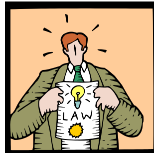
e-MANTSHI

A KZNJETCOM Newsletter

January 2018: Issue 138

Welcome to the hundredth and thirty eight 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 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.
"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."
Any feedback in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The President has, under section 19 of the Maintenance Amendment Act, 2015 (Act No. 9 of 2015), issued a notice in Government Gazette no 41352 dated 21 December 2017 that the following sections of the Maintenance Amendment Act will come into operation on 5 January 2018: sections 2, 11 and 13(b). Amended Regulations in this regard has also been promulgated in the same Government Gazette. The important amendment is Section 2 which amends section 7 of the principal Act as follows:

"(3) (a) If a complaint is lodged with a maintenance officer in terms of section 6 and the maintenance officer, after all reasonable efforts to locate the whereabouts of the person who may be affected by an order which may be made by a

maintenance court pursuant to the complaint so lodged, have failed, the maintenance officer may apply to the maintenance court, in the prescribed manner, to issue a direction as contemplated in this subsection.

(b) If a maintenance court is satisfied that all reasonable efforts to locate the whereabouts of a person have failed, as contemplated in paragraph (a), the court may issue a direction in the prescribed form, directing one or more electronic communications service providers to furnish the court, in the prescribed manner, with the contact information of the person in question if that person is in fact a customer of the service provider."

(This Government Gazette can be accessed here: https://archive.opengazettes.org.za/archive/ZA/2017/government-gazette-ZA-vol-630-no-41352-dated-2017-12-21.pdf)

2. The Children's Amendment Act (No.17 of 2016) and the Children's Second Amendment Act (No. 18 of 2016) have been put into operation with effect from the 26th of January 2018. The proclamation to this effect was published in Government Gazette no 41399 dated 26 January 2018.

The Children's Amendment Act (No 17 of 2016) can be accessed here: http://www.ddyn.com/downloads/docsofinterest/CHIL_GG40564_Act_17_of_2016.pdf

The Children's Second Amendment Act (No 18 of 2016) can be accessed here: http://www.ddyn.com/downloads/docsofinterest/CHIL_GG40656_Act_18_of_2016.pdf

Recent Court Cases

1. S v CACAMBILE 2018 (1) SACR 8 (ECB)

In a matter where an accused had been found guilty of assault with intent to do grievous bodily harm, and, applying the provisions of s 77(6)*(a)*(i) of the Criminal Procedure Act 51 of 1977 (the Act), the court ordered that he be detained at a 'mental hospital' pending a decision by a judge in chambers in terms of s 47 of the Mental Health Care Act 17 of 2002 the court had not been informed of the nature and extent of any admissible evidence against the accused, and this was fatal to the proceedings.

Stretch J (Van Zyl DJP concurring):

[1] On 16 August 2017 the Alice magistrate convicted the accused of assault with intent to do grievous bodily harm, and, applying the provisions of s 77(6)*(a)*(i) of the Criminal Procedure Act 51 of 1977 (the Act), ordered that he be detained at Fort Beaufort Mental Hospital pending a decision by a judge in chambers in terms of s 47 of the Mental Health Care Act 17 of 2002. The court recorded that the matter was subject to automatic review, as provided for in s 302 of the Act.

[2] This is not correct. An order for the detention of an accused person pending a judge's decision is not a sentence, and as such is not automatically reviewable. If, however, a magistrate has reason to believe that there may be a problem in a particular case, he is free to submit the matter for review and the High Court will exercise its powers of review if necessary (*S v Zondi* 2012 (2) SACR 445 (KZP)).

[3] In the matter before us the magistrate sent the matter on automatic review under cover of an opinion that the proceedings were not in accordance with justice. For the reasons which follow, I agree that the proceedings were not in accordance with justice. In the circumstances the magistrate's assumption, that the matter is automatically reviewable, is irrelevant.

[4] The magistrate's order is based on a psychiatric report dated 26 May 2017 signed by three psychiatrists who apparently observed the accused at Fort England Hospital during the period 11 – 22 May 2017.

[5] At the conclusion of the period of observation, they diagnosed the accused as schizophrenic with alcohol and cannabis abuse. In terms of s 79(4)*(c)* of the Act, they found that the accused was unable to follow court proceedings so as to make a proper defence. In terms of s 79(4)*(d)* they also concluded that, although the accused was able to appreciate the wrongfulness of his conduct at the time of the alleged offence, he was unable to act in accordance with an appreciation of such wrongfulness. Accordingly, they recommended that the accused be admitted to Fort England Hospital as a state patient in terms of ch VI of the Mental Health Care Act.

[6] The magistrate criticized the proceedings on a number of grounds. In my view some of these are perhaps unduly self-critical and do not necessarily render the proceedings not to have been in accordance with justice. I intend only to deal with those which do, in my view, have the effect of vitiating the proceedings. They are the following:

There is no indication whether the content of the report and the findings of the panel were accepted or disputed by the accused

[7] Section 77(2) of the Act reads as follows:

'If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the mental condition of the accused and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.'

[8] It is indeed so that, although the prosecutor gave the magistrate the assurance that the accused had been informed of the contents of the report, the enquiry appears to have ended there. The accused's attitude to the findings of the panel is not recorded. Indeed, it appears that he and/or his family members were not invited to comment. This is a misdirection.

