e-MANTSHI

A KZNJETCOM Newsletter

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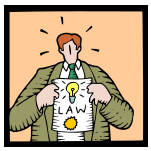
Welcome to the hundredth and forty sixth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Justice and Correctional Services has, under section 16 of the Magistrates Act, 1993 (Act No. 90 of 1993), on the recommendation of the Magistrates Commission, amended the Regulations for Judicial Officers in the Lower courts. This amendment was published in Government Gazette no 41888 dated 7 September 2018. The amendments relate to the appointment of magistrates and the Code of Conduct for Magistrates. The amendment can be accessed here:

https://www.gov.za/sites/default/files/41888_rg10864_gon933.pdf

Recent Court Cases

1. S v Luzil (18294) [2018] ZAWCHC 75; 2018 (2) SACR 278 (WCC) (19 June 2018)

Once bail was finally forfeited to the state and the accused appeared before the court after arrest, there was a second inquiry that had to follow relating to the status of the accused.

Thulare AJ

[1] The matter comes before this court on review. The accused was arrested together with another and made his first appearance before the magistrate Bellville on 8 May 2017 for unlawful possession of undesirable dependence producing substance. The accused elected to apply for legal aid and the matter was postponed to 23 August 2017 for further investigation and legal representation and the accused was granted to bail of R400-00.

[2] The accused failed to appear on 23 August 2017. It is difficult, if not impossible, to follow what really happened in court in relation to which of the two accused, from the minutes of the record of proceedings kept by the presiding acting magistrate, Mr Ahmed from 23 August 2017. This court will allow itself to be led by the two Memoranda compiled by Magistrate Jacks and Adv Stephen SC respectively.

[3] From the two Memoranda, it is said that on 23 August 2017 a warrant of arrest was authorised against the accused and her bail was declared provisionally forfeited to the State with a return date of 6 September 2017. On 6 September 2017 the accused was still absent and the forfeiture order was extended to 20 September 2017 on which date it was made final and her bail forfeited to the State as she was still absent.

[4] The accused was arrested and brought before court on 9 February 2018. She was represented and the matter was postponed to 14 February, 1 March and ultimately 7 March 2018 for an enquiry. The accused, a mother of an infant less than six months old, was kept in custody throughout, until bail at R300-00 was fixed on 7 March 2018.

[5] On 7 March 2018 the defense attorney made submissions that the accused admits guilt for contravention of section 170 (1) of the Criminal Procedure Act, 1977

(Act No. 51 of 1977) (the Act). The explanation given was that the accused was in hospital on days preceding the court appearance date and gave birth to a baby. She was no longer in hospital on the day of appearance but the excitement of the newborn baby caused her to forget about the court date.

[6] Despite a specific request by the Public Prosecutor to address the court, no such opportunity was afforded and there is no explanation as to why the State was not afforded an opportunity to address the court on the merits on 7 March 2018. The magistrate simply proceeded to pronounce judgment and found the accused guilty for failing to attend court. It remains unknown whether the denial of the audience of the Public Prosecutor would have saved the court from the irregularity that occasioned.

[7] It is only when the court had to attend to the sentencing, that the magistrate realized that it was incorrect to conduct the matter in terms of section 170 of the Act, and that the court should have acted as envisaged in section 67 of the Act. The magistrate immediately stopped the proceedings and submitted the matter for special review.

[8] Section 170(1) of the Act reads as follows:

"170 Failure of accused to appear after adjournment or to remain in attendance

(1) An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2)."

In Commentary on the Criminal Procedure Act, Du Toit et al, service 58, 2017 22-105 the learned authors said:

"The wording of the section makes it plain that s 170 is applicable only to an accused who is not in custody and who has not been released on bail."

It was irregular, which irregularity vitiates the proceedings, for a magistrate to apply the provisions of section 170(1)of the Act to an accused who had been granted to bail and had failed to appear in court after her bail was finally cancelled and forfeited to the State.

