e-MANTSHI

A KZNJETCOM Newsletter

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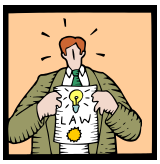
Welcome to the hundredth and twenty seventh issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. An explanatory summary has been published on a Criminal Procedure Amendment Bill, 2016 which will be introduced in the National Assembly soon. The summary was published in Government Gazette no 40487 dated 9 December 2016. The Bill seeks to amend the Criminal Procedure Act, 1977 (Act No. 51 of 1977), so as to provide the courts with a wider range of options in respect of orders to be issued in cases of findings that accused persons are not capable of understanding criminal proceedings so as to make a proper defence; or that accused persons are by reason of mental illness or mental defect, or for any other reason, not criminally responsible for the offences they are charged with, also to clarify the composition of the panels provided for in section 79 to conduct enquiries into the mental condition of accused persons; and to provide for matters connected therewith. The Bill can be accessed here http://pmg-assets.s3-website-eu-west-.amazonaws.com/160620CPA-Bill-2016.pdf

2. An explanatory summary of a Cybercrimes and Cybersecurity Bill, 2017 has been published in Government Gazette no 40487 dated 9 December 2016. 3. The Bill intends to -

(a) create offences which have a bearing on cybercrime and to prescribe penalties;

(b) criminalise the distribution of data messages which are harmful and to provide for interim protection orders;

(c) further regulate jurisdiction in respect of cybercrimes;

(d) further regulate the powers to investigate cybercrimes;

(e) further regulate aspects relating to mutual assistance in respect of the investigation of cybercrime;

(f) provide for the establishment of a 24/7 Point of Contact;

(g) further provide for the proof of certain facts by affidavit;

(h) impose obligations on electronic communications to service providers and financial institutions to assist in the investigation of cybercrimes and to report cybercrimes;

(i) provide for the establishment of structures to promote cybersecurity and capacity building;

(j) regulate the identification and declaration of critical information infrastructures and measures to protect critical information infrastructures;

(k) provide that the Executive may enter into agreements with foreign States to promote cybersecurity;

(l) delete and amend provisions of certain laws; and

(m) provide for matters connected therewith.

The Bill can be accessed here http://pmg-assets.s3-website-eu-west-.amazonaws.com/CyberCrimes-Bill-2017.pdf

3. *Act no 17 of 2016; a Children's Amendment Act* was published in Government Gazette no 40564 dated 19 January 2017. On the same day a *Children's Second Amendment Act, Act 18 of 2016* was published in Government Gazette no 40565. The first Act, Act 17 of 2016, intends to amend the Children's Act, 2005, so as to insert certain definitions; to provide that a person convicted of certain offences be deemed unsuitable to work with children; to afford a child offender an opportunity to make representations as to why a finding of unsuitability to work with children should not be made; to provide that the National Commissioner of the South African Police Service must forward to the Director-General all the particulars of persons found unsuitable to work with children; to provide for a child offender to apply in the prescribed manner to have their particulars removed from the Register; to provide for the review of a decision to remove a child without a court order; to extend the circumstances as to when a child is adoptable; to extend the effects of an adoption order by providing that an adoption order does not automatically terminate all parental responsibilities and rights of a parent of a child when an adoption order is granted in favour of the spouse or permanent domestic life-partner of that parent; and to provide for matters connected therewith.

The second Act, Act 18 of 2016, intends to amend the Children's Act, 2005, so as to extend a definition; to insert new definitions; to provide that the removal of a child to temporary safe care without a court order be placed before the children's court for review before the expiry of the next court day; to provide for the review of a decision to remove a child without a court order; to provide for the provincial head of social development to transfer a child or a person from one form of alternative care to another form of alternative care; to provide that an application for a child to remain in alternative care beyond the age of 18 years must be submitted before the end of the year in which the relevant child reaches the age of 18 years; and to provide for matters connected therewith. Both these Act will come into operation on a date to be proclaimed in the Government Gazette.

Recent Court Cases

1. S v MALISWANE AND ANOTHER 2017 (1) SACR 26 (ECG)

Where a convicted person is the primary caregiver of a minor child it is imperative that investigation be undertaken into the fate of the child before the primary caregiver is sentenced to incarceration.

Eksteen J (Smith J concurring):

[1] The appellants, who pleaded guilty, were each convicted in the magistrates' court, Grahamstown, of one count of theft and sentenced to 36 months' imprisonment. Their application for leave to appeal was dismissed. However, leave to appeal against the sentence imposed was granted on petition to the Judge President of this court.

[2] The first appellant was charged together with two other individuals (to whom I shall refer as accused 2 and 3, respectively) with theft of groceries valued at R4697,84 from Shoprite at Market Square in Grahamstown on 30 October 2012. The second appellant was charged with theft of shoes to the value of R1610 from Woolworths in Grahamstown on 30 October 2012. It is difficult to understand why the second appellant was charged in the same proceedings, along with the first appellant and accused 2 and 3, and there is nothing on record to indicate that there is any correlation between the two offences.

[3] The appellants both pleaded guilty. The appellants each have one previous conviction of theft, in each instance committed during the same year as the offence currently under consideration. By contrast, accused 2 and 3, who are convicted of the same charge of theft as the first appellant, are older and have very lengthy criminal records extending over numerous years reflecting multiple offences of dishonesty. All four of the accused were treated equally and sentenced to three years' imprisonment.

[4] I consider that the magistrate erred in this regard. While it is generally desirable that the same sentence be imposed on co-offenders, the personal circumstances of each accused must always be recognized. In the present case the previous criminal history of the various accused differs so markedly that I do not consider that this is a case which calls for parity of sentence. Mr *Zantsi*, on behalf of the state, fairly in my view, conceded same.