[9] Had the accused been legally represented at the time, the misdirection may not have been of such a serious nature as to vitiate the proceedings. However, there is no indication that he was legally represented when the order was made. On the contrary, it appears from the record that he was not, despite the Acting Director of Public Prosecutions having given a written directive (which was before the court at the time) that the accused 'must be legally represented during the enquiry', in terms of the decision in this division of Judge Hartle in *S v Matu* 2012 (1) SACR 68 (ECB), where it was held that the court has a duty to establish whether the report is disputed by either the prosecutor or the accused, and to note their responses in this regard on the record. In that matter Hartle J went further and observed as follows in para 28:
'In my view, substantial injustice has resulted by virtue of the fact that the accused was unrepresented at the enquiry. In the result I propose to set aside the order (and both template orders issued pursuant thereto), and remit the matter back to the magistrate to determine the matter afresh, even if the input of a legal practitioner turns out to be perfunctory only in such further proceedings. The object of this order, however, is to ensure that the fundamental rights of the accused are respected in that process. In enquiries such as these, where much store is set by assurances given that there is available evidence to justify a finding that the act in question has been committed and that it involves serious violence — putting it into the category of complaints that require the more drastic directive referred to in s 77(6)(i) — legal assistance is not merely desirable but necessary.'

[10] This brings me to a further, and to my mind fatal, criticism of the proceedings:
Whether the court was informed of the nature and extent of any admissible evidence available in the docket linking the accused to the offence

[11] The relevant portions of s 77(6)*(a)* state that the court may, if it is of the opinion that it is in the interests of the accused (taking into account the nature of the accused's incapacity and unless it can be proved on a balance of probabilities that the accused committed the act in question) order that any information or evidence it deems fit be placed before the court in order to determine whether the accused has committed the offence. With respect to a charge involving serious violence or if the court considers it to be necessary in the public interest, once the court has found that

the accused committed the act, the court shall direct that the accused be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of s 47 of the Mental Health Care Act.

[12] These steps were carefully, clearly and categorically set out in the Acting Director of Public Prosecutions' letter which was placed before the court. Indeed, the instruction emphasizes the prosecutor's duty to inform the court of 'what *admissible* evidence is available in the docket linking the accused to the offence, in order to enable the Court to determine whether the accused committed the act' [emphasis added].

[13] The magistrate in these proceedings made a factual finding that the accused committed the offence of assault with intent to do grievous bodily harm. There is nothing before me to suggest that the magistrate did so as a consequence of having been informed about any admissible evidence to support such a conclusion. Indeed, it seems that no such information was placed before the court. In the absence of such information or evidence, the finding constitutes a material misdirection which has the effect of vitiating the proceedings.

[14] The record must show whether any facts were presented to the presiding officer, enabling him to determine and find whether the accused committed the actus reus complained of (see *S v Sika* 2010 (2) SACR 406 (ECB) at 408*a* – *b*). It seems to me from the ruling, that the magistrate did not convict the accused as recorded in the J4 but merely found that he committed the offence in question. This finding would have been a proper one, had the court been apprised of information or evidence to support such a finding. Not only was this not done, but the review coversheet suggests that the accused was convicted and sentenced. This is confusing. The portions of the standard form J4 for review proceedings relating to conviction and sentence should not be completed by rote in matters of this nature.

[15] A last aspect that deserves mention is the wording used in the ruling, the charge-sheet and the review-referral coversheet. Throughout, reference is made to the accused being detained at a 'mental' hospital pending a judge's decision in terms of s 47 of the Mental Health Care Act or until a further lawful order is given for the accused's 'disposal'. Lawyers are encouraged to use the term 'psychiatric hospital' or 'institution' instead. I am not sure what the word 'disposal' is intended to convey. My interpretation is that it is simply offensive. The literal meaning of the word as a noun is the action or process of getting rid of something, especially by throwing it away. It is inappropriate to use such wording with respect to a person.

[16] I make the following order:
(a) The magistrate's order dated 16 August 2017 recorded on the face of the J15 is set aside.

(b) The matter is remitted to the magistrate to make a determination pursuant to the relevant provisions of s 77 of the Criminal Procedure Act 51 of 1977, and to issue such order and directive thereupon as is appropriate in the circumstances.
(c) Arrangements must be made for the accused to be provided with the services of a legal practitioner as envisaged in s 77(1A) of the Criminal Procedure Act 51 of 1977.

2. S v RANTLAI 2018 (1) SACR 1 (SCA)

It was imperative for judicial officers to consider the desirability of a globular sentence (the court imposed a globular sentence of 20 years' imprisonment for three counts taken as one for the purposes of sentence) carefully before imposing it, bearing in mind the kind of problems it might cause.

Bosielo JA (Seriti JA, Saldulker JA, Plasket AJA and Tsoka AJA concurring):

[1] The appellant was convicted in the regional court, Orlando, on three counts of robbery with aggravating circumstances read with s 51(2)*(a)* of the Criminal Law Amendment Act 105 of 1997 (the Act) as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007; one count of unlawful possession of a semi-automatic firearm (count 4); and one count of unlawful possession of ammunition (count 5). He was sentenced to 20 years' imprisonment on all three counts of robbery with aggravating circumstances. The trial court took all three counts together for purposes of sentence. In respect of count 4 the appellant was sentenced to 15 years' imprisonment with 11 years wholly suspended for five years on suitable conditions. This meant that he was sentenced to an effective term of four years' imprisonment. In respect of count 5 he was sentenced to one year's imprisonment. His effective sentence was thus 25 years' imprisonment.

