e-MANTSHI

A KZNJETCOM Newsletter

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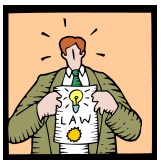
Welcome to the hundredth and twenty first issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Justice and Correctional Services, acting in terms of Article 38 of the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, has with effect from 1 May 2016 declared in accordance with Article 38 of the Hague Convention on the Civil Aspects of International Child Abduction that the Hague Convention will enter into force between South Africa and respectively Albania, Andorra, Armenia, Belarus, Bulgaria, Costa Rica, Estonia, Georgia, the Republic of Korea, Latvia, Lithuania, Malta, Morocco, Paraguay, the Russian Federation, Singapore, Sri Lanka, Ukraine, Zambia, and the Dominican Republic, El Salvador, Fiji, Gabon, Guatemala, Guinea, Kazakhstan, Lesotho, Nicaragua, the Republic of Moldova, San Marino, Seychelles, Thailand, Trinidad and Tobago, Turkmenistan and Uzbekistan. The notice to this effect was published in Government Gazette no 40058 dated 10 June 2016.

Recent Court Cases

1. Nkadimeng R v S (A435/16) [2016] ZAGPPHC 504 (30 June 2016)

Questioning of an accused in terms of section 112(1) (b) of Act 51 of 1977 should not be too cryptic to determine if the accused is admitting all the elements of the offence he is charged with.

Kubushi,J

[1] The accused, Ronny Nkadimeng, was charged in the magistrates' court Cullinan on two counts, namely, one count of robbery and one count of malicious injury to property.

[2] On the robbery charge it was alleged that on 24 January 2016 and at or near Rumo Drive, Ext 5, Refilwe in the District of Tshwane East, the accused unlawfully and intentionally assaulted Senior Hlatswayo and did then and with force take three (3) cell phones, her property or property in her lawful possession, from her.

[3] As regards the malicious injury to property charge, the allegation is that on 2 February 2016 at Rayton in the District of Tshwane East, the accused unlawfully and intentionally damaged the window and/or grill of a bakkie, the property or property in the lawful possession of the South African Police Service and/or J Leonard, by kicking or punching it.

[4] The accused pleaded guilty and the presiding magistrate proceeded to question him in terms of s 112 (1) *(b)* of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act"). The record shows the material questioning in terms of section 112 (1) *(b)* of the Act as the following:

"Q: Were you on___Cullinan in the Tshwane District?
A: Accused did not assault Senior Hlatswayo. He fell. People at the tavern were fighting, including Senior who fell. Accused understands that the cell phones did not belong to him. He took the phones in order to sell them. Accused understood that such action was unlawful. He was not forced to take the cell phone by anyone."

[5] Based on this questioning the presiding magistrate made the following findings:

"Based on the testimony, it appears that accused is pleading guilty to the offence of theft."

[6] The state accepted the plea of theft and thereafter withdrew the charges of malicious injury to property against the accused. The presiding magistrate found the accused guilty of theft in terms of s 112 (1) *(b)* of the Criminal Procedure Act as pleaded and proceeded to sentence him. The accused was, as a result, sentenced to three (3) years direct imprisonment of which two (2) years was suspended for five (5) years on condition the accused is not convicted of theft or a similar offence during the period of suspension. He was also declared unfit to possess a firearm.

[7] After reading the record of proceedings, the acting judicial head Cullinan ("the acting judicial head") noticed that the accused was convicted in terms of s 112 (2) of the Criminal Procedure Act and thus referred the matter for review in terms of s 304 (4) read with s 304 (2) *(c)* of the Criminal Procedure Act, to this court. The matter is before me, in chambers, as a reviewing judge.

