). It has been noted that although a number of situations have been included in the definition of sexual penetration, nowhere is mention made as to whether phrase includes or excludes omissions (Van der Bijl *supra*) It could then be suggested that where a person intentionally fails to disclose his or her HIV, such behavior could qualify as 'any act' which caused the sexual penetration (Van der Bijl *supra*). Although it can be suggested that rape could be construed as the correct medium to criminalize non-disclosure of HIV, the courts should avoid being over inclusive where the theoretical basis for the criminalization of such behavior is concerned (Slater "HIV, Trust and the Criminal Law" (2011) *Journal of Criminal Law* 310). The problem appears to be that if the legal convictions of the community are taken into consideration, it would allow 'any act' to be read as including all 'omissions' (Van der Bijl *supra* 229). Does this necessarily mean that if you are HIV positive but use a condom during sexual intercourse criminal liability for rape will now ensue? Strictly speaking, legality plays an important role in interpreting legislation. The principle of *ius strictim* ought not to be applied as omissions would not be included in any act (Van der Bijl *supra* 230). While it is correct to assume that courts are not precluded from adapting existing crimes to meet contemporary requirements, a line needs to be drawn between the extension and adaption of the definition Van der Bijl *supra)*. It is this authors submission that criminalization for omissions should occur in case of breaches of relationships of trust. While a breach of trust giving rise to a legal duty to disclose can be considered a moral wrong, and although it is often a key to criminalization, it is insufficient to justify criminalization. They must be supplemented by additional normative factors (Slater *supra* at 318). It is this authors contention that a breach of trust should be criminalized when the trust is in some sense 'involuntary' and the breach causes personal and social harm (Slater *supra*).

Legal duty as defined by the courts

In terms of the law of Delict, the defendant must owe a legal duty to the plaintiff before any liability can ensue for acting in a negligent manner (Schulman "Sleeping with the Enemy: Combatting the Sexual Spread of HIV/AIDS through a Heightened Legal Duty" (1996) *John Marshall Law Review* 957 at 968). A duty can be defined as an obligation recognized by the law which requires a person to comply with a particular standard of conduct for the protection of others (Schulman *supra* 968-969). To establish whether or not a duty existed, one must examine whether the defendant and plaintiff stood in such a relationship to one another, that the "law imposed upon [the] defendant, an obligation of reasonable [care] toward the plaintiff (Schulman

supra 969). The court determines the existence of a duty as a matter of law (Schulman *supra*). Whether or not a duty is owed depends on a number of factors. However, foreseeability is the most important consideration in determining whether a duty of care exists. In other words, a duty comes into existence if the defendants conduct is the type of occurrence, which was or should have been reasonably foreseeable by the defendant (Schulman *supra* 970). It follows that that there is no duty to warn for things which are unforeseeable (Schulman *supra*). The rationale the duty in this manner is to limit liability and encourage defendants to act with greater caution regarding foreseeable occurrences (Schulman *supra*). In determining the element of foreseeability, an important factor which comes into play is whether a genuine relationship existed between the plaintiff and defendant (Schulman *supra*). That is where there is a special relationship in which one person entrusts himself to the protection of another (Schulman *supra*). For harm to be foreseeable, the courts require the defendant to have either actual or imputed knowledge of the disease. For instance in the case of *Doe v Roe* 598 N.Y.S.2d 678 (N.Y.J.C. 1993). The court agreed that if a person has actual knowledge of the disease, he or she has a duty to warn their sexual partner. The problem arises where a person does not have actual knowledge of the disease. In such cases*"[C]ourts will generally impute knowledge of a disease to people with obvious symptoms regardless of medical confirmation"* (Schulman *supra* 974).