[2] The appellant failed in his application for leave to appeal before the regional magistrate against both his conviction and sentence. Upon leave to appeal having been refused, he filed a petition with the Gauteng Local Division, Johannesburg, for leave to appeal. The court a quo granted him leave to appeal against his conviction only.

[3] The appellant's appeal before the court a quo succeeded partly, in that the conviction on count 1 was set aside. However, the court below left the sentence of an effective 25 years' imprisonment unaltered. Aggrieved by this, he then petitioned this court for special leave to appeal against the order of the court a quo which essentially confirmed the sentence imposed by the regional magistrate. This court granted the appellant special leave to appeal against the sentence to this court. Hence the appeal before us.

[4] Because this appeal turns on a narrow legal issue, it is not necessary to deal with the evidence tendered. The appellant's counsel attacked the sentence on two

grounds. The first ground was that the regional magistrate failed to investigate and consider if there were substantial and compelling circumstances present, as required by s 51(3) of the Act, which could justify a departure from the minimum sentence prescribed by s 51(2)*(a)* of the Act. In support of his submissions, he relied on the following facts, namely the appellant's youthfulness; that there were no injuries caused to the complainants during the robberies; that only two cellular phones were taken; and that the appellant had spent almost a year in prison awaiting his trial. He submitted that these facts, considered cumulatively, are weighty and substantial enough to justify a departure from the minimum sentence of 15 years' imprisonment.

[5] The second attack was against the globular sentence of 20 years' imprisonment imposed on the appellant in respect of three counts of robbery which were considered together for purposes of sentence. The attack was premised on the basis that, notwithstanding the fact that the conviction in count 1 (robbery with aggravating circumstances) was set aside by the court below, the court below did not take that into account when considering an appropriate sentence. In fact, it left the sentence imposed by the regional magistrate intact. In simple terms the argument is that the appellant is still serving a globular sentence of 20 years' imprisonment, as if the conviction on count 1 still stands.

[6] On the contrary, the respondent's counsel submitted, regarding the first ground, that the facts and personal circumstances put forward by the appellant did not qualify as substantial and compelling circumstances justifying a departure from the minimum sentence prescribed by the Act. However, he conceded that the composite sentence of 20 years' imprisonment appeared, in the circumstances of this case, to be undesirable, inappropriate and impractical, as it was impossible to ascertain how to apportion the sentence in respect of each count of robbery. To resolve this conundrum, he submitted that it would be practical and just if the globular sentence imposed by the trial court in respect of counts 1, 2 and 3 could be set aside and substituted with a sentence of 15 years' imprisonment in respect of counts 2 and 3. He conceded further that, in order to ameliorate the severity of the sentence, the sentences imposed should be ordered to run concurrently.

[7] Once again, this appeal raises the contentious issue of the desirability and practicality of imposing a globular sentence where an accused, who pleaded not guilty to multiple counts, is partly successful in his appeal against one or other conviction, as happened in this case. The real question facing us as a court of appeal is, how do we undo the globular sentence of 20 years' imprisonment to enable the appellant to get the benefit of an acquittal on count 1, for, should we do nothing about it, it would mean that his success on appeal is nothing but a Pyrrhic victory.

[8] Having listened to both counsel, I am not persuaded that the facts put before us by the appellant's counsel qualify as substantial and compelling as interpreted by our courts, in particular in the seminal judgment of *S v Malgas* 2001 (1) SACR 469 (SCA)

(2001 (2) SA 1222; [2001] 3 All SA 220; [2001] ZASCA 30) paras 20 – 22. It suffices to state that they are ordinary circumstances which do not qualify as cogent or sufficiently weighty to justify a departure from a sentence peremptorily prescribed by the legislature for the kind of offences for which the appellant was convicted. To put it differently, in the circumstances it appears to me that the prescribed sentences in respect of counts 2 and 3 are not disproportionate to the crimes, the criminal and the legitimate needs of society. I therefore find that there is no merit in the appellant's counsel's submission.

[9] It is widely accepted that there is no law which prohibits or provides for the imposition of a globular sentence. See *S v Young* 1977 (1) SA 602 (A) at 610E. The imposition of a globular sentence depends upon the discretion of the sentencing officer, based on the peculiar facts of the case. However, our courts have on various occasions expressed some misgivings about such sentences, particularly where an accused was convicted after having pleaded not guilty, but subsequently having the conviction on some counts set aside on appeal. See *Director of Public Prosecutions, Transvaal v Phillips* 2013 (1) SACR 107 (SCA) ([2011] ZASCA 192) H para 27 where Petse AJA stated:
'The practice of imposing globular sentences for multiple counts is generally an undesirable one.'
See also *S v Kruger* 2012 (1) SACR 369 (SCA) ([2011] ZASCA 219) para 10.