[5] There is, however, more serious cause for concern. Firstly, in imposing sentence the magistrate's reasoning proceeds from the premise that all four the accused before her, including the first and second appellants, were members of a syndicate. No reasons are provided for this assumption, nor was any evidence placed before her to justify such a conclusion. As recorded earlier, the first appellant and second appellant were not convicted of the same offence. First appellant was convicted of theft at Shoprite, while second appellant was convicted of theft at Woolworths. It is so that the offences were committed on the same day and that all four the accused reflected their permanent residential addresses as being in Mdantsane. This on its own does not, however, justify the conclusion that they were all part of a syndicate. Some evidential basis would be required to reach such a conclusion. The second appellant, in particular, on the facts, acted alone.

[6] The magistrate proceeded, apparently on the strength of the assumption that all the accused before her were part of a syndicate and that shoplifting was a prevalent offence in her jurisdiction, to hold that it was necessary to make an example of the appellants in order to deter the community from committing similar offences. I consider for the reasons set out earlier that the approach of the magistrate reflects a serious misdirection on the facts.

[7] Secondly, the magistrate's judgment in respect of sentence contains no reference whatsoever to the personal circumstances of the appellants, save for their previous convictions. Her failure to give any or due consideration to the personal circumstances of the accused constitutes a further misdirection.

[8] The first appellant, who left school during grade 12, is currently 21 years old. She is unemployed and has one minor child. She did not testify in mitigation. However, her legal representative, on her behalf, recorded that she takes care of the child and that there is no support system to care for the child, should she be imprisoned. The child's father, so it was recorded, is obliged to pay maintenance in respect of the minor child. However, he does so only when forced by the first appellant to do so. Moreover, the moneys paid as maintenance are insufficient to maintain the minor child and, so it was argued, it was necessary for the first appellant to be available to care for the child.

[9] The second appellant too left school during grade 12 and is currently 24 years old. She too is unemployed and she has two children, the younger being just 1 year of age. She too did not testify in mitigation, but it was placed on record on her behalf by her legal representative that her child was ill, suffering from bronchitis and was due to be taken to the Red Cross Children's Hospital in Cape Town for treatment. By virtue of her arrest, however, the child did not go.

[10] In these circumstances the appellants' legal representative requested, with reliance on *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) (2008 (3) SA 232; 2007 (12) BCLR 1312; [2007] ZACC 18), that a probation officer's report be obtained in respect of the material circumstances relating to the two appellants. The magistrate, however, would have none of it and the appellants' legal representative was afforded no reasonable opportunity to present an argument in this

regard. Having effectively prevented her from bringing the application, the following exchange occurred:
'*Court*: So you may proceed if you still want to mitigate for your clients, you may proceed. Is that all, or are you still going to mitigate for them?
Miss Nothywana: I am going to mitigate Your Worship, that is if you are not granting the correctional [interrupted] . . . .
Court: No, I'm not saying stop. You can see, I may listen to what I'm [sic] saying, but what I'm saying for them it is out let me tell you now.'
[11] In *S v M* supra Sachs J stated at 551*c* – *d*:
'Section 28(2) of the Constitution provides that "(a) child's best interests are of paramount importance in every matter concerning the child". South African courts have long had experience in applying the "best interests" principle in matters such as custody or maintenance. In our new constitutional order, however, the scope of the best-interests principle has been greatly enlarged.'
[12] Later Sachs J recognised that society had a great interest in seeing that its laws were obeyed and that criminal conduct was appropriately penalised. Indeed, he held that it was profoundly in the interests of children that they grow up in a world with moral accountability, where criminality was publicly repudiated. On the other hand, he recognised that the children were innocent of the crime and yet their needs and rights tend to receive scant consideration when a primary caregiver is sent to prison. He then concluded at 562*a* – *c*:
'Sentencing officers cannot always protect the children from these consequences. They can, however, pay appropriate attention to them and take reasonable steps to minimise damage. The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.'
[13] In the present matter the magistrate was dismissive of their interests. No attempt was made to investigate their circumstances or the quality of whatever alternative care was available. No attention was paid to who would maintain them in their mother's absence. The present case is clearly a matter in which further investigation of the children's circumstances is called for. No social worker's report was called for, nor was any other method used for acquiring adequate information. The magistrate proceeded blindly to pass sentence, without having sufficient or any independent and informed opinion to enable her to weigh the interests of the children, as was required by s 28(2) of the Constitution. Indeed, a perusal of her judgment reveals that she gave no consideration at all to the interests of the children or to the personal circumstances of the appellants.
[14] In the circumstances I consider that the magistrate has misdirected herself in these respects. The sentence imposed accordingly falls to be set aside and this court is at liberty to impose the sentence which we consider to be appropriate.

[15] A disturbing feature of this appeal is that it is heard at a time that the sentences imposed have, in all probability, already been served. The appellants were sentenced in November 2012 and the sentence imposed has virtually expired. The record reflects that the appellants have not been released on bail pending the appeal. In these circumstances, no useful purpose can be served in referring the matter back to the magistrate to obtain an appropriate social worker's report and to acquaint herself with the circumstances necessary for the consideration of an appropriate sentence, as would ordinarily be desirable. Justice requires that we address the issue. On a reconsideration of the sentence imposed, and having regard to such circumstances as we have at our disposal, I consider that an appropriate sentence in each case would have been 12 months' imprisonment.
[16] In the result:
1. The appeal succeeds.
2. The conviction of the appellants is confirmed.
D 3. The sentence imposed by the magistrate is set aside and substituted in each case by a sentence of 12 months' imprisonment.
4. The sentence imposed is backdated to 12 November 2012.

2. S v LOURENS 2016 (2) SACR 624 (WCC)

Where the court has to consider the suspension of an accused's driver's license the accused's personal circumstances as well as the interests of the community has to be taken into account.