[8] The acting judicial head requests in a letter dated 16 May 2016 that I set aside the, conviction and sentence in terms of s 304 (2) *(c)* (iii) of the Criminal Procedure Act and to remit the matter to the magistrate to note a plea of not guilty in terms of s 113 of the Criminal Procedure Act and continue with the trial in terms of s 304 (2) *(c)* (v) of the Criminal Procedure Act, on the following grounds:

"(1) The accused was charged with robbery but convicted of theft. Nowhere in the record does it reflect that the state accepted the plea on a theft charge.
(2) The questioning in terms of section 112 (1) *(b)* of the Criminal Procedure Act as *per* Annexure "A" is not in accordance with the law. Questioning remains primarily a safety measure against unjustified convictions and is applied and circumspection [sic!] (see S v Naidoo 1989 (2) SA 114 (A) at 121C). The accused in this matter did not even admit all the elements of the offence.
(3) The conditions of sentence in this matter are also not in accordance with the law. Sentence conditions must be clear and enforceable in case of contravention and, in this instance, the presiding officer uses "similar offences" which is vague and ambiguous.
(4) Section 103 Act 60/2000 is an inquiry which must form part of the record. The purpose thereof is to determine whether the accused should or should not be declared unfit to possess an arm. In the proceedings in this matter the accused was declared unfit to possess an arm without such an inquiry.
(5) The record does not show any direction with regard to the revision of the sentence. The sentence in this matter warranted to be dealt with in terms of section 302 (2) *(b)* of the Criminal Procedure Act. The presiding magistrate did not deal with the matter in accordance with the above mentioned section as required by the law."

[9] The acting judicial head's letter was referred to the office of the Deputy Director of Public Prosecutions ("the DDPP") for comment. In the comment, the DDPP states that some of the grounds the acting judicial head raises, without specifically stating which ones, have merit and warrant a conclusion that the conviction and sentence are irregular and should be set aside and comments further as follows:

"3. The original record of court proceedings shows that the accused was asked on 24 April 2016 [the correct date is 22 April 2016] by the presiding magistrate whether he understands the charges (of robbery and malicious injury to property) to which he replied in the affirmative. The presiding officer then recorded that he elects to plead guilty, ostensibly, on both charges. The accused was then questioned by the presiding officer in terms of section 112 (1) *(b)* of the Criminal Procedure Act only in respect of count 1 namely robbery. The original record further shows that the prosecutor brought an application that the second count of malicious injury to property be withdrawn after he had accepted the accused's plea of guilty on a charge of theft with regard to the charge of robbery. The acting judicial head's remark in paragraph 4 (1) of his letter is therefore incomprehensible.

The same applies to his remark in paragraph 4 (5) of his letter. His reference to section 112 (2) of the Act in paragraph (2) of his letter is incorrect. The original record of court proceedings shows that the following was conveyed to the accused by the presiding officer: 'Rights in respect of application for leave to explain (sic!) in full." Accused understood this. (see page 1 of the record). According to the typed copy of the record the rights in respect of application for leave to appeal and Review were explained in full to the accused. Magistrate S Rama furthermore certified in his "Application for Special Review case" that the prisoner was on the said date informed that the proceedings should be sent for review by the Gauteng Provincial Division of the Supreme Court of South Africa Pretoria within seven days. This document erroneously refers to a conviction of the accused on charges of (1) robbery and (2) malicious injury to property. The plea of the accused does not even appear on the typed copy of the J15. The sentence on count 1 in the typed copy of the J15 is three (3) years direct imprisonment of which two (2) years is suspended for five years (5) whereas the original J15 is three (3) years direct imprisonment of which two (2) years is suspended for five (5) years on condition accused does become convicted (sic!) of theft or a similar offence during period of suspension. . .

4. I now return to the withdrawal of count 2 of the charge sheet after the accused (according to the record) pleaded guilty to the two charges. Section 6 *(a)* of the Criminal Procedure Act provides that a prosecutor may withdraw a charge only before an accused has pleaded to that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge."

[10] On the basis of the aforementioned submissions the DDPP is of the view that the conviction and sentence, in this instance, are not in accordance with justice and recommends that they be set aside and the matter be remitted to the trial magistrate as suggested by the acting judicial head and as stated in paragraph [8] of this judgment.