[10] As it is clear from *Young*, *Kruger* and *Phillips* that there is no absolute bar against imposing globular sentences, there seems to be some unanimity in our courts that, depending on the facts of each case, it can be effectively used in exceptional circumstances. See *S v Nkosi* 1965 (2) SA 414 (C) at 416C. This is because there will be circumstances where, for instance, it can be used to ameliorate the effect of sentences which individually may appear to be shockingly inappropriate. Furthermore, such a sentence may be appropriate where an accused pleaded guilty on multiple offences which are closely connected in terms of time and common facts and in respect whereof the individual sentences may, cumulatively, amount to a sentence that induces a sense of shock. There may of course be other cases where such a sentence might be appropriate.

[11] The serious difficulties which are likely to be caused by imposing such a sentence were highlighted as far back as *Nkosi* supra where the court stated at 415 – 416:
'In the vast majority of cases no practical advantage results from imposing a globular sentence. A reasonable sentence can usually be determined by deciding upon a reasonable sentence for each offence and then by scaling down the sentences if the cumulative effect renders the total unreasonable. An exception would seem to arise in cases where it is decided to impose a reformatory sentence or a sentence of whipping, and there may be other such cases. But as pointed out by VAN DEN HEEVER, J. (as he then was), in *R v Frankfort Motors (Pty.) Ltd.*, 1946 OPD 255 at

pp. 267 – 8, the imposition of a globular sentence often causes difficulties on appeal or on review and this seems to be the reason underlying the practice in England.'

The same misgivings were expressed by Trollip JA in *Young* at 610E – H as follows:

'Appellant's counsel contended that counts 1 to 4 should be taken together for the purpose of imposing one sentence thereon, and that counts 5 to 7 should be dealt with similarly[.] That procedure is neither sanctioned nor prohibited by the Criminal Procedure Act, 56 of 1955. Where multiple counts are closely connected or similar in point of time, nature, seriousness, or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused. But according to several decisions by the Provincial Divisions (see, e.g., *S v Nkosi*, 1965 (2) SA 414 (C), where the authorities are collected) the practice is undesirable and should only be adopted by lower courts in exceptional circumstances. The main reason for frowning upon the practice mentioned in these cases is the difficulty it might create on appeal or review, especially if the convictions on some but not all of the offences were set aside. As any sentence imposed by this Court is definitive, that objection to the practice is, of course, not applicable. However, in the present case I think it conduces to clearer thinking in determining the appropriate sentences to treat each offence separately. Moreover, no risk of duplication of punishment thereby arises for each offence is sufficiently distinct, different and serious; and in the ultimate result the cumulative effect of all the sentences imposed can be otherwise suitably controlled to avoid undue harshness to the appellant.'

[12] As alluded to already, the main argument in this appeal is that, because of the globular sentence of 20 years' imprisonment in respect of all three counts of robbery, the appellant was wrongly denied the benefit which should have redounded to him when count 1 was set aside. It was submitted that the court below erred in not considering the sentence in respect of counts 2 and 3 afresh after it set aside the conviction in respect of count 1.

[13] It is true that, if the appellant was sentenced individually on each count to imprisonment for 15 years as prescribed by the Act, the sentence of imprisonment in respect of count 1, on which he was acquitted on appeal, would have had to fall away. Once the conviction on one count of robbery with aggravating circumstances was set aside, the court below was obliged to reconsider the sentence and determine afresh an appropriate sentence for the remaining two counts. That did not happen. As a result, the appellant is now serving the same sentence, as if the conviction on one count of robbery was never set aside.

[14] The globular sentence of 20 years' imprisonment for all three counts is clearly impractical and unworkable in this case. It is difficult to try to apportion the sentence to individual counts. What the trial court should have done was to sentence the appellant separately for each count and to invoke s 280(2) of the Criminal Procedure Act 51 of 1997 to make an order that the sentences run concurrently, if it wanted to

ameliorate the severity of the three sentences. See *Nkosi* at 415H.

[15] I find it apposite to reiterate the warning expressed in *Young*, *Kruger*, Nkosi and recently *Phillips* that, although there is no bar to imposing a globular sentence, it is imperative for judicial officers to consider the desirability of such a sentence carefully before imposing it, bearing in mind the kind of problems it may cause. This case is a classic example of the kind of serious, if not intractable, problems which will occur on appeal where some counts are set aside and there is a need to alter the globular sentence imposed. We are now faced in this appeal with the difficult task of having to unscramble a scrambled egg. Although useful at times, such a sentence must be imposed in exceptional circumstances only.

[16] It is clear to me that the result of what happened in this case amounts to an injustice. An accused cannot be made to serve a sentence for a conviction that has been set aside. It follows that such a sentence cannot stand, as its legal basis fell away when the conviction for which it was imposed was set aside. It follows that the court below erred in failing to reconsider the sentence. On this basis, the court is at liberty to reconsider the cumulative effect of the sentence imposed on the appellant afresh.

[17] Both counsel were agreed that the most practical solution to this rather intractable problem, given the time lapse and possible prejudice to the appellant, is to set aside the globular sentence and to sentence the appellant afresh in respect of counts 2 and 3 and to make an order that the sentences run concurrently. I agree.