Consider for instance the case of *C.A.U v R.L*. 438 N.W.2d 441 (Minn. Ct. 1989). In this case woman sued her former fiancé for negligent transmission of HIV/AIDS (*ibid* at 443). The woman argued that the defendant's AIDS related symptoms as well as his prior homosexual conduct when taken in conjunction with the knowledge available to the defendant on HIV/AIDS would likely result in HIV transmission. On this basis she contended that he owed a duty to warn her (Schulman *supra* 980). In determining whether the defendant was under a duty to warn the defendant, the court looked at his knowledge of AIDS, what symptoms were associated with the disease, and how the disease might be sexually transmitted. The court went on to note that *"[A] person's perception, experience and memory will determine whether he is imputed to have knowledge. Moreover, the court stressed that one is not expected to perceive things which are not apparent. Rather, a person's perception only has to be reasonable under the circumstances"(Schulman supra* 968). Requiring knowledge of HIV/AIDS infection poses a number of serious problems, not the least of which an individual can be infected with the disease for a number of years without being aware of it. In this case, which took place between 1984 and 1985, the court noted that it was not reasonably foreseeable for the defendant to have constructive knowledge of the disease or its modes of transmission, given the time period. Therefore, there was no duty to warn the plaintiff (Schulman supra). However, were such a case to be decided in 2015, given the widespread knowledge of HIV/AIDS, an accused would not be able to avail himself of such a defence.

In the case of *Doe v Johnson* 817 F. Supp. 1382 (W.D. Mich. 1993) the court weighed additional factors to determine whether a legal duty to warn existed: (1) societal interest (2) the severity of the risk (3) the burden on the defendant (4) the

likelihood of transmission and (5) relationship between the parties (Schulman *supra* 982). In considering the element of societal interest, the court balanced two competing societal interests. First, the court noted that imposing a duty to warn might infringe a defendant's right to privacy (*Doe v Johnson supra 1391*). However, the court went on to note that privacy rights cannot shield a person from judicial inquiry into his sexual relations when those sexual relationships cause intentional harm to others (Schulman *supra* 982). The second societal interest at stake was preventing the transmission of an infectious and incurable disease. Given the infection rate, the court stressed that society's interest in preventing the spread of HIV/AIDS was important and should be given weighty consideration in its decision (Schulman *supra*). Regarding the severity of the risk, this factor is noteworthy considering the potential for "serious bodily harm" posed by HIV infection *"The consequences of HIV transmission are grave: at this time there is no 'cure'; a person infected with HIV is considered to be infected for life. The most pessimistic view is that without a cure all people infected with the virus will eventually develop AIDS and die prematurely…[A]lthough the life expectancy and the quality of life of those who receive HAART [ARV's] has improved dramatically over the past 30 years…those diagnosed with HIV can expect to have a shorter life span-morbidity and mortality. HIV infected individuals can also experience a number of conditions that do not normally develop in healthy individuals, such as rare cancers and opportunistic infection"* (Cornett "Criminalization of the intended Transmission or Knowing Non-Disclosure of HIV in Canada" (2011) *McGill Journal of Law and Health* 63 at 96).

These consequences are far reaching not only for those living with the disease, but who inadvertently expose innocent third parties to the illness. In S *v Makwanyane* 1995 6 BCLR (CC) the court noted that *"The right to life is in one sense, antecedent to all other rights in the Constitution, Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of the, But the right to life was included in the Constitution not simply to enshrine the right to existence, It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity, The concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the society is recognized and treasured. The right to life is central to such a society" (*at par [326]). This statement provides a useful illustration of the manner in which the constitutional right to life can be understood within the South African context. The central question is whether as an antecedent human right and the central point of all constitutional values, has been employed by our courts as a workable constitutional concept in order to promote the quality of life as envisaged in *Makwanayne* (*supra*) This quality of life (referred to as the 'safe life') essentially entails an existence in accordance with human dignity and equal worth, which enables all persons to enjoy a quality of life that goes beyond mere survival (Bohler-Muller "Rethinking the State's Duty to Protect and Uphold the Right to Life in a Criminal Justice Context" (2009) *Obiter* 307 at 308). The quality of life necessarily