Ad convictions

[11] It is common cause that the accused was charged on two counts, namely, one count of robbery and one count of malicious injury to property. It is also not in dispute that the accused pleaded guilty. I am, however, not in agreement with the DDPP's submission's that the accused pleaded guilty to both charges.

[12] The original record shows that the 'accused pleaded guilty to the charges'. The record does not specifically state that he pleaded guilty to both charges. My understanding, on perusal of the record, is that the accused pleaded guilty to the charge of robbery only. This view is supported by the fact that the accused was questioned by the presiding magistrate only in respect of the robbery. This is also confirmed by the fact that immediately after the state had accepted the presiding magistrate's finding that the accused pleaded guilty to theft, the state withdrew the charges of malicious injury to property against the accused. I am as such satisfied that on count 2, that is, the charges of malicious injury to property were properly withdrawn.

[13] As regards count 1, the accused was charged of robbery but found guilty of theft. The acting judicial head makes a submission that the accused should not have been convicted as such because there is nowhere in the record where it is reflected that the state accepted the plea on a theft charge. This submission is wrong. Although this is not reflected in the typed record, but on a proper perusal of the original record it is clear that the state did accept the plea on the charge of theft. The record shows that after questioning the accused in terms of s 112 (1) *(b)* of the Criminal Procedure Act, the presiding magistrate made a finding that *'Based on the testimony, it appears that Ace is pleading guilty to the offence of theft.'* The record also shows that the *'State accepts such plea. See annexure* ".A ".'

[14] The presiding magistrate was correct to have not convicted the accused on the robbery charges, but, I am not satisfied that the conviction of theft has been proved.

[15] Section 112 (1) *(b)* of the Criminal Procedure Act stipulates that -

"(1) Where an accused person at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts the plea -
(a) …

(b) the presiding judge, regional magistrate or 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. . . ."

[16] The primary purpose of s 112 (1) *(b)* of the Criminal Procedure Act in questioning the accused after she or he has pleaded guilty is for the trial court to ascertain whether the accused admits all the allegations in the charge she or he is facing. A further purpose of such questioning is said to be to safeguard an accused against the result of an unjustified plea of guilty.[1]

[17] I am in agreement with the submission by the DDPP that the questioning as reflected in Annexure "A" is not adequate enough to comply with the requirements of s 112 (1) *(b)* of the Criminal Procedure Act. The questioning is too cryptic to determine if the accused is admitting all the elements of the offence he is convicted of. The conviction in terms of s 112 (1) *(b)* of the Criminal Procedure Act is, thus, irregular and cannot stand.

[18] Both the acting judicial head and the DDPP submit that the conviction ought to be set aside and the matter remitted to the presiding magistrate to note a plea of not guilty in terms of section 113 of the Criminal Procedure Act and to continue with the trial. I am, however, of the view that, in the interest of justice, the matter should be remitted to the magistrates' court for the accused to be tried *de novo* before a different magistrate.

Ad sentence

[19] The submission by the acting judicial head that the conditions of the sentence imposed, in this instance, are not in accordance with the law is correct. It is indeed so that the conditions attached to a sentence must be clear and enforceable and as such the use of the words 'similar offences' in the conditions of the sentence are vague and ambiguous. On this basis alone the sentence ought to be set aside.

[20] It is also correct that the presiding magistrate should not have declared the accused unfit to possess a firearm in terms of s 103 of the Firearms Control Act 60 of 2000 without holding an inquiry.

[1] See S v Naidoo 1989 (2) SA 114 (A) at 121C.

Ad revision of sentence

[21] The acting judicial head's argument that the record does not show any direction with regard to the revision of sentence is unfounded. The following is stated in the original record – *'Rights in respect of application for leave to explain (sic!) in full'* On a careful reading of the typed record it is clear that rights in respect of the application for leave to appeal and review were explained to the accused - and he understood. The presiding magistrate also certified in the 'Application for Special Review Case' that the prisoner was on the said date informed that the proceedings would be sent for review by the Gauteng Provincial Division of the Supreme Court of South Africa within seven days. I am satisfied therefore that these rights were explained to the accused in full.