[9] An enquiry may be held if the accused appears before court within fourteen days of the issue of the warrant of arrest – [Section 67(2)(a) of the Act]. The enquiry is limited in its scope. It does not attract punishment ordinarily at the discretion of the court. It is only qualified to satisfy the court that the failure to appear was not due to fault on the part of the accused. If the accused satisfies the court that the failure to

appear was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money becomes invalid, which amongst others includes that bail is reinstated. The position before the provisional cancellation and provisional forfeiture maintains –[S v Mabuza 1996 (2) SACR 239 (T) at 243d]. If the accused fails to satisfy the court that his failure was not due to fault on his part, the provisional orders may be made final. It follows that I do not agree with Adv. Stephen SC, when he wrote in the Memorandum on behalf of the Director of Public Prosecutions, Western Cape, that no enquiry is held in terms of section 67 of the Act.

[10] The provisional cancellation of bail and the provisional forfeiture of bail money had become final by the time the accused was arrested and appeared before the court – [Section 67(2)(c) of the Act]. In my view, this is not the end of the matter. The court has the power to remit the whole or any part of any bail money forfeited under section 67 – [section 70 of the Act].

In S v Mudau 1999 (1) SACR 636 (WLD) at 636h-j the court said:

“At this stage I want to say this. Whatever legislative provisions were operative there was clearly an injustice done to the accused; or more pertinently the person who deposited the money. It offends anyone’s sense of justice that persons (in this case clearly poor) should loose R1000-00 because an accused is prevented from attending court. The facts have only to be mentioned for the injustice to be apparent. There was therefore a miscarriage of justice even if the law was correctly applied.

In applying the law, wherever there was discretion to be exercised it should have been so exercised that if at all possible a miscarriage of justice was averted.”

There are instances where fairness to such accused would require that the bail money deposited by him or on his behalf be remitted.

[11] In my view, upon the appearance of an accused granted bail, whose bail had been finally cancelled and the money forfeited, the court should satisfy itself whether it is fair and just for the final cancellation and forfeiture order to stand.

In S v Nkogatse 2002 (2) SACR 369 (TPD) the court said at 373g-i:

“The provisions of s 70 are not and cannot be construed as being intended to or capable of being interpreted as requiring a court to review its own decision to declare as finally forfeited bail money in consequence of the violation of bail conditions. In my view, and without in any way prescribing or in any way limiting the relevant criteria, the process must determine whether, taking all the facts into account, including the reason, nature and the extent and duration of the recalcitrance of the accused, the actions taken by the depositor to bring to an end such recalcitrant conduct by the

accused, the source of the bail funds, it would be fair and just to remit part or the whole of the bail money estreated."

Earlier on, the court, expressing itself on the onerous responsibility of administering justice, had said at 372i-j:

"That responsibility must be discharged judiciously and in the spirit of justice, fairness and reasonableness."

The magistrate is obliged in the interests of justice to determine whether the final order of cancellation and forfeiture should stand or whether the bail money forfeited should be remitted. The enquiry is qualified and limited to remittance.

[12] In S v Rall 1982 (1) SA 828 (AD) at 831A-B it was said:

"According to the well-known dictum of Curlewis JA in R v Hepworth 1928 AD 265 at 277, which the learned Judge a quo obviously had in mind in his remarks quoted above:

"A criminal trial is not a game … and a Judge's position … is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done'"

At 831H the court continued:

(1) According to the above quoted dictum of Curlewis JA the Judge must ensure that "justice is done". It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused …"

The final loss of the money paid for bail, in my view, had to occasion in a manner that is not only substantively fair, but also in a manner that is procedurally fair to the accused and the depositor of the money as well as the State.

[13] I however agree with Adv. Stephen SC, when he said:

"Previously the final forfeiture of the bail was considered sufficient punishment but S v Mabaso 1990 (1) SACR 675 (T) led to section 67A being inserted into the Act by section 9 of Act 75of 1995. It criminalises the failure of an accused to attend court after having been released on bail. It is not an enquiry but a separate prosecution on

its own charge sheet and it must also be held separately from any inquiry that might be held under section 66 of the Act." [See S v Mabuza, supra, at 243g].

If the State wishes to hold the accused criminally liable, as a person who was on bail, on the ground of failure, without good cause, to appear or to comply with a condition of bail, then such prosecution should follow the ordinary course, and cannot be a summary enquiry.

[14] In my view, once the bail is finally forfeited to the State, and an accused appears before the court after arrest, there is a second enquiry that should follow, and this relates to the status of the accused. In my view, the provisions of section 50 of the Act relating to procedure after arrest are applicable in general, and in particular section 50(6) read with section 60 of the Act. It follows that at his or her first appearance after such arrest such accused is entitled to be informed of the reasons for his or her further detention if the court so orders, and that he/she is entitled to be released on bail – [S v Mandili [2006] JOL 17588 (T)] or even be warned – [S v Rabele (76/2014) [2016] ZAFSHC 178 (29 September 2016) at para 35]. The failure of the magistrate to give attention to the status of the accused was a material misdirection.