entails the right to be free from illness where it is within your power to do so. It has been suggested that freedom from violence is already adequately protected by section 12 (1) (c) of the Bill of Rights which provides that 'everyone has the right to freedom and privacy of the person which includes the right to be free from all forms of violence from either public or private sources' (Bohler-Muller *supra* 310). However, it is argued that the right to life must be more broadly interpreted to include within its ambit the right to a 'safe' life so as to enable the holders of this right to be protected against the fear, threat and consequences of violent crime. It then follows that if a failure to inform your partner of your HIV/AIDS status could qualify as an omission and subsequent liability for rape could ensue, then surely the fear of getting HIV from a partner with whom you are in a close relationship should also be protected against. This could be done by providing a legal duty to inform your partner of your status. In this regard, it proves useful to evaluate the ambit of section 12(1)(c). Is the right only infringed once violence has actually been inflicted (or the complainant infected) or nor does the fear or threat of potential violence also fall within its ambit? The courts have interpreted section 12(1)(c) as placing positive duties on the state to protect individuals against violations of their physical integrity by other persons (Bohler-Muller *supra* 310). It would seem as if the protection that was offered by this section has been limited to specific instances that have primarily resulted in duties in terms of delictual law *"[T]he net of unlawfulness [is cast] wider because constitutional duties are now placed on the State to respect, protect, promote and fulfill the rights in the Bill of Rights and, in particular the right of woman to have their safety and security"(Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) at par [57], discussed in Bohler-Muller *supra* 310).

Consideration of these constitutional duties resulted in the extension of state liability in instances where *"The authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life or physical integrity of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."(Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) at par [33], discussed in Bohler-Muller *supra* 310). It is submitted that such protection is offered ex post facto and limited to individual protection in specific, "well-defined" circumstances. It is this author's contention that the courts should move away from judicial restraint and fulfill their constitutional mandate by further developing the right to life as encompassing the right to a safe life in situations where other specific entitlements fail to do so (Bohler-Muller *supra* 311).

Conclusion

The conclusion of this article is that in relationships of trust, the moral duty to disclose HIV positive status should be reinforced by the criminal law. It is this authors submission that criminalization for omissions should occur in case of breaches of relationships of trust. While a breach of trust giving rise to a legal duty to disclose can be considered a moral wrong, and although it is often a key to criminalization, it is

insufficient to justify criminalization. They must be supplemented by additional normative factors.

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Matters of Interest to Magistrates

Guilty plea: weight of dagga to be proved or can it be admitted without proof?

1. In an automatic review case that recently came before a judge of the KZN High Court the magistrate *a quo* had asked the accused in terms of Section 112(1)(b) of Act 51/77: "Do you agree that the dagga confiscated weighed 5,45 Kg" and the answer was: "Yes, I do". The Honourable the Reviewing Judge then queried the act that the questioning by the magistrate did not reveal proof of the weight of the dagga. The presiding magistrate responded by saying that she presumed that the accused was present when the dagga was weighed.

2. The real question to be answered is whether the weight of the dagga should be proved in a guilty plea through the handing in of a certificate or affidavit setting out the weight of the dagga or whether the weight of the dagga is of any relevance whatsoever.

3. The relevant portions of Section 112(1)(b) of Act 51/77 reads as follows:

"Where an accused at a summary trial in any court pleads guilty to the offence charged, ….. the …. magistrate shall ….. question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence".

4. At the outset it has to be mentioned for purposes of later consideration together with what follows hereunder, that Section 112(1)(b) does not provide, in so many words, for the handing in of any form of document during the questioning by the

presiding officer. It is respectfully submitted that the Legislature had only verbal questioning in mind with the enactment of the mentioned section in 1977. (I happened to have attended many a workshop during the years 1975 - 1977 where the (at that stage) envisaged passing of Section 112(1)(b) was on the table, and documentary evidence was pertinently ruled out during those discussions)

5. The leading case on the issue of whether an accused may admit facts beyond his knowledge is the KZN decision of S *v Vorster and four similar cases* 2002(1) SACR 379 (N) where the Court drew a distinction between admissions made in the course of a trial and admissions made in response to judicial questioning in terms of Sect 112 (1) (b). At 388 c – e Hugo, J said: "Admissions in a trial (where there is a *lis between* the parties) form a part of the evidence material which to a greater or lesser extent relieves the party who bears the *onus* from duty of proving the admitted fact …. Admissions in terms of Sect 112(1)(b) serve a different purpose, they are not tendered as proof but as a safeguard for persons who erroneously believe themselves to be guilty and not for persons who merely erroneously believe that the State has sufficient evidence of their guilt".

6. The Court remarked that an analysis of the questioning in the present cases showed that the magistrate went into much greater detail and depth than in the *Naidoo* case.(See para 9 hereunder) Although in the present case there was no certificate or statement that complied with the provisions of s 212 (4) of Act 51 of 1977 nor were the certificates produced in court, there was however available to the accused a whole plethora of documents (my underlining – see *paragraph* 12 below) at the time that the sample was taken and from which he could satisfy himself of the matters they contained. If, in addition the accused admitted that he consumed alcohol, then there could be no unfairness.