Other irregularities

[22] There are other various irregularities which were brought to my attention by the DDPP, namely –

23.1. The Application for Special Review Case mistakenly states that the accused was convicted of the offence of: (1) robbery, (2) malicious injury to property. These two convictions are clearly wrong as the accused was not found guilty of either of the two convictions.

23.2. The typed J15 does not reflect the accused's plea.

23.3. The typed J15 erroneously states the sentence on count 1 as *'3 years direct imprisonment of which 2 years is suspended for* 5 *years'* whereas the original J15 states the sentence as *'3 years direct imprisonment of which 2 years is suspended for* 5 *years on condition accused does not become convicted (sic!) of theft or similar offence during period of suspension.'*

23.4. The acting judicial head refers in paragraph 2 of his letter that the accused was convicted in terms of s 112 (2) of the Criminal Procedure Act. This is not correct. The accused was convicted in terms of s 112 (1) *(b)* of the Criminal Procedure Act. This is apparent right through the record if one had taken the time to carefully read the record.

23.5. A further argument by the acting judicial head is that the sentence in this matter warranted to be dealt with in terms of s 302 (2) *(b)* of the Criminal Procedure Act. This argument is entirely misplaced. Paragraph *(b)* of s 302 (2) of the Criminal Procedure Act has been deleted by s 22 of the Criminal Law Amendment Act 59 of 1983.

[24] These irregularities are indicative of the wanton manner in which the presiding officer and/or the staff at the magistrates' court Cullinan dealt with this matter. Much as the acting judicial head wanted this court to correct the proceedings of the presiding magistrate, he did not take the necessary precautions required before he could transfer this matter to this court for review. It is evident from the reading of his letter that he did not acquaint himself with the contents of the record and the relevant

provisions of the Criminal Procedure Act which are applicable in this matter. In cases of this nature it is imperative that the acting judicial head should thoroughly peruse the record, which in my view he did not do, and would in that sense have picked up all these irregularities as mentioned here above. He should have noted that members of his staff improperly completed some of the forms in the record and taken steps to rectify them before sending the matter to this court. Importantly, he should have taken time to read the provisions of the Criminal Procedure Act which finds application in this matter, this in my view he did not do.

[25] In the premises I would propose to make the following order:

1. The conviction and sentence handed down on 22 April 2016 by the Magistrate S Rama are set aside.
2. The matter is remitted to the magistrates' court Cullinan for a retrial before a different magistrate.

From The Legal Journals

Skosana, T & Ferreira,S

"Step-Parent Adoption Gone Wrong: *GT v CT* [2015] 3 ALL SA 631 (GJ)"

Potchefstroom Electronic Law Journal 2016(19)

Stevens, P

"Recent Developments in Sexual Offences against Children – A Constitutional Perspective"

Potchefstroom Electronic Law Journal 2016(19)

Naidoo,K & Karels, M G

“Prosecuting “hate”: An overview of problem areas relating to hate crimes and challenges to criminal litigation”

2016 Journal for Juridical Science 41(1):65‑82

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

Contributions from the Law School

Errors and omissions not accepted: considering *error in negotio* as a vitiator to consent to sexual relations

The case of *Notito v The State* [(123/11) [2011] ZASCA 198] was an appeal against convictions on five counts of rape and one count each of indecent assault and theft. The accused would target and approach any woman walking alone and tell her that she had been bewitched and that he could help her. In order to render such help he told each victim that he required hair from her head, armpit and pubic area. Once the woman succumbed to his request he would touch her private parts and then have sexual intercourse with her. The ages of these women varied from 13 years to 19 years. He was charged with several counts of rape, indecent assault, theft and robbery. The incidents occurred over a period of two years from 2005 to 2007 (at para 3). He was sentenced to 120 years imprisonment (at para 4 and confirmed by the appeal court at paras 46 and 47).

This article considers the facts of *Notito* (supra) in relation to assessing whether an error in negotio has occurred thereby rendering consent to sexual relations invalid.