Savage J (Henney J concurring):

[1] This matter came to this court by way of review from the magistrates' court at Piketberg in terms of s 302 of the Criminal Procedure Act 51 of 1997 (the CPA). The accused, Mr Werner Lourens, was convicted I of contravening s 65(1) of the National Road Traffic Act 93 of 1996 (the Act), in that on 17 October 2015 on Asblom Street, a public road in Piketberg, the accused drove a motor vehicle while under the influence of alcohol. The accused pleaded guilty to both the main and the alternative charge under s 65(2), in which he admitted that the concentration of alcohol in his blood was 0,18g/100 ml.
[2] Having convicted the accused on the main charge, the presiding magistrate explained the provisions of s 35 of the Act to the accused who testified following his conviction that he was 21 years old, unmarried, had passed matric and that he had been employed for eight months at Dup Meubels in Piketberg earning R5000 per month. He has held a driving licence for two years and requires his licence for work, as he undertakes deliveries. The accused stated that the incident took place at 21h30, that he was alone in the vehicle, the road was quiet with no other vehicle or pedestrians involved, and no accident occurred. It was submitted for the state that,

although the accused was a first offender, a serious crime was committed and that the police had been contacted regarding his driving. The accused was a danger to himself and the public and a sentence must be imposed which sends a message and serves to deter the future commission of the offence.

[3] The magistrate sentenced the accused to a fine of R6000 or 12 months' imprisonment of which half was suspended for a period of four years on condition that the accused was not again convicted of a similar offence during the period of suspension. In addition, the accused's driving licence was suspended for a period of six months from 15 March 2016. The matter was thereafter referred to this court for review in the ordinary course in terms of s 302 of the CPA. Having had regard to the matter, it appeared to this court in terms of s 304(2)*(a)* that the proceedings were not in accordance with justice, for the reasons which follow, but that it was not necessary to obtain a statement from the judicial officer who presided at the trial setting forth the reasons for the sentence imposed, which were self-evident. Furthermore, given the period of suspension of the driving licence imposed, the matter was considered urgent and therefore stood to be determined forthwith.

[4] On review the accused made written submissions to this court regarding the suspension of his driving licence, which submissions were supported by way of a letter from his employer, Mr Japie du Plessis, the owner of Dup Meubels CC in Piketberg. These submissions confirmed the accused's evidence that he requires his driving licence for purposes of his employment, in order that he is able to undertake deliveries for his employer.

[5] Section 35 of the Act, which was amended with effect from 20 November 2010 by the National Road Traffic Amendment Act 64 of 2008, provides that:

'(1) Subject to subsection (3), every driving licence or every licence and permit of any person convicted of an offence referred to in —

(a) section 61(1)*(a)*, *(b)* or *(c)*, in the case of the death of or serious injury to a person;

(aA) section 59(4), in the case of a conviction for an offence, where —

(i) a speed in excess of 30 kilometres per hour over the prescribed general speed limit in an urban area was recorded; or

(ii) a speed in excess of 40 kilometres per hour over the prescribed general speed limit outside an urban area or on a freeway was recorded;

(b) section 63(1), if the court finds that the offence was committed by driving recklessly;

(c) section 65(1), (2) or (5),

where such person is the holder of a driving licence or a licence and permit, shall be suspended in the case of —

(i) a first offence, for a period of at least six months;

(ii) a second offence, for a period of at least five years; or

(iii) a third or subsequent offence, for a period of at least ten years,

calculated from the date of sentence.

(2) Subject to subsection (3), any person who is not the holder of a driving licence or of a licence and permit, shall, on conviction of an offence referred to in subsection

(1), be disqualified for the periods mentioned in paragraphs (i) to (iii), inclusive, of subsection (1) calculated from the date of sentence, from obtaining a learner's or driving licence or a licence and permit.
(3) If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit. . . .'
[6] Unlike s 35(1)*(c)* of the Act, which provides that a driving licence 'shall be suspended' where an accused has been convicted in terms of ss 65(1), (2) or (5), s 34(1) records that the court holds a discretion, providing that:
'Subject to section 35, a court convicting a person of an offence in terms of this Act, or of an offence at common law, relating to the driving of a motor vehicle may, in addition to imposing a sentence, issue an order, if the person convicted is —
(a) the holder of a licence, or of a licence and permit, that such licence or licence and permit be suspended for such period as the court may deem fit or that such licence or licence and permit be cancelled . . . ;
(b) the holder of a licence, or of a licence and permit, that such licence or licence and permit be cancelled, and that the person convicted be disqualified from obtaining a licence, or a licence and permit, for any class of motor vehicle for such period as the court may deem fit . . . ; or
(c) not the holder of a licence, or of a licence and permit, declaring him or her to be disqualified from obtaining a licence, or a licence and permit, either indefinitely or for such period as the court may deem fit.'
[7] Section 276 of the CPA details the sentences that may be passed upon a person convicted of an offence. While the suspension or cancellation of a driving licence is not a sentence provided in s 276, in terms of s 35 of the Act it is clearly a punishment imposed consequent to an offence committed under s 65 (as is s 34 in relation to the offences cited in that provision). With sentences often combined by judicial officers in order to arrive at an appropriate punishment, a decision to cancel or suspend a driving licence is integral to such a determination. A suspension or cancellation order is therefore not a purely administrative adjunct to the sentence, but constitutes a significant part of the punishment imposed.
[8] The material amendments made to s 35(3) by Act 64 of 2008 were B the inclusion of the words 'after the presentation of evidence under oath' and 'circumstances relating to the offence exist'. From a plain reading of the amended provision, s 35(3) authorises the court 'after the presentation of evidence under oath' to find that 'circumstances relating to the offence exist' which justify a decision not to suspend a licence or to C suspend it for such shorter period that the court considers appropriate.
[9] In *S v Greef* 2014 (1) SACR 74 (WCC).Rogers J, with Saldanha J concurring, stated with regard to the amended s 35(3) that —

'whereas previously there was no limit on the circumstances to which a court could have regard in determining whether a non-suspension order was justified, the lawmaker has now limited the circumstances which may be taken into account to circumstances relating to the offence . . . . Since the suspension of a driving licence in terms of s 35(1) serves not only to protect the public, but also to punish the offender (see *S v Van Rensburg* 1967 (2) SA 291 (C) at 296E – F), the circumstances which — prior to the amendment — could properly be taken into account would have included all the circumstances relevant to the imposition of a sanction of that kind: not only the circumstances of the crime would have been relevant, but also the personal circumstances of the accused and the interests of the community. That is why one will find, in cases decided prior to the amendment, weight being attached, for example, to the importance to the accused person of having a driving licence for purposes of his work or family commitments, the fact that the accused was a first offender, and so forth. It is perfectly clear that the lawmaker, by now confining the relevant circumstances to those relating to the offence, has deliberately narrowed the circumstances to which regard may be had. Unless a particular circumstance can properly and rationally be said to relate to the offence, it must be left out of account.'