7. Hugo, J said on Page 382: The learned Judge to whom these matters were sent on review expressed his concern about the correctness of the convictions in the following terms: 'I have some misgiving as to whether this accused was correctly convicted. Should there not be affidavits by the various experts concerned in the manufacture, calibration and the basic functions of the machine? The accused has absolutely no understanding of what he is in fact pleading guilty to and therefore the proceedings seem to be fundamentally unfair.'

8. The learned Judge continued on page 383 saying: "Strictly speaking, on a plea of guilty being entered there is no triable dispute between the parties in terms of the accusatorial system of criminal procedure. See Hiemstra *Suid Afrikaanse Strafproses* 5th ed at 293. Over the years however the Legislature has devised ways of protecting accused people from erroneously or falsely pleading guilty in cases where a fairly severe sentence could be imposed. In fairly minor offences no such protection existed or exists.

9. In terms of s 112(1)*(b)* the presiding officer is to question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty. It would however be wrong to assume I believe that these provisions create a *lis* or dispute between the State and the accused. The magistrate must gain his satisfaction of the guilt of the accused by virtue of his own questioning. He need not go into the evidence that the State may or may not have to prove the allegations in the charge sheet. After all it is only after a full trial that the court can evaluate the evidence presented by the State and find that all the elements have either been proved or not been proved. It is therefore not the evidence that must be questioned by the magistrate but the allegations".

Hugo, J continues lower down on the same page: "It seems to me that there are two reasons why an accused would plead guilty. Firstly, because he believes that he is guilty and does not wish to waste his money or the court's time in a prolonged trial. In this he may be mistaken and s 112(1)*(b)* is designed to protect him against such mistakes".

10. The following citation by the learned judge leads me to the conclusion that the demanding of all sorts of certificates by a court can be prejudicial to the accused. Judge Hugo says in this regard: "The second reason why people plead guilty is because they seek a cheap and fast method of getting the court case off their backs as it were. They may have a residual doubt as to the actual guilt but realise that the process of a trial in order for the State to prove it would be long, expensive and inconvenient, and would probably end in a conviction anyway. They then plead guilty for the very purpose of avoiding technicalities and lengthy procedures. I do not believe that the provisions of s 112(1)*(b)* were designed to discourage people of this ilk (*sic)* from pleading guilty, <u>provided of course that the questioning shows that what is admitted by such an accused indeed amounts to an offence</u>". (my underlining).

11. I would argue that *in casu* the facts which were correctly admitted did in fact amount to admission of all the material facts on the offence of possession of dagga.

12. In my humble view, and keeping in mind the *stare decesis* rule, the Vorster case has to take preference over the case of *S v Tertelil* 2003(1) SA 327 (C) where Moosa, J said on Page 331: "In the present case the accused was unrepresented. He could not legally admit to the concentration of alcohol in the specimen of blood taken from him in the absence of a certificate or affidavit in terms of Section 212(4) or other acceptable evidence"

13. I also add, for what it is worth that the judge in *Tertelil* did not say that the mentioned certificate or affidavit <u>has to be handed in</u> to the court. In view of earlier cases quoted herein, especially *Vorster* it would appear that the mere <u>availability</u> of these certificates may be sufficient.

14. The case of *S v Lebokeng* 1978(2) SA 676 (A) is to be taken note of. It was decided in that case that admissions are to be obtained on each and every particle of the charge. This decision cannot at all be criticised, but one also has to keep in mind the fact that certain allegations in a charge is superfluous e.g the weight of dagga in a case where the accused is outright charged with the illegal possession of such dagga. In such cases the weight of the dagga merely has important relevance in as far as sentence is concerned. It is rather unfortunate that prosecutors still mention the weight in the charge sheet, but the reason is clear: – in the era when the Section 10(3) presumption of dealing in dagga was still constitutional, the weight of the dagga was an essential element of the crime.