[18] In the result, the following order is made:
1. The appeal against sentence in respect of counts 2 and 3 is upheld.
2. The sentence imposed by the trial court in respect of counts 1, 2 and 3 is set aside and replaced by the following:
'*(a)* In respect of count 2, the appellant is sentenced to 15 years' imprisonment.
(b) In respect of count 3, the appellant is sentenced to 15 years' imprisonment.'
3. In terms of s 280(2) of the Criminal Procedure Act 51 of 1977, the sentence imposed in respect of count 2 is ordered to run concurrently with the sentence imposed in respect of count 3.
4. The sentences of imprisonment of 15 years in respect of the unlawful possession of a semi-automatic firearm, of which 11 years is wholly suspended for a period of five years on condition that the accused is not convicted of possession of an unlicensed firearm in contravention of the Firearms Control Act, and which offence is committed during the period of suspension, where direct imprisonment is imposed without the option of a fine, together with imprisonment for one year imposed in respect of the unlawful possession of ammunition, remain unaltered. Effectively the appellant will undergo imprisonment for five years.
5. Taking into consideration the sentences in respect of counts 4 and 5, the accused will therefore undergo imprisonment for an effective period of 20 years.

6. In terms of s 282 of the Criminal Procedure Act 51 of 1977, the sentence imposed in respect of para 2 above is antedated to 3 May 2012.

From The Legal Journals

Pienaar, L

"Deciphering the Composition of Section 79-Assessment Panels in the Criminal Procedure Amendment Act 4 of 2017."

PER/PELJ 2017(20)

Abstract

Section 79 of the Criminal Procedure Act 51 of 1977 provides for the appointment of mental health professionals to assess an accused's fitness to stand trial and/or criminal capacity if the court orders such an enquiry in terms of sections 77 and 78 of the Criminal Procedure Act. In terms of section 79, one mental health professional must assess an accused charged with a non-violent offence, whereas a panel of such professionals must assess an accused charged with an offence involving serious violence.

The legislative provisions regarding the appointment of mental health professionals to a section 79-assessment panel are not without ambiguity. Section 79(1)(b) read with section 79(13) is problematic. Directives issued by the National Prosecuting Authority in terms of section 79(13) do not aid in clarifying the legal position either. The main point of contention is whether a section 79-assessment panel must consist of a minimum of two or three psychiatrists. This ambiguity creates challenges for presiding officers tasked with appointing section 79-assessment panels. When presiding officers appoint these panels incorrectly, it causes delays in the assessment process and the delivery of justice to the accused and the victim.

The court considered the interplay between section 79(1)(b) and section 79(13) in S v Pedro 2015 1 SACR 41 (WCC). The judgment highlights the need to clarify the position in the Criminal Procedure Act regarding the appointment of section 79-assessment panels. This case provided the impetus for the amendment of section

79 through the Criminal Procedure Amendment Act 4 of 2017.
This contribution explores the composition of section 79-assessment panels as provided for in the Criminal Procedure Act. Section 79(1)(b) and the seemingly contradictory provisions contained in section 79(13) are discussed. The S v Pedro judgment is discussed with a specific focus on the court's interpretation of the interplay between these two provisions.
Following the S v Pedro judgment, the Criminal Procedure Amendment Act 4 of 2017 amended section 79. This contribution explores the clarifying provisions of the Amendment Act regarding the composition of assessment panels.

This article can be accessed here:
https://journals.assaf.org.za/per/article/view/3062

James, A A W

"South Africa's Debut into Broadcasting Criminal Trials – The Legal Arguments in Televising the Oscar Pistorius Trail."

PER/PELJ 2017(20)

Abstract

The televising and/or any other form of broadcasting of judicial hearings and of criminal trials in particular is a controversial topic that has not only provoked debate and been argued about by academics, the media and the public for years, but continues to be argued about with few signs of abatement. Until recently South Africa had largely escaped becoming embroiled in this provocative topic, as the live broadcasting of criminal trials from South African courtrooms did not occur. The situation has changed, though, following the recent live televising of a full criminal trial – namely, the trial of South African Para-Olympic champion Oscar Pistorius. Given that this trial signalled South Africa's debut into the world of the live televising of criminal trial proceedings, the question is asked why exactly South Africa ventured into this contentious legal territory.
It must be emphasized that the intention of this contribution is solely to explore the court's consideration of the constitutional mandates and rights that were contained in both the application and the opposing arguments pertaining to the live broadcast the trial of Oscar Pistorius. This note will not attempt to examine or even approach the far greater question of whether criminal trials should be televised or not, a topic better left to future research.

This article can be accessed here:
https://journals.assaf.org.za/per/article/view/4168

Bellengère, A

"We'll Teach You a Lesson": The Role of the SCA as Educator and Disciplinarian – A Note on S v Mashinini 2012 1 SACR 604 (SCA) and S v M M 2012 2 SACR 18 (SCA) with reference to S v Kolea 2013 1 SACR 409 (SCA)"

Speculum Juris Volume 30 Issue 2 2016

This article can be accessed here:
http://www.ufh.ac.za/speculum/sites/default/files/SJ%20VOLUME%2030%20PART%202%202016%20Bellengere.pdf

Mujuzi, J D

"Victim Participation in Plea and Sentence Agreements in South Africa as a "Right": analysing Wickham v Magistrate, Stellenbosch and Others 2017 (1) SACR 209 (CC)."