[15] Adv. Stephen SC urges this court to remit the matter to the magistrate to continue with the trial.

For these reasons, I propose the following orders:

1. The conviction of accused under section 170(1) of the Criminal Procedure Act, 1977, for failing to attend court, is set aside.

2. The matter is remitted back to the Magistrate for the accused to be dealt with in accordance with the law.

2. S v Fransman and Another (17531; 17532) [2018] ZAWCHC 79; 2018 (2) SACR 250 (WCC) (22 June 2018)

It is the duty of a presiding officer to keep a proper record of proceedings when questioning an accused. It must be carried out carefully and with scrupulous regard for elements relevant to the charge and in the case of a written notation of the questioning, the record should as far as possible be a reproduction of what actually transpired.

Henney et Sher JJ:

Introduction

[1] This judgment deals with two separate matters that were submitted for automatic review by the magistrate of Clanwilliam, who presided over both. The issue for consideration is unique to these cases. In the first matter of S v Andries Fransman (the "Fransman case") the accused was charged with one count of housebreaking with intent to steal and theft, which was allegedly committed on or about 22 –23 January 2017. After his arrest on 23 February 2017 the accused made several appearances in court and on 9 March 2017 his right to legal representation was explained by the magistrate and he elected to conduct his own defence and to enter a guilty plea.

[2] The magistrate then proceeded to question him in terms of the provisions of s 112(1)(b) of the Criminal Procedure Act[1] ("the Act"). Upon conclusion thereof the magistrate was satisfied that the accused had pleaded guilty to the lesser charge of theft and after the plea was accepted by the prosecutor the accused was convicted accordingly and thereafter sentenced to 24 months imprisonment in terms of the provisions of s 276 (1)(i) of the Act.

[3] In the second matter of S v Ntsikelelo Kowa (the "Kowa case"), the accused was charged with contravening ss 65(1)(a) and s 12 of the Road Traffic Act[2] (the "RTA"). It was alleged that on 15 November 2015 on the N7 National Road in the district of Clanwilliam he drove a motor vehicle whilst he was under the influence of intoxicating liquor, and without being in possession of a valid driver's licence.

[4] After the accused was summonsed to appear before the magistrate, he elected to conduct his own defence and to plead guilty to both charges. The magistrate then similarly proceeded to question him in terms of the provisions of s 112(1)(b) of the Act and on conclusion thereof he was duly convicted as charged.

[5] In respect of the first count he was sentenced to a fine of R10 000 or 12 months imprisonment of which R8000 or 10 months imprisonment was suspended for a period of 5 years on condition that he was not again convicted of contravening the relevant provisions of the RTA during the period of suspension.

[6] In respect of the second count he was sentenced to a fine of R800 or 60 days imprisonment which was wholly suspended for a period of 5 years on similar conditions.

[7] When the review came before this court on 17 May 2017 it was returned to the magistrate with a query pertaining to the questioning of both accused in terms of the provisions of s 112(1)(b) of the Act. The magistrate was required to explain why such questioning had been so cryptic and whether it constituted a true and accurate representation of the proceedings in both matters, and why a complete record was not kept in light of the fact that the magistrate's court is a court of record, as much as

the High Court is.

[8] The magistrate only formulated a response to this query a year later on 8 May 2018 before thereafter returning the case records to this Court.

The magistrate's response

[9] In her response the magistrate confirmed that all lower courts are courts of record and that ordinarily everything which is said during formal proceedings before such courts should form part of the record thereof. She said that although the record in both matters appeared incomplete and somewhat cryptic, the questioning of the accused had not been so. According to her, notwithstanding the abbreviated notation thereof her questions were put in full sentences and in a form clear enough for the accused to understand and to answer properly.

[10] The magistrate said that it was unfortunate that she had noted the questions in an abbreviated manner. She was aware that this was not the correct procedure to follow and now that it had been brought to her attention she would make every effort to ensure that such an omission would not occur again. She said that she could understand the court's misgivings as to whether she had been satisfied that the accused in both matters properly pleaded guilty to all the elements of the charges, given her incomplete record of what transpired. However, she assured the court that she had been completely satisfied, in both matters, that each accused had pleaded fully to all the elements of the charges.