Introduction

In order for consent to be valid, it must be given freely and voluntarily, by a person who is in law, capable of giving consent. This is true, not only for matters of a commercial nature, but also for sexual activity. S 1(2) of Criminal Law (Sexual offences and related matters) Amendment Act (Criminal Law (Sexual offences and related matters) Amendment Act 32 of 2007(SORMA) states that consent, in this context is valid only if the agreement was voluntary **and** un-coerced.

It is trite that a person can be found guilty of the crime of rape (or sexual violation) where consent was obtained through fraudulent means. Not only does this notion exist in the common law, but it has also been codified in the Sexual Offences Act (supra). In determining whether or not the consent was real and valid, the assessment turns on whether the fraud was in relation to the act itself (sexual penetration or violation) or to the inducement (the reason why the person has agreed to the sexual act). South African common law as well as legislation acknowledges this as either an *error in negotio* or an *error in personam*. The cases that have been reported and have appeared before the courts show that fraudulently obtained consent to sexual acts occur mostly in the context of medical treatment (for example, where a doctor tells a patient that he is conducting a pelvic examination, but has sexual intercourse with her; or where he tells her that intercourse was a necessary form of medical treatment) aka an *error in negotio* or marital relations (Where a person consents to sexual intercourse in the mistaken belief that the person is their spouse/partner) aka an *error in personam*.

Thus, consent to acts of a sexual nature, is not valid if it is given because of fear, force or threats, or by someone who cannot give proper consent because they are too drunk, have been drugged, are unconscious, or are too young to give consent.

Error in negotio

A person who enters your home pretending to be a TV repairman commits the crime of trespass – you have consented to him entering your home because of the lie he has told you; a person who fraudulently makes himself out to be a doctor and he lays a hand on you commits the crime of assault (or indecent assault, rape, depending on the nature of the 'examination') – you consented to him examining you based on the lie he has told you. This applies equally with issues of a sexual nature.

The common law acknowledges these circumstances which negate the validity of consent as an *error in negotio.* SORMA codified[2] the common-law position regarding situations where consent, although given, will, in terms of the law, not be valid. As a result of a mistake as to the nature of the act[3] ('error in negotio') to which a person is ostensibly able to consent to (because they are an adult) that person's consent is

[2] Section1(3)(c)(i) and (ii)
[3] Section (1)(3)(c)(ii)

rendered invalid. For example, in the case of *R v Flattery [(1887) 2 QBD 410]* where a surgeon induced a patient to believe that he was performing a medical procedure to cure her epilepsy, but in fact engaged in sexual intercourse with her. He was found guilty of rape because her 'consent' was invalid. SORMA caters for this situation by considering situations where consent is obtained through 'fraudulent' means.

There is a presumption that a person understands unless proven otherwise (or the accused party has reason to believe that the victim could not have understood the nature of the act) - being asleep, drugged, intoxicated, 'error in negotio', etcetera[4]. This position remains and applies to children as well. *Error in negotio* caters only for a mistake or misunderstanding regarding the nature of the act (that what was done was an act of a sexual nature – either penetration or violation as described in SORMA). Thus, if a person is misinformed of the *consequences* of participation in a sexual act (eg. transmission of an STD; pregnancy; etc), the person's consent to the sexual act will still be **valid**, and no rape, sexual assault, or sexual violation would have occurred. Only where the person is made to believe that the act consented to is something other than sexual penetration or violation (as defined in SORMA), then a criminal offence would have occurred.

In assessing the genuineness of consent, the courts adopt a two stage inquiry:

- Whether a complainant had the capacity (i.e. the age and understanding) to make a choice about whether or not to take part in the sexual activity at the time in question; and
- Whether s/he was in a position to make that choice freely, and was not constrained in any way. (Was the consent obtained fraudulently?).