South African Public Law Vol 31, No 2 (2016)

Abstract

Section 105A of the Criminal Procedure Act empowers a prosecutor to enter into a plea and sentence agreement with an accused irrespective of the type of the offence in question. In entering into such an agreement, the prosecutor is required to give the victim of a crime an opportunity to make representations to him or her on the content of such an agreement and the issue of compensation. The section does not provide for the victim of a crime to have a right to make such representations. In Wickham v Magistrate, Stellenbosch & Others the Constitutional Court held that a victim of a crime has a right under section 105A to make representations to the prosecutor. Although the Constitutional Court's holding is commended for strengthening the victim's right to participate in the criminal justice system, it is argued in this article that the court should have explained in detail why it held that the victim had a right to make such representations, despite section 105A not expressly conferring such a right. The author also discusses other contributions that this judgment has made to the plea and sentence regime.

This article can be accessed here:
https://upjournals.co.za/index.php/SAPL/article/view/3079

Contributions from the Law School

The use of ear print evidence in identification[1]

The idea of using ear print evidence is not a novel one. Alphonse Bertillón, the chief of criminal investigation for the Paris police force from 1880, devised a system of identification known as the anthropometric method, in terms of which the statistics of offenders were recorded by means of a system of photographs and meticulous measurements (Dean 'Forensic Science Overview and the Development of Earprinting' 1997 21(1) *The Criminologist* 33 at 34). The measurements included those of the body, limbs and head including the ear. Bertillón was apparently the first scientist to use the ear as a means of identification (López de Arcaute and Navarro 'Ear Print as an Identification Method' 2006 57(7) *Acta Otorrinolaringol Esp* 329 at 330). The unwieldy and time-consuming nature of the anthropometric technique meant that it was never fully adopted, and the rise of fingerprinting as a form of forensic identification, and its universal adoption by police forces, resulted in Bertillón's methods being consigned to an historical footnote. Owing to the overwhelming success of fingerprinting, early attempts to develop the use of ear prints were discontinued (Graham, Bowyer, Martin and Rutty 'Investigation into the Usefulness of DNA Profiling of Earprints' 2007 47 *Science and Justice* 155).
However, relatively recently, there has been something of an upsurge of interest in the description of ear prints and in identification by means of ear printing, with the work of Lannarelli being at the forefront of this renewed interest. Trained as a policeman rather than a scientist, Lannarelli became interested in ear print identification, and proceeded to develop his own system of classification, which he applied to some 7000 ears over a 14-year period. Subsequent to the publication of Lannarelli's work, there have been a number of different, more scientific methods for ear identification proposed. The European Union even funded a research project in 2002 known as FearID ('Forensic Ear Identification') to evaluate the use of ear print evidence, and to produce a protocol in order to standardize procedures and reports.
The rationale for pursuing this line of research is that the structure of the ear is rich, changes little with age, and is unaffected by facial expressions. Despite the possibility that the ear may be occluded by hair, the immediate background is predictable, unlike that of the face. Unlike fingerprints, there is not an associated hygiene issue, and unlike iris and retina measurements, it will not cause anxiety.

[1] This contribution is based on a similarly titled (and longer) note published in 2009 *Obiter* 175.

Compared with the iris, retina and fingerprint, the ear is relatively large, and so can be more easily captured at a distance (Hurley, Arbab-Zavar and Nixon 'The Ear as a Biometric' in EUSPICO 2007, Poznan, Poland (http://eprints.ecs.soton.ac.uk/14771 (accessed 2018-01-25). Moreover, it may be possible to determine the height of the person leaving an ear print, on the basis of floor-to-print distance, with certain adjustments (López de Arcaute and Navarro 2006 *Acta Otorrinolaringol Esp* 330). Ear prints, like fingerprints, are produced by the remains of desquamation (shedding of skin), sweat and grease that the skin leaves on contact with a surface (ibid). Whilst the individuality of the ear has not been decisively empirically established, it is contended that the variability between ears is so large that one may be able to distinguish between ears on a limited number of features or characteristics (Meijerman *et al* 'Exploratory study on classification and individualization of earprints' 2004 140 *Forensic Science International* 91 at 94). The results of the analysis will inevitably be expressed in terms of whether the probability of two different ears leaving indistinguishable prints is reasonably small (López de Arcaute and Navarro 2006 *Acta Otorrinolaringol Esp* 331).

Ear print evidence is not uncontroversial however. Questions have been raised about the uniqueness of each ear, and even if each ear is individual in its characteristics, whether the stability of the features of the auricle (external ear) is trustworthy. In this regard, it is clear that a single ear can leave varying prints, dependent on factors such as the amount of pressure, the angle at which the ear was applied to the surface, and anatomical modifications (ibid 331; Moenssens 'Handwriting identification evidence in the post-*Daubert* world' 1997 66 *UKMC Law Review* 251 at 293-294). Therefore, to justify a claim that an ear print can be matched uniquely to an ear, it must be established that a particular print resembles prints from the same ear significantly more than it resembles prints from another ear (Meijerman *et al* 2004 *Forensic Science International* 93). Research concluded in the context of the FearID project suggests that ear prints found at crime scenes do exhibit a 'high degree of stability' comparable to fingerprints, and that the longer the listening time at a window, the greater the chances of force and pressure variations, and the more skin grease deposited, which will then be spread more evenly on the listening surface (Kieckhoefer, Ingleby and Lucas 'Monitoring the Physical Formation of Earprints: Optical and Pressure Mapping Evidence' 2006 39 *Measurement* 918 at 932). These factors clearly have negative implications for the quality of the print. In addition, there can be high local variation of pressure when the listener fidgets, and the longer the listening time, the greater the chances of fidgeting. Nevertheless, the experimental results have been deemed promising, as the listening ear 'acts like a plunger stuck to the surface', which then results in little slippage of the contact area and consequent blurring of the print (ibid 933).