The record in s 112 (1)(b) and 112 (2) proceedings

[11] In S v Baron[3] it was held that s 112(1)(b) proceedings are intended to protect especially an unrepresented or illiterate accused from the consequences of tendering an ill-considered plea of guilty.[4] As such, the record of the questioning in terms of s 112(1)(b) as a whole (ie including the answers thereto) should form part of the record of the trial.

[12] Although the judgment in Baron was handed down in the pre-constitutional era, the sentiments expressed therein are of even greater application today especially if regard be had to the provisions of s 35 of the Constitution, which guarantee an accused's right to a fair trial. This includes the right to be treated fairly during plea proceedings in terms of the provisions of s 112(1)(b), when an accused has elected to waive his or her right to remain silent, and the fairness of such proceedings should consequently be safeguarded by the magistrate who presides over them.

[13] To this end the magistrate should take especial care to ensure that the questioning of the accused is carried out carefully and with scrupulous regard for the elements relevant to the charges at hand, and it should further appear from the

contents of the record that such questioning took place in a clear manner and in terms which the accused understood. In addition, in the case of a written notation of the questioning the record ought, as far as possible, to be a reproduction of what actually transpired and should not simply be an ex post facto attempt at reconstructing what the magistrate believes to be the gist of what was said, for by doing so aspects of what was essentially evidentiary material before the court might, to use a colloquial phrase, thereby be lost in the subsequent 'translation'.

[14] Rule 66 (1) of the Magistrate's Court rules provides that "the plea and explanation or statement, if any, of the accused, the evidence orally given, any exception or objection taken in the course of the proceedings, the rulings and judgment of the court and any other portion of criminal proceedings, may be noted in shorthand... either verbatim or in narrative form" or may be recorded "by mechanical means."

[15] In S v Phundula; S v Mazibuko; S v Niewoudt [5] it was pointed out that it should always be the aim of the presiding officer when questioning an accused not only to make sure that he/she actually committed the offences in question, but also to ensure that the record faithfully reflects the proceedings in which that was determined, even if the manual, narrative form is used instead of an audio recording.

[16] It should be remembered that ultimately the record of the proceedings in a criminal trial is not only there for the benefit of the magistrate, but for any other court which may have to consider it subsequently, and as such it should be an objective and accurate portrayal of what transpired during those proceedings.

The Fransman case

[17] During the s 112(1)(b) questioning in Fransman, the accused admitted that his plea of guilty was made freely and voluntary. He further admitted that the incident happened on the date, and at the place, alleged in the charge-sheet. When he was asked by the magistrate to recount what happened he said that whilst he was on his way to his mother's home he had passed by the complainant's house and had noticed that the front door was standing ajar. As he did not see anybody in the house he entered it and took a television set which he sold for R300. He was later arrested by a policeman after the buyer had informed him that the accused was the person who had sold the television set to him.

[18] In order for the magistrate to cover the elements of housebreaking, intent and unlawfulness, she proceeded to ask the following questions:

"V: Deur?"

A: Wawyd oop. Nie verder oopgemaak . Kon net ingestap het.

V: Eienaar permanent onteien?

A: Ja

V Hoekom?

A: Geld nodig gehad

V: Weet verkeerd en strafbaar?

A: Ja”

[19] Although this form of cryptic notation of the questioning in terms of s 112(1)(b) is not to be encouraged as it might not always result in a true and accurate reflection of the actual proceedings, from our assessment of the record the admissions which were made in the answers given by the accused properly established his guilt on the lesser charge of theft on which he was convicted. We are therefore of the view that despite its shortcomings the proceedings in respect of the conviction were in accordance with justice in terms of the provisions of s 302 of the Act, and in our view the sentence which was imposed was also an appropriate one.

The Kowa case

[20] In Kowa the situation is somewhat different. On questioning by the magistrate in respect of count 1 the accused said that he pleaded guilty freely and voluntarily and he admitted that the incident took place on the N7 highway, a public road within the area of jurisdiction of the court, while he was driving in the direction of Vredendal. This part of the questioning by the magistrate, even though it was in a similar cryptic form, resulted in the accused providing answers which were uncontroversial. However, the following further questions which were put with a view to ascertaining whether the accused’s driving skills were impaired, and the manner in which these questions were framed, raise some difficulties:

“V: Wat gebeur?