NOTITO

In *Notito,* the accused approached one of the complainants using the following modus operandi: He professed to be a prophet and stated that he could cure the complainant's infertility issues. He told her that she was not able to conceive because some eggs were blocking her uterus, and that he could remove them. She went with him to a park and he told her to pray. He left with another woman and on his return the complainant said she was no longer interested. He then told her that rejecting his help could result in her death. She then allowed him to proceed – he removed hair from her head and armpit and instructed her to remove her skirt, pull down her underwear and spread her legs. He then penetrated her vagina with his fingers and also pulled out pubic hair. She testified that she was not comfortable with him doing this, but did not stop him as she was under the impression that he was helping her.

It was clear from the evidence and testimony led that the complainant was never told how the eggs would be removed from her uterus. As a result she could not have had

[4] Section 1(3)(c) and (d)

a full appreciation of what she was consenting to. The court held (correctly) that the consent had been secured by 'clandestine machination amounting to fraud.' This meant that the consent she had given was not real as there had been a manifest fraud (*error in negotio*) engineered by the accused. On an objective level, the accused could not have reasonably believed that the complainant (or any of the other complainants in the case) would have consented to him penetrating them had he not misguided them by pretending to be a prophet.

The accused raised several defences in regards to the numerous charges laid against him:

1. He told the court that he had no recollection of the incident/s. He averred that he would never attack a stranger in such a manner. The court a quo rejected his version as false and convicted him. This was supported by the appeal court as well.

2. He further argued that the complainants cannot have been said to not have consented as they had not objected to the acts that he had performed. The court rejected this argument stating that "…the test pertaining to indecent assault is an objective one. It has nothing to do with whether the complainant objected or not. In *S v F 1982 (2) SA 580 (T)*, the court held that regard must be had to the expressed motive or intention of the accused as conveyed to the complainant (whether by words, conduct or implication), in determining whether an assault amounted to an indecent assault. It further held that the particular part of the body of the complainant, at which the assault was directed, was not of decisive importance in determining the 'indecency' of the assault. In *S v Kock 2003 (2) SACR 5 (SCA*) para 9, Heher JA remarked that: 'Indecent assault is in its essence an assault (not merely an act) which is by its nature or circumstances of an indecent character.' In this case, the appellant's conduct of inserting his finger into the complainant's vagina is objectively indecent." (at para 44)

3. It was evident that the appellant never explained the manner in which the eggs would be removed from the uterus and therefore it was clear that the complainant did not have full appreciation of what she was consenting to. It is clear that consent was secured by clandestine machinations amounting to fraud. In the result, the appellant was correctly convicted of indecent assault.

Conclusion:

Where consent to sexual relations is induced by fear, force, threats, fraud, abuse of power, etc, it is not valid consent in our law. The issue of consent induced by fraud has been brought to the fore in *Notito* (supra). The court was definitive and deliberate in the wording of its judgement stating that consent was obtained via "…clandestine machinations amounting to fraud." The appeal court confirmed the guilty verdict of the court a quo, as well as the sentence of 120 years.

SUHAYFA BHAMJEE

UNIVERSITY OF KWAZULU-NATAL, PIETERMARITZBURG

Matters of Interest to Magistrates

Use of an Intermediary

- Section 170A Criminal Procedure Act 51 of 1977 is the enabling provision.
- The provisions apply to any witness so it can be used for both state and defence witnesses who are:
  - ❖ under the biological or mental age of 18 years;
  - ❖ and where it appears to the court that such witness would be exposed to undue mental stress or suffering should they testify at the proceedings.

As proof of the biological age a certified copy of the birth certificate of the witness can be handed in to court or the mother (or someone who was present at the birth) can testify as to when the child was born.
If the allegation is that the witness is below the mental age of 18 years, then a psychologist who has done as assessment on the witness will be called in support of the application in terms of Section 170A (unless the report of the psychologist is handed in by consent).
The age requirement refers to the age at the time of testifying and not at the time of the alleged offence.
The applicant is to provide reasons why the witness would be exposed to undue mental stress and suffering; this will usually relate to factors such as the age of the witness, the nature of the evidence they would give, the relationship to the accused

etc. (See paragraphs 100 – 109 *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, & others* 2009 (2) SACR 130 (CC))