[10] It was stated further in *Greeff*:

'In my view, the fact that the holding of a driving licence is of particular importance to an accused person for work or family reasons is not a circumstance that can properly be said to relate to the offence. The same is true of the fact that the accused might be a first offender. Indeed, s 35(1), in setting up the periods of automatic suspension, expressly takes into account whether the accused is a first, second or multiple offender.'

[11] As with the current matter, it was made clear in *Greeff* that the court was only concerned with suspensions for which s 35(1) provides, read with s 35(3), and not with the court's discretionary power to suspend a licence in terms of s 34(1).

[12] It has been stated by our courts prior to the coming into force of the Act, and later its subsequent amendment, that the principles which guide a court in deciding whether to endorse, suspend or cancel a driving licence are the same as those which guide a court in determining an appropriate sentence, with the court holding a discretion as to how it should proceed. In *Cooper's Motor Law* 'Exercise of Discretionary Power' (RS 1, 2009) para 34.2 at B4-22. it was emphasised, in relation to an offence committed prior to the Act, that not only does this require a consideration of the nature and 'gravity of the offence and the degree of the offender's culpability, but the court should also bear in mind that to deprive an individual of the right to drive on a public road is a severe punishment and that the suspension or cancellation of a driving licence is an even more severe punishment to a person whose livelihood depends on the driving of the vehicle'.

[13] The preconstitutional era matter of *S v Toms; S v Bruce* 1990 (2) SA 802 (A) at 807. took issue with reducing the court's normal sentencing function to the level of a rubber stamp. It reiterated, with reference to *R v Mapumulo and Others*, 1920 AD 56 at 57.that the infliction of punishment is in the first instance pre-eminently a matter for

the discretion of the trial court and that courts should, as far as possible, have an unfettered discretion in relation to sentence; and secondly that punishment is to be individualised to entail a proper consideration of the individual circumstances of each accused person. Our courts in cases such as *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220; [2001] ZASCA 30) and *S v Dodo* 2001 (1) SACR 594 (CC) (2001 (3) SA 382; 2001 (5) BCLR 423; [2001] ZACC 16).have had regard to prescribed minimum sentences under our constitutional order. *Malgas* made it clear that, while the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, the factors traditionally taken into account in sentencing are not to be excluded in the sentencing process; with *Dodo* stating that minimum sentences do not compel a sentencing court to act inconsistently with the Constitution.

[14] The court in *Greef* found that s 35(3) limited the discretion of the sentencing court so as to exclude a consideration of the personal circumstances of the accused or the interests of the community. Having regard to the wording of s 35, I am unable to agree that, in the consideration of s 35(1) read with s 35(3) of the Act, 'circumstances relating to the offence' do not include the personal circumstances of the accused or the interests of the community, but are limited only to circumstances related to the commission of the offence itself.

[15] Imposing a sentence is an action that requires the court to work purposefully at finding the most appropriate sentence in a manner which accords with an accused's fair-trial right embodied in s 35 of the Constitution. Our courts have emphasised repeatedly that a sentence imposed must always be individualised, considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors, on the basis that retribution and revenge alone do not drive sentencing. As was stated in *S v Dodo*, in relation to prescribed minimum sentences in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997:

'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'

[16] An interpretation of s 35(3) of the Act, that a consideration of the accused's personal circumstances and the interests of the community are to be excluded, has the result that the sentence imposed is not appropriately individualised and is not imposed after careful consideration of all relevant factors. A presumption exists in favour of construing legislation in such a manner that rights are not interfered with and courts are to be cautious of unduly extending provisions so as to alter existing law, or to impose burdens that previously did not exist. An interpretation of s 35(3) of the Act must occur within the context of the scheme of not only the statute but also the appellant's constitutional fair-trial right, with statute law interpreted in such a manner that it alters the existing law no more than is necessary. Had the legislature intended that s 35(3) of the Act was to remove from the sentencing jurisdiction of the court a consideration of an accused's personal circumstances and the interests of

the community, in my mind, this would not only have had to be made pertinently clear in the provision, but the provision would then have had to overcome the impact that the removal of the individualisation of sentence would have on an accused's fair-trial right. It does not do so and, in my mind, the interpretation given to s 35(3) in Greef is incorrect.

[17] A plain reading of the words 'circumstances relating to the offence' in the amended s 35(3) includes a consideration of the personal circumstances of the offender and the interests of the community, so as to allow the sentencing court to impose a sentence dispassionately on consideration of all relevant factors traditionally relevant to sentencing. Punishment should —

'fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'.

In order that it does so, as was stated decades back in *S v Zinn*, 1969 (2) SA 537 (A) at 540G – H the personal circumstances of the appellant are to be considered against society's demand for retribution, which must be carefully balanced with the nature and circumstances of the crime. Intrinsic to an offence is an offender whose criminal conduct occurs within the context of the community. To find differently is to unduly insulate the factual circumstances under which an offence is committed, when it need hardly be stated that an offence is not capable of commission without an offender who operates within the broader context of his or her community. For all of these reasons, the view I take of the matter is that, in considering an appropriate sentence under s 35 consequent to the commission of an offence in terms of s 65(1), an interpretation of the words 'circumstances relating to the offence' in s 35(3) is to include a consideration of the circumstances of the offender and the interests of the community.