A: Stokvel gehad. Einde van die jaar. Geld uitdeel. Ek het gedrink. Nie besef so dronk. Bier en brandewyn gedrink. Weet nie hoeveel nie. Eienaar van motorvoertuig baie dronk. Besluit ek moet bestuur want nie so dronk. Op N7 polisie ons gestop en ek is gearresteer vir dronk bestuur. My hospitaal toe geneem en bloed getrek. Nie padblokkade. Polisie my net gestop.

V: Bestuursvermoë aangetas?

A: Kan nie onthou hoe my bestuursvermoë was. Was motor voertuig agter my.

V: Mense gekla heen en weer oor pad?

A: Kan nie stry want was aand en ek het gedrink."

Then in a follow-up question he was asked:

"V: Indien nugter sou beter bestuur of nie bestuur?

A: Stem saam."

[21] From the manner in which this questioning proceeded it is not apparent that the admissions which the accused made on this aspect were clear and unequivocal. As is apparent, he said he was not 'so drunk' (sic) and could not remember whether his driving skills or abilities were impaired at the time. Although he made reference to a motor vehicle which was behind him it is not clear whether this was at a time when he was driving or when his vehicle was stationary, and the relevance of this vehicle in relation to the offence in question was never made clear. In this regard it is not apparent from the questioning whether the occupants of the vehicle observed that he was driving his vehicle inappropriately or back and forth across the road or whether someone else saw this, or even whether this in fact happened at all. It was merely suggested to the accused by the magistrate that 'persons' had complained that he was driving back and forth across the road. In the absence of such an allegation in the charge-sheet it is not apparent where this averment came from. It was not in direct answer to any preceding question which was posed by the magistrate and it was simply put in the form of a statement to the accused, and his answer acceding to such a possibility hardly constituted an admission that his driving abilities were impaired. In the circumstances it is a cause for concern that the magistrate even put such a statement to the accused. Either she was indulging in conjecture or she was privy to information which was not included in the charge-sheet, but which may have been obtained elsewhere.

[22] If this is the record of the proceedings in respect of which the magistrate says that she was satisfied that the accused admitted all the material allegations in the charge-sheet and upon which she based her conviction she surely could not have arrived at such a conclusion. We are not satisfied from the record we have before us that the accused properly made the necessary admissions which were required in order for the magistrate to be satisfied, beyond a reasonable doubt, that the accused's driving abilities were impaired so as to conclude that he was guilty of driving under the influence of intoxicating liquor in contravention of s 65 of the RTA.

[23] As a court of review we are required in terms of s 302 of the Act to make a determination as to whether the proceedings before the magistrate were in

accordance with justice. Given the deficiencies in the record which we have highlighted, we find ourselves unable to make such a finding. In the circumstances the conviction on this charge cannot stand and must be set aside.

(Paragraph 24 to 45 of the Judgment is not reproduced here but the full judgment can be accessed at:
http://www.saflii.org/za/cases/ZAWCHC/2018/79.html

From The Legal Journals

Marumoagae, C

"Retirement benefit payments used for child maintenance"

***De Rebus* 2018 (Sept) *DR* 20.**

The article can be accessed here:

http://www.derebus.org.za/retirement-benefit-payments-used-for-child-maintenance/

Manyame, A

"Are your hands tied when it comes to cyber harassment?"

De Rebus* 2018 (Sept) *DR 22

The article can be accessed here:

http://www.derebus.org.za/are-your-hands-tied-when-it-comes-to-cyber-harassment/

Prinsloo, M & Huysamen, E

"Cultural and Religious Diversity: Are they effectively accommodated in the South African workplace?"

Law, Democracy and Development 2018 Vol 22 26 to 38

The article can be accessed here:

http://www.ldd.org.za/images/stories/Ready_for_publication/diversityatworkplace.pdf

Visser, J-M & Kruger, U

"Revisiting admissibility: A review of the challenges in judicial evaluation of expert scientific evidence"

2018 SACJ 1

Abstract

Research has shown that criminal courts in common law jurisdictions generally take a liberal approach to the admission of incriminating expert evidence and leave considerations of reliability and methodological validity until the evaluation stage. This article investigates the ability of presiding officers to accurately evaluate expert evidence by describing