Procedure

Generally the application will be brought by the State, but it is also open to the defence to bring such an application or the court can raise it mero motu whether an intermediary should be used.
The applicant must provide proof of the age (biological or mental) of the witness and allege why the witness would be exposed to undue mental stress or suffering should they testify at the proceedings.
The other party must be given the opportunity to respond to the application.
The court will then give a ruling on whether an intermediary should or should not be used. It is important to use the words *"undue mental stress or suffering"* as per Section 170A in the ruling.
If an intermediary is going to be used, the intermediary should then testify and place his/her qualifications and experience on record. The parties should be given the opportunity to question him/her. Only certain persons can be appointed as intermediaries – these are set out in GN R1374 in *GG* 15024 of 30 July 1993 as amended by R360 in *GG* 17882 of 28 February 1997 and R597 in *GG* 22435 of 2 July 2001:
"*(a)* Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974), and against whose names the speciality paediatrics is also registered.
(b) Medical practitioners who are registered as such under the Medical, Dental and Supplementary Health Service Professions Act, 1974, and against whose names the speciality psychiatry is also registered.
(c) Family counsellors who are appointed as such under section 3 of the Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987), and who are or were registered as social workers under section 17 of the Social Service Professions Act, 1978 (Act 110 of 1978), or who are or were educators as contemplated in paragraph *(f)* hereunder, or who are or were registered as clinical, educational or counselling psychologists under the Medical, Dental and Supplementary Health Service Professions Act, 1974.
(d) Child care workers who have successfully completed a two-year course in child and youth care approved by the National Association of Child Care Workers and who have two years' experience in child care.
(e) (i) Social workers who are registered as such under section 17 of the Social Service Professions Act, 1978, and who have two years' experience in social work; and
(ii) persons who obtained a master's degree in social work and who have two years' experience in social work.
(f) (i) Persons who have four years' experience as educators and who have not at any stage, as a result of misconduct, been dismissed from service as educators.

(ii) For the purposes of subparagraph (i) "educators" mean persons who teach, educate or train other persons, or who provide professional educational services, including professional therapy and educational psychological services at a public, independent or private school as contemplated in the South African Schools Act, 1996 (Act 84 of 1996), including former and retired educators.
(g) Psychologists who are registered as clinical, educational or counselling psychologists under the Medical, Dental and Supplementary Health Service Professions Act, 1974.'"
The intermediaries permanently appointed should all qualify however if a contract/ casual intermediary is used it is important to ensure that s/he meets the requirements. Also ensure s/he is fluent in the language of the witness
The court must make a finding as to whether the intermediary is found competent to be appointed in the matter. If competent s/he is then sworn in as intermediary.

(Some magistrates do not make the intermediary take the oath in every matter where he has been permanently appointed as intermediary by DOJ at that office, but merely notes on the record that the intermediary was previously sworn in as an intermediary for that office. Neither way is irregular)

An intermediary is not an interpreter. If s/he is also being used as an interpreter, s/he must have been sworn in as such as well.
Aspects of relevance when intermediaries are used:

- Section 158 – use of the CCTV system or other electronic device. This would be brought by way of an application setting out the factors mentioned in Section 158(3). Only one of the factors needs to be alleged by the applicant. If the court refuses such an application in respect of a complainant under the age of 14 years the court must record immediately the reasons for the refusal [Section 158(5)]

The court can on its own initiative invoke the provisions of Section 158
Section 158 is not limited to children and these provisions can be considered in respect of any traumatised witness

- The court will also make an order in terms of Section 170A (3) to enable the witness to testify from the camera room.