[18] Having explained the provisions of s 35 to the accused, it is clear that the magistrate had regard to the provisions of that section, but failed to take account of the personal circumstances of the accused, including that he required a driving licence for his work, that he was a first offender and that there was no injury or accident caused by his offence. Given that the accused is gainfully employed in a position which requires a driving licence, he runs the risk that such employment, in difficult economic times, may be terminated, were this court to confirm the suspension of his licence. In this regard, the sentence imposed upon the accused was unduly harsh, was one that was not in the interests of justice and it warrants the interference of this court on review. I am satisfied that the relevant circumstances related to the offence exist, as were placed before the presiding magistrate under oath, to justify this court, in terms of s 304(2*)(c)*(ii) of the CPA, setting aside only that part of the order of the magistrate which suspends the accused's driving licence.

Order

[19] In the result, I propose the following order:

A 1. The conviction of the accused for driving a motor vehicle while under the influence of alcohol on a public road in terms of s 65(1) of the National Road Traffic Act 93 of 1996 is confirmed.

2. The following sentence imposed upon the accused is confirmed on review:
'1. The accused is ordered to pay a fine of R6000 or serve a period of 12 months' imprisonment, of which one-half is suspended for a period of four years on condition that the accused is not convicted of an offence in terms of s 65(1) or (2) of the National Road Traffic Act 93 of 1996 committed during the period of suspension.'
3. The order of the magistrate, in terms of which the accused's driving licence was suspended for a period of six months with effect from 15 March 2016, is reviewed and set aside.

From The Legal Journals

Terblanche, S S

“Committal to a treatment centre as sentence: Complicated by an incomplete amendment”

2016 SALJ 744

Abstract
It is submitted that the following approach should be followed by courts in dealing with committal to a treatment centre.
Section 296(1) of the Criminal Procedure Act should remain the main source of the powers of the sentencing court. This means that it should require a report by a probation officer, and that it should consider whether the offender is a person as described in s 21(1) of the Drug Dependency Act. Although this Act has been repealed, through its incorporation by reference into the Criminal Procedure Act, s 21(1) obtained a distinct existence which continues until it too is expressly repealed. The court can easily establish what kind of person this is; there is a logical connection between that kind of person and the remedy (as in the past); and, as indicated above, there is no meaningful difference between the incorporated provision and the most recent provision.
The same might not be true of the reference to s 22 of the Drug Dependency Act. In order to maintain the sentencing option, the best option here might be to read this reference to be to s 33 of the Substance Abuse Act, based on the argument that this

is clearly the intention of the legislature that all treatment centres in South Africa should operate in terms of the Substance Abuse Act.
In the final analysis, it remains the legislature's task to ensure that complications such as the present one do not exist. To this end it is proposed that s 36 of the Substance Abuse Act be repealed and that its provisions be imported into s 296(1) of the Criminal Procedure Act as far as that is considered appropriate. The alternative — that s 296 be removed from the Criminal Procedure Act — is not advisable.

Campbell, J

"Short-term credit: Recent developments and the new limits on the cost of micro-loans"

2016 SA Merc LJ 461

Abstract
The new limits on the cost of credit have provided no relief for consumers of short-term credit, who are now likely to pay more for micro-loans. When all fees and interest are carefully considered in the calculation of the total cost of credit, it quickly becomes apparent that the initiation and service fees (in particular the latter) cause the total cost of small credit to be exorbitant and out of all proportion to the actual loan, the more so the smaller the loan. These fees work well in the case of large credit, where they assume incidental importance to the more significant interest charged, which is as it should be. In the case of small credit, however, these fees dwarf the cost of interest, causing the total cost of small credit to be unconscionably high, and obscuring this total cost in the web of the relatively complex calculation of the total cost of credit. This factor, coupled with the questionable purpose and unclear definition of these fees, calls into question the justification for these fees to exist at all in the case of small credit.
In order to address these shortcomings, it is suggested that the initiation and service fees should be removed in the case of short-term credit if their purpose cannot adequately be justified, and an appropriate additional price included in the interest rate to compensate for their removal. Alternatively, the maximum initiation fee and service fee on short-term credit should be considerably reduced, with an appropriate adjustment if necessary to the interest rate. Such adjustments would help to achieve an equitable and reasonable total cost of credit, having regard to the need to balance the factors set out in section 105(2) of the Act, in particular access to credit and over-indebtedness, as well as the interests of both micro-lenders and consumers.
(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za).

Contributions from the Law School

When is it competent to convict on a competent verdict?
S v Van Ieperen 2017 (1) SACR 226 (WCC)

Introduction

The Criminal Procedure Act makes provision for the passing of a competent verdict in order to prevent 'futile' prosecutions. Without the provision, a prosecutor would have to draft a fairly lengthy charge sheet, encompassing every conceivable charge with which the accused could be found guilty of and, conceivably, given the maxim that an accused must know what he is charged with so that he can properly answer that charge, leaving something out, would mean that a conviction could not be made.

Chapter 26 of the CPA[1] (Sections 256 through to s270) regulates competent verdicts, and sets out what the competent verdicts are for various statutory and common law crimes.

How do competent verdicts work?

Whether or not a conviction on a competent verdict should be upheld turns on the question of prejudice: would the accused, if convicted, have been prejudiced[2] by the conviction? And this question turns on whether he was able to answer all the allegations made against him in terms of said conviction. This is also a requirement in terms of s35(3)(a) of the Constitution.

"Basically there are two rules which must be followed in deciding whether a conviction on a competent verdict is appropriate. The first is that in terms of Chapter 26 of the Act (ss 256 – 270) it must be provided that it is competent to convict an accused person of such other charge. The sections referred to provide in great detail

[1] Criminal Procedure Act 51 of 1977

[2] *Mukwevho v S* (A452/09) [2009] ZAGPJHC 71; 2010 (1) SACR 349 (GSJ) (7 December 2009) "The principle of prejudice being decisive and, as had occurred in *Mwali*, that, in determining whether there had been any prejudice by either the State or the court failing pertinently to draw attention to the possibility of a competent verdict, the court would consider whether the defence may have been conducted differently."

exactly which crimes an accused person may be convicted of if the crime charged is not proven (competent verdicts). Thus, culpable homicide is a competent verdict to a charge of murder. The second is that, even though such other offence is indeed a competent verdict, its commission must be proven beyond reasonable doubt. Thus, if murder is not proven, but culpable homicide is proven beyond a reasonable doubt, the accused person may be convicted of culpable homicide."[3].