15. This is no longer the case and the weight of the dagga plays no role in the establishment of the guilt of the accused. What would probably play a considerably more significant role is whether the accused can admit that the substance in his possession was in fact dagga. However, the courts don't seem to have a dilemma with the accused admitting (or not disputing) the latter allegation. In this regard Van den Heever, J remarked in *S v Chetty* 1984(1) SA 411 (C): "In the ordinary course (my underlining – what is "ordinary course"?) the State can and should hand in a certificate of an analysis which proves itself and causes no problems that what has been found is what it is alleged to be. There may of course be other methods by which the questioner could satisfy himself that the accused had good reason to accept that the pills that he intended dealing in were what they purported to be or did contain the drug in question…."

16. In *S v de Klerk* 1992(1) SACR 181 (W) it was quite correctly decided in my humble opinion that the Court cannot draw (any) inferences under Sect 112(1)(b). This would have the effect *in casu* that the magistrate was wrong in gaining the impression that the accused was present when the dagga was weighed.

17. It is clear from Du Toit *et al* page 17 -17 that special care is to be exercised where an accused admits facts falling outside his personal knowledge. However the learned authors emphasize that the general rule in our law of evidence is that a court may accept and rely upon an admission of an accused irrespective whether the facts admitted falls outside the personal knowledge of the accused. Page 17 -20)

18. There is ample authority for the proposition that an accused is entitled to admit facts that do not fall within his personal knowledge. See for example, *S v Naidoo* 1985 (2) SA 32 (N). *S v Naidoo* 1985(2) SA 32 N – (full bench) where Thirion, J said – "In my view this is a case where the accused was constrained to plead guilty by the force of the evidence available (my underlining) to the State. The magistrate satisfied himself of the accused's guilt on an examination of the sources of the accused's knowledge on the strength of which the acc had made his admissions and the probative force of those sources was sufficient to establish the reliability of the admissions" Further on in the same judgment Judge Thirion said: "The purpose of the questioning is to ascertain from the accused what facts concerning the

commission of the offence he admits so as to enable the court to decide whether the facts so admitted constitute proof of all the elements of the offence sufficient to establish the accused's guilt"

19. I would argue that in our case under discussion the accused admitted the weight of the dagga when she replied upon being asked whether she agreed that the dagga weighed 5.45 Kg saying: "Yes, I do"

20. In *S v Martins* 1986(4) SA 934 (T) it was decided : "dat indien 'n hof tevrede is dat so 'n erkenning van 'n feit buite die persoonlike kennis van die besk, vrywillig gedoen is in die volle wete van die betekenis en gevolge van sodanige erkenning, dit sonder huiwering genotuleer behoort te word en geen verdere bewys verg nie." (my underlining)

21. In *S v Heugh and 3 others* 1998(1) SACR 83 (N) the outcome was that it is the duty of the judicial officer first, to ascertain whether accused admit the allegations in the charge, and, secondly, to satisfy himself that the accused is guilty.

22. In the case of *Comptroller (sic) of Customs v Western Electric Co Ltd* 1966 AC 367 a finding of the court *a quo* was set aside, because the court *a quo* was of the opinion that an admission about something of which a person has no knowledge, had no evidential value.

23. My conclusion, with respect, is that the weight of the dagga is completely irrelevant in substantiating the guilt of an accused and prosecutors should not mention such weight in their charge sheets. Moreover the time is certainly mature for courts to take into account the weight of dagga only for purposes of sentence.

Louis Radyn

Retired magistrate

22 September 2015

A Last Thought

New Release
Questioning: The Undefended Accused – Practical Examples for Magistrates Volume 1B (SECOND edition)

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Questioning: The Undefended Accused – Practical Examples For Magistrates series is a quick reference guide to criminal law, the law of evidence and the law of criminal procedure, blended together in a practical approach. This book is the most practical and to the point explanation of what magistrates can encounter in the questioning of an undefended accused appearing before them in a criminal matter. Judges, magistrates, public prosecutors, legal representatives, law students, the various exponents of the police service and traffic law enforcement will derive great benefit from this convenient title. Theory is balanced by practical examples on how to question an undefended accused on each different offence.

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Published works

1) Questioning: The Undefended Accused – Practical Examples for Magistrates (Juta) (2011)
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3) Questioning" The Undefended Accused – Practical Examples for Magistrates – Volume 1A (2nd edition) (LexisNexis) (2014)
4) 6 academic articles on sociology of law.