Ear prints have been used as identification evidence in jurisdictions such as the Netherlands, Spain and Switzerland. In English law, a murder conviction based on an identification obtained by way of ear print evidence, in *R v Dallagher* [2003] 1 Cr. App. R 12 (CA), was overturned on appeal, with the Court of Appeal doubting the reliability of the evidence. When a retrial was ordered, the new investigation

discovered that the DNA profile obtained from the ear print at the scene, which had been unequivocally linked to the accused, did not in fact match the accused. Following the decision in *R v Kempster (No 2)* [2008] 2 Cr. App. R. 19 (CA), it is clear that ear print evidence can be used in identification, with the caveat that unless the gross features (such as the folds in the ear) provide a precise match, the evidence could not be regarded as determinative. This approach flows from the court's acknowledgement of the flexibility of the ear and its susceptibility to change depending on the amount of pressure applied to the surface. However, where some small anatomical feature, such as a notch or crease in the ear structure could be identified and matched, then the evidence would be far stronger.

In the South African context, the Criminal Law (Forensic Procedures) Amendment Act 6 of 2010 provided for the insertion of the definition of 'body-prints' into the Criminal Procedure Act, which are defined as 'prints other than fingerprints, taken from a person and which are related to a crime scene, but excludes prints of the genitalia, buttocks or breasts of a person' (s 36A(1)(*c*) of the Criminal Procedure Act 51 of 1977 ('CPA')). In terms of section 36C of the CPA, such body-prints – which would clearly allow for the possibility of ear prints – may be taken, without warrant, for the purposes of investigation. Section 37 of the CPA further provides for any police official to take a body-print from an accused or convicted person.

In conclusion, it may be noted that although there are some promising aspects to ear print evidence, the current scientific literature remains somewhat equivocal in its support of such evidence, and particularly its validation. In the United States, the use of ear print evidence has been rejected in *S v Kunze* 97 Wash App 2d 832 (Ct App 1999) (applying the determinative test for admissibility of expert evidence framed by the Supreme Court in *Daubert v Merrill Dow* (1993) 125 L Ed 2d 469; 113 S Ct 2786), but it seems that in jurisdictions like England and South Africa such evidence will indeed be admissible, on the basis that any weaknesses in the evidence will be exposed through the usual adversarial forensic techniques of cross-examination and opposing evidence.

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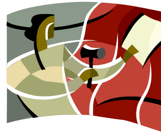

Matters of Interest to Magistrates

The following Act may not be well known to many but is still in operation and may be of interest to magistrates. The Act came into operation on 16 April 1993. (It is anticipated that in the near future more of these "unknown" Acts will be highlighted to assist magistrates in their duties).

ANIMAL MATTERS AMENDMENT ACT 42 OF 1993

1. Directions in respect of injuries caused by animals

(1) Any person as a result of whose negligence an animal causes injury to another person, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(2) Whenever a person is convicted of an offence in terms of subsection (1), the court convicting him may in addition to any punishment imposed upon him in respect of that offence:-
(a) make any order relating to the removal, custody, disposal or destruction of the animal concerned and the recovery of any costs incurred in connection therewith;
(b) declare the person convicted to be unfit, for a specified period, to own a certain kind of animal or an animal of a specific breed or to have it under his control or in his custody.

(3) Subsection (2) shall mutatis mutandis apply if any person:-
a) as a result of whose negligence an animal causes the death of another person is found guilty of an offence with regard to such negligence;
(b) as a result of whose deliberate action an animal causes the death of or injury to another person is found guilty of an offence with regard to such action.

(4) The Minister of Justice may from time to time, with the concurrence of the Minister of State Expenditure, appropriate funds to a society for costs incurred relating to the removal, custody, disposal or destruction of an animal.

(5) (a) A person who has in terms of subsection (2)(b) been declared unfit, for a specified period, to own a certain kind of animal or an animal of a specific breed or to have it under his control or in his custody, shall, if at the time of the declaration he owns or has under his control or in his custody such an animal and such animal is

not destroyed in terms of subsection (2)(a), within 14 days from the date on which such declaration was made, make alternative arrangements for the caring of the animal for the period for which he is declared unfit to own such an animal or to have it under his control or in his custody.
(b) Subject to the provisions of paragraph (a), any person who owns or has under his control or in his custody an animal in contravention of a declaration made in terms of subsection (2)(b), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.
(6) Notwithstanding anything to the contrary contained in any law, a magistrate's court shall have jurisdiction to impose any penalty which is provided for in this section.