It would appear then, that only if the competent verdict is listed as such under the relevant section in the CPA, can a conviction on a competent verdict so listed, be obtained. However, S270 states that "If the evidence on a charge for any offence not referred[4] to in the preceding sections of this Chapter[5] does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged[6], the accused may be found guilty of the offence so proved."

Essentially, this is where the difficulty lies in relation to the *Van Ieperan*[7] case.

Facts

The appellant and the complainant were both attorneys. It appeared from her testimony, that on the day in question, the complainant alleged that as they both were leaving court, the appellant had slapped her on the buttocks after saying he wanted to ' "smack her bum…" (which he did) that she "wore sexy shoes…" and that "she needs a man…"'[8]. The appellant was charged in the district court of Malmesbury with sexual assault[9] , and was charged in the alternative with common assault. The appellant pleaded not guilty to both the main and the alternative charge, and was acquitted on both charges as the magistrate found that the state had failed to prove the necessary intent for said charges. He was however found guilty of *crimen injuria*. The Magistrate relied on s270 of the Criminal Procedure Act[10]. He was sentenced to a R2000 fine or 3 months imprisonment. He took the matter on appeal stating that the state had failed to prove its case beyond a reasonable doubt, and secondly, that the court erred in finding him guilty of *crimen injuria*.

[3] Miller, M (2014) "Is theft a competent verdict on a charge of fraud?" *De Rebus*, n546 (Oct 2014): 59-60 translating and quoting *S v Mavundla* 1980 (4) SA 187 (T) per Le Grange J at 190H – 191A
[4] Emphasis added
[5] Chapter 26 of the CPA
[6] Emphasis added
[7] 2017 (1) SACR 266 (WCC)
[8] At para 28 of the judgement
[9] In terms of s5(1) of the Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007, read with sections 1, 56(1), 56A, 57, 58, 59, 60 and 61 of said Act.
[10] supra

The issue before the high court thus, was whether *crimen injuria* was a competent verdict to sexual assault or common assault.

Judgement and application of the doctrine of competent verdicts

The first difficulty with the decision made in the court *a quo* arises from the wording in s270 of the CPA. It is only applicable 'to an offence so charged'. *Crimen injuria* was not mentioned in the charge sheet, and so it is not a verdict that the court can make. This could however have been remedied had the prosecution simply given the appellant notice of its intention to rely on *crimen injuria* by amending the charge sheet.[11]

Crimen injuria is defined as "unlawfully, intentionally and seriously violating the dignity or privacy of another"[12]. It protects "dignitas, all the rights of personality other than reputation and bodily integrity."[13] The prosecution failed to mention any of this in the charge sheet, yet his appears to have been raised in evidence in chief. This appears from para 33 of the judgement: "the complainant testified about how shocked she was that the appellant spoke to her in that way because she is an attorney of 11 years standing, the manager of the Legal Aid Board's Judicare offices in Malmesbury, Atlantis and Vredenburg and, therefore, a professional person, who was engaged in rendering professional services to her clients at the time when those words were uttered. The complainant considers herself to be on an equal footing with the appellant. She had difficulty understanding whey the appellant humiliated her and attempted to diminish her standing."

The judge of the appeal court goes further to state that "…the offending words collectively, used in the context where both the appellant and the complainant are attorneys present in a court room where other colleagues and members of the public were present, had the effect of humiliating and belittling the complainant."[14] However, the verdict of the court *a quo* cannot stand, simply because of substantive irregularity – a failure on the part of the prosecution to draft the charge sheet properly, and alternatively, failing to have the charge sheet amended[15]. Although the evidence and testimony that was led clearly supports and satisfies the requirements to prove impairment of her dignity, the stumbling block preventing the conviction of *crimen injuria* from standing is the rule that "although the state can supplement the allegations in the charge sheet with evidence led at the trial, it cannot create a new offence by virtue of such evidence."[16]

[11] At paras 12 and 13 of the judgment.
[12] Criminal Law by Snyman 6th ed at 461
[13] At para 29 of the judgement
[14] At para 34
[15] At para 35
[16] At para 42

Reliance on a conviction on a competent verdict is legislated for and regulated by Chapter 26 of the CPA. Sections 256 through to 269 cater for specific offences, and more specifically list what the competent verdicts for those listed offences are. S270 deals with main charges that are not listed in Chapter 26. The purpose of listing the competent verdicts in the act is to avoid lengthy charge sheets[17]. It was held in S v Jabulani[18] that "it is possible that the evidence might fall short of proving the crime charged, but nevertheless succeeds in proving beyond reasonable doubt the commission of some other offence not specifically formulated as an alternative charge, in terms of s83 of the Act, to the charge in the indictment or charge sheet, as the case may be. This type of situation is governed by the statutory rules pertaining to so-called competent verdicts, that is, the unexpressed or latent or implied normally lesser than or akin to the crime charged, is proved."[19]

Thus, for a competent verdict to be deliverable, firstly it must be listed as a competent verdict in the CPA, and secondly, all the elements to prove liability for said competent verdict must all have been proved beyond a reasonable doubt.

Because *crimen injuria* is not listed as a competent verdict for either the main charge or the alternative charge which the appellant was charged with, it cannot and does not stand as a verdict deliverable by the court in these circumstances. Not only because of the provisions in the Act, but also because the prosecution failed to amend the charge sheet and bring *crimen injuria* within the ambit of s270 – here it would have been sufficient even if the prosecution had simply included the "allegation that the verbal utterances of the appellant impaired the dignity of the complainant."[20] All that was required was that the allegation be included, not necessarily that an alternative charge be included.