If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place –

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

- ❖ Section 153 – for the witness to testify in camera.
    - Section 153(5) deals with witnesses under 18 years of age

Relevant case law:

- *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, & others* 2009 (2) SACR 130 (CC)
- *S v Peyani* 2013 DR 2449 (GNP)
- *S v Stefaans* 1999 (1) SACR 182 (C)
- *S v Staggie and another* 2003(1) SACR 232 (CPD) (relating to Sections 153 and 158)

Karen Chamberlin
Regional Magistrate / Emlazi

A Last Thought

Tools of torture: South Africa's trade in electric shock equipment

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In South Africa, various types of electric shock devices are authorised for use by law enforcement officials. These include stun belts, stun shields, stun batons, stun guns and projectile electric shock weapons. However, across the world, the use of such devices by law enforcement officials has been associated with serious abuses, which result in torture or cruel, inhuman or degrading treatment, injury, and even death.

These devices are often perceived as less-lethal alternatives to firearms. But there is a gap in South African legislation regarding the control of these and other types of law enforcement equipment that can facilitate torture and ill treatment.

The use of certain electric shock equipment has been internationally condemned. The European Commission has banned both the import and export of body-worn

electric shock equipment (commonly referred to as stun belts, stun cuffs or stun sleeves), and subjects other types of electric shock equipment to trade restrictions. Stun devices that deliver an electric shock through direct contact with the human body are designed to achieve compliance through pain.

Body-worn electric shock devices are often used when prisoners are transported, in courtroom settings or to control prisoner work groups. Other types of direct contact electric shock devices – such as stun shields, stun batons and stun guns – require close proximity to the individual. They deliver a painful shock on contact.

Another category of stun weapons delivers a powerful electric shock on impact by means of projectile darts. An example is Taser International's so-called Smart Weapon; a pistol-shaped device that causes almost immediate neuromuscular incapacitation.

Unlawful beatings and the assault of convicted prisoners and detainees awaiting trial by prison guards and police officials are commonly reported in the South African press. These include instances where electric shock devices are misused. A number of legal cases have been launched against local officials in relation to the abuse of electric shock devices and other forms of ill treatment.

At least one South African company manufactures electric shock devices for law enforcement and has supplied South Africa's Department of Correctional Services with stun belts and stun shields. Many other South African companies advertise and sell electric shock equipment.

South Africa has one of the most progressive constitutions in the world. Instituted in 1996, the constitutional Bill of Rights enshrines the rights of all people living in the country to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way. It is surprising, then, that South Africa does not prohibit law-enforcement equipment that can be abused or facilitate torture and ill treatment; or at least have rigorous oversight mechanisms to control the manufacture, use and trade of such equipment.

A prohibition on law enforcement equipment that has no practical purpose other than for torture and cruel, inhuman or degrading treatment or punishment is clearly called for. The local manufacture of such devices and their export from South Africa should also be prohibited. Safer and more humane forms of restraint and control should instead be used, such as non-electrified shields or batons in the case of electric shock devices.

Other types of law-enforcement equipment that may have a legitimate law-enforcement function but which are prone to misuse, such as projectile electric shock weapons, should also be prohibited, or regulated and controlled, to prevent human-rights violations. The manufacture of any such devices in South Africa and their export should not be allowed – or should at least be highly controlled in the same way that other sensitive items such as fire arms, and material relating to nuclear, chemical and biological weapons and their means of delivery are regulated.

South Africa has ratified the 1987 United Nations Convention against Torture, and

has passed its own legislation aimed at combating and preventing torture. It is therefore duty-bound under its constitutional and international obligations to respect human rights. Prohibiting or exercising restraint in the transfer and trade of policing and security equipment that facilitates torture or other forms of ill treatment should be prohibited, or controlled as appropriate. Body-worn electric shock devices should be prohibited for import and export. These do not meet a legitimate law-enforcement objective that could not be effectively achieved with safer, less abusive alternatives.

A control mechanism similar to the current system overseen by the National Conventional Arms Control Committee – which exercises political control over the import and export of conventional weapons – should be instituted to regulate the trade in the various types of electric shock devices. In this way, South Africa's trade policies would conform to internationally accepted practices, and prevent the transfer of items that could contribute to the violation or suppression of human rights.

Omega Research Foundation and Noel Stott, Senior Research Fellow, Transnational Threats and International Crime division, ISS Pretoria