A Last Thought

Manners maketh man – and that includes judges

A stinking Durban Friday afternoon, one of those when summer humidity turns your body into an endlessly dripping tap and you long for the weekend sea. In the middle of our lethargic puddles at work, we had a sudden tip-off – a worthwhile "urgent" was about to start in the high court.
We raced over and though I remember that we wrote a good news story out of the facts, I recall very little of what the case was all about. What sticks with me, though – what I will never forget – was the way the judge behaved. Counsel had a poor case – that much was obvious. He tried his best, with the poor facts and poor instructions at his disposal. But the judge was merciless. His repeated, razor-sharp questions sliced the man in front of him to the bone. His sarcasm and derogatory comments shocked even those not directly involved. We winced, repeatedly. Not far into the torture session, counsel became increasingly pale. Then he began to weep. It was a hideous experience. We had to avert our eyes. It was like witnessing something

indecent. I could not imagine what the man's clients thought or whether counsel could survive the onslaught.

All this was long ago, and the judge concerned is no longer around. He had a reputation for his wit and his intellect. But that day I wished that he had not been quite such a show-off, or so irritable, or that he had exercised more self-control, even if he felt that counsel was ill-prepared and clueless. That judge, for all his legendary intelligence, would find himself up against it if he were to behave like that in 2017: the Judicial Service Commission, established in 1994, has made it clear that polite behavior towards all those in court is the very minimum required from members of the bench. Reports from the Bar and the attorneys' profession on this very issue seem to be considered with appropriate seriousness by members of the JSC when they weigh whether to recommend the appointment of someone to the bench after an acting stint or to back someone for promotion to a higher court.

I have to say that there is a difference between rudeness and anger – though sometimes they are seen together – and there are times when I have seen members of the judiciary impressively angry, though still icily polite.

Judicial rudeness in court is, however, still an issue, in South Africa and elsewhere. In fact, it is regarded as almost a rite of passage for an advocate that he or she should "suck it up" when a judge gives them a going-over.

That's why the Bar in England was riveted in October when a senior barrister, Mary Aspinall-Miles, did two things that were unheard of. First, she complained about judicial rudeness – on the record. Second, she made her complaint in the most public way possible – on Twitter. She began her series of Tweets on October 11, saying they were prompted by her reflections on World Mental Health Awareness Day, observed the previous day. Against this background, it was perhaps time the Bar "broke cover" about its problems, she wrote. Here is the big one, she Tweeted, "the taboo: rude judges. There, I have said it."

She said she had no issue with a judge who took her to task for "shortcomings/ failings – in fact I welcome it if it helps me improve – but the tone is key". "I have seen judges just come over unnecessarily aggressive/sharp over small issues." Their criticisms, delivered in such a tone "sting and undermine professional confidence. The words stay with me long after the case is done." Aspinall-Miles said she "got it" that the workload of a judge these days was "unbelievable" and that judges were under stress too. But they were in a position of authority and needed to understand that "you won't improve advocacy or performance by undermining and belittling advocates" or by "welding" themselves to an old view of the job – this was a reference to judges who preface their rudeness with the words, "In my day …" If, unlike judges, she could be held to professional standards and reported to the head of chambers or held in contempt for professional discourtesy, surely there was an onus on all sides to act properly. "Once a judge has said these things, then stalks out of the courtroom, the advocate is left in personal and professional pieces."

Judges sometimes spoke to people in a tone "that would make most have employment lawyers on speed dial", she said. She was still "smarting" at something

said to her “without foundation” more than 10 days before “and I bet I am not alone in these things”. Indeed, she seems not to have been alone. And there was a mini-flood of responses from other lawyers supporting her views. She said she was “quite big enough” to take fair criticism if that was due “because that’s how you learn, but meanness stays with you and erodes.”

Replying to one Tweet, a colleague mentioned a particular judge and said she had asked him what he wanted her to do in a matter. “He said, ‘Even the most junior member of the bar of the meanest intelligence would understand.’” Another mentioned a “very diligent, experienced” colleague who had recently asked how she had ended up in a job where she was so often “publicly humiliated”.

A second theme from Aspinall-Miles, in what she called her “confessional”, concerned the behaviour of certain opponents in court. There were some things that were not acceptable: rude/aggressive opponents. “I have been shouted at, sledged, demeaned and occasionally been lied to. How they sleep at night is their business, but it has meant that I can’t.” Her criticisms on both issues prompted a surprising number of responses, ranging from attorneys who spoke about being harassed in court by certain judges who have behaved one way to counsel and another way to attorneys, to advocates who said they shared her experiences and concern for the impact on clients, not to mention young advocates who could be devastated by such behaviour from a judge and might even quit the profession. reduced to tears by judges, thankfully both retired, but those days remain seared on my soul.”

Somehow, I have a sense that the Aspinall-Miles “confessional” could be the start of something significant in her country. One of the women silks who responded to her series of Tweets, later posted this: “Re bullying at the Bar, if any junior member has difficulties, with judge or opposition, please know on Mid Circuit you can talk to me in confidence.” And from London, another QC Tweeted: “I’m in London and you can talk to me in confidence.” Referring to a colleague she added, “Let’s work together so people #survive&thrive and #stopbullying”. Then she appeals to her other senior colleagues to join in to help: “Anyone else?”, she asks.

Carmel Rickard in *Without Prejudice* November 2017 p 30-31