The constitution and the right to a fair trial

One may be inclined to say that this situation is unfair, and that where the facts clearly point to a particular outcome, that outcome should be a competent one deliverable by the court. However, s35 (3) (a) of the Constitution clearly and emphatically states that "every accused person has the right to a fair trial, which includes the right to (a) be informed of the charge with sufficient detail to answer it…" This right was explained in *S v Mashinini & another* [21]as being "… central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly informed of the specific charge(s) which he or she faces. Evidently, this would also include all competent verdicts. The clear objective is to ensure that the charge is sufficiently detailed and clear to an extent

[17] Commentary on the Criminal Procedure Act, Du Toit et al, RS 53, 2014 ch26-p1
[18] 1980 (1) SA 331 (N)
[19] Supra at 332B-C of the judgement
[20] At para 12 of the judgement
[21] 2012 (1) SACR 604 (SCA)

where an accused person is able to respond and, importantly, to defend himself or herself. In my view, this is intended to avoid trials by ambush."

Concluding remarks from the High Court

The court states at para 26 that the court *a quo* "failed to apply the law relating to common assault correctly. The state therefore could have appealed against the acquittal on common assault on a question of law. The state however elected not to appeal the acquittal on a common assault and the conviction on *crimen injuria* under section 310(1) of the Criminal Procedure Act. In *S v Zoko* 1983 (1) SA 871 (N) at 875 C the court held that the magistrate's decision that his factual finding supports a conviction of a crime that the accused was not charged with, is a decision on a question of law. This court is therefore, not in a position to interfere with the court *a quo's* finding that the State failed to prove the necessary intent required to establish that he appellant assaulted the complainant." Thus, as the prosecution failed to raise this specifically on appeal, the appeal court is not empowered to do this. It is vital that that prosecution performs its tasks properly in order to ensure that justice is done.

The court went further to comment on the behavior and conduct of legal practitioners: "It is incumbent upon attorneys and legal practitioners generally, to develop a consciousness about Constitutional rights and obligations which they ought to apply in the course of practicing their profession. It is necessary to be alert to the imperative of upholding the dignity of others and to refrain from humiliating a colleague with sexist and undermining innuendos." The court was not at all impressed with the way in which the appellant conducted himself or addressed the complainant, and although the verdict could not stand, the court directed that the record of the judgement be forwarded to the Law Society for investigation and an appropriate remedy from within the profession.[22]

Conclusion

It is clear that the duty of the prosecutor to draft a charge sheet correctly cannot be taken lightly. It is the very first stage in the process of the trial, and as we see in this case, the failure, even at a later stage resulted essentially in nullity. The prosecution could not be saved by the rules and provisions of competent verdicts, because the prosecution failed also in amending the charge sheet.

A further issue lies in the finding of the magistrate in the court a quo. It appears from the judgement in the high court that a verdict of guilty on the charge of common assault could and would have been appropriate. So, it is accordingly submitted that

[22] At paras 45, 48 of the judgement and para 2 of the order

magistrates must be aware and vigilant of what the elements of offences are so as to ensure that appropriate verdicts are made, rather than the end result being a prosecution in futility. On this point, we can turn once again to the prosecution, and urge that the prosecution bring matters on appeal where such instances arise. As stated in the judgement of the high court, the prosecution in this instance could have and should have done this.

A third, and worrisome issue is the manner in which members of the profession conduct themselves and how they treat and address their colleagues. We must remember that we are officers of the court, and that carries with it the responsibility and duty to behave appropriately. At all times. In this case, the offence occurred in side the court room (albeit as the parties were leaving the court), but it speaks volumes of the callous disregard that the appellant has for the Constitution, basic human rights, woman's rights and the concept of dignity and its impairment.

It is hoped that this case serves as a reminder to us all of the positions we hold in society and the added duties that accompany the title of 'lawyer'.

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Matters of Interest to Magistrates

Yes, be worried about the Hate Bill

On the last day of this month, the first call for public comments on the Prevention and Combating of Hate Crimes and Hate Speech Bill will come to a close and the public will have had its first real chance to see and shape this potentially game-changing piece of policy.
For civil society, more than a decade of protest, lobbying, advocacy and collaboration culminates in this Bill and a difficult process of introspection and strategy is required at this final hurdle.
Civil society, and the Hate Crimes Working Group in particular, has been deeply involved in the initial process of developing this Bill. The spirit of collaboration between civil society and the department of justice exemplifies how the parties can work together without sacrificing their individual aims.

The new Bill creates some protection for groups vulnerable to targeted crimes because of their race, sexual orientation or gender, national origin, occupation and disability. It fulfils three essential necessities in combating these types of crimes.

The first is the policing and prosecution of these crimes, where the Bill creates obligations for the police, the National Prosecuting Authority and others to identity hateful motives in crimes and investigate and prosecute on this understanding.

The police often fail to understand, recognise and thus investigate hateful motives in crimes against lesbian, gay, bisexual, transgender and intersex (LGBTI) people and foreigners.

The second aspect relates to monitoring and reporting. An unprecedented obligation has been created to report and monitor crimes with a hateful motive.

These statistics will form part of the national crime statistics and help the state and civil society to understand more fully the landscape of targeted violence, and thus be able to tackle the prevention and combating of these crimes.

Third, the Bill's focus on prevention creates cross-cutting mandates for various departments – health, labour, home affairs, higher and basic education and others – to create holistic programmes relating to the prevention of hate crimes. This includes programmes to train and sensitise public sector staff, and ensure they are aware of their duty to prevent and combat these crimes.

There is much to be commended in this Bill but there is also much to be cautious about.

The Justice Department announced early last year that it would include hate speech in the Bill and has stated publicly that this is owing in part to the racist outbursts over the 2015 holiday period. That Penny Sparrow and others seem to have precipitated such a major policy shift is worrying, because it suggests the state did not consider hate speech a problem up to that point. Cause for further concern is that a decade-long process of deliberation has been interrupted by a knee-jerk and political reaction to what is the deep and complex problem of racism and white supremacy in South Africa.

The desperate reaction to the outcry that followed this racism shows in the hasty construction of the hate speech provision in the Bill. The interpretation of hate speech is broad to the point of futility and has been wedged into an otherwise useful and important Bill without the kind of consultation that had strengthened the Bill up to that point.

The definition of hate speech in the Bill contains two parts. Part one refers to the communication of "hate" itself and qualifies this as any person who communicates to one or more people in a manner that advocates hatred or is threatening, abusive or insulting. Part two relates to the intention of the communication in whether it demonstrates a clear intention to incite others to harm people or to stir up violence or bring into contempt or ridicule any person or group of persons.

To qualify, both parts must be present and this does, for the most part, cohere with our current understanding of harmful speech in that it may lead to violence. But this expanded definition would also consider insulting speech that intends to ridicule people as a criminal offence.

Although the Promotion of Equality and Prevention of Unfair Discrimination Act has made hate speech illegal since 2000, this remains a civil rather than a criminal remedy, and one that South African jurisprudence has still not fleshed out despite two decades of protective constitutional provision.

Our Constitution's Section 16 Right to Freedom of Expression is constrained by a provision on hate speech that limits the right. Yet both differ from the Bill proposals, first because they are not criminal law responses and, second, because (definitional uncertainty aside) they require the hateful speech to be linked to violence or its promotion.

The Bill is an unconstitutional limitation of freedom of expression as set out in Section 16 and not sufficiently connected to the good it wishes to achieve and would seek to counter. It may fall short of the test in the "limitations clause" in Section 36 of the Constitution.

This test determines whether a right can be limited based on, among others, the importance of the right, the importance of the aim of the limitation and the manner it could otherwise be achieved.

Civil society is then faced with a difficult choice: Does it advance the Bill, even with this poison-pill provision, or does it oppose its inclusion and perhaps risk scuppering the entire Bill?

This does not mean that hate speech is not a problem or that there shouldn't be severe consequences for it. The issue is how we wish to tackle it and how we view the role of the state and criminal justice system in this fight. The issues facing civil society fall broadly into three areas.

The first is a rejection of politicisation of the issue. The state wishes for civil society to be either service providers or constructive partners, where "constructive" is often interchangeable with "uncritical in public". This leaves civil society with a dilemma of co-operation and potential co-option, or the possible inability to influence from outside this potentially toxic relationship.

The state has taken a hate crimes process spanning years and combined it with the immediately current and difficult problem of hate speech, and attempted to "fix" it in one fell swoop. As civil society, our role is to reject this as political manoeuvring and to demand that the state make all its policy decisions on a considered basis, and not treat vulnerable groups and age-old problems as a political football.

Second, the potential erosion of rights must be confronted head-on. Although some responses to the Bill have been predictable and alarmist, there is a justifiable concern in the way that this hate speech provision was formulated and the way it found itself included in the Bill.

This Bill cannot be used, for example, to remove the rights of satirists to attack politicians, mostly because the courts will probably strike down any interpretation of the Bill in that manner as unconstitutional.

The best-case scenario, however, is not a good enough reason for the passage of legislation that potentially endangers our right to freedom of expression.

The hate speech provision is a problem in and of itself, but is exceedingly worrying when viewed in the context of a state that is growing increasingly uncomfortable with

pointed criticism and one that joined just seven other countries, including China, Venezuela and Russia, in voting against a United Nations resolution that would have sought to protect space for civil society.

Finally, we must ask whether we are backing a false remedy to serious problems.

Many are uneasy about criminalising speech and making a role for the state in policing speech. To be clear, where speech can be seen to incite violence, there is a clear mandate to stop that speech. But where the speech is insulting or causes discomfort, the role of the criminal justice system, and by extension the state, is more debatable. Could more benefit perhaps exist in giving real strength to our equality courts and empowering more people to protect their rights in this manner?

Reconciliation is the subject of intense debate as a new generation of young black South Africans feel they are failing to see the benefits promised by democracy and continue to live with the scars – old and more recent – of racism. With that in mind, it should be clear that we do not yet fully understand how to tackle racism or homophobia, transphobia, xenophobia and others. It is doubtful that criminalising speech and jailing those who offend will have the desired effect.

The role of the criminal justice system and the department of corrections in rehabilitating offenders are already wholly neglected. Our system overflows with prisoners awaiting trial, petty criminals and serious offenders who are being denied some of their most basic human rights but also their chance to rehabilitate and rejoin their communities.

It is not clear how the state envisions the role of the already overburdened criminal justice system in our ongoing attempts to tackle racism and other forms of supremacy and discrimination. It should be making civil society uneasy, to say the least.

The choices available to civil society are stark. They range from smaller decisions about how we tweak this Bill, to extract the most utility from it, to larger decisions about the very nature of our democracy, freedom and the role of the state.

This does not mean the strategy of constructive engagement should be abandoned. There is important work to be done with many of the committed people in our civil service who maintain the machinery of government.

This work and these relationships should not overshadow the oversight that civil society should maintain. Now is the time for a co-ordinated and clear voice that provides advice and acts as a counterbalance to the state rather than being a mere rubber stamp or tool for engagement.

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A Last Thought

"Mercy is not a reward for remorse. In *S v Rabie* 1975 (4) SA 855 (A) Holmes JA said that mercy or compassion or plain humanity had nothing in common with 'maudlin sympathy for the accused'. It is a 'balanced and humane quality of thought' which tempers one's approach when considering the *Zinn* triad. One does not first determine an appropriate sentence and then reduce it for the sake of mercy (861D-E). Mercy, or a balanced and humane way of thinking, infuses the assessment of the three *Zinn* considerations; it is not an independent fourth element (*S v Roux* 1975 (3) SA 190 (A) at 197E-198C)."

Per Rogers J in Smith v S (A273/16) [2017] ZAWCHC (26 January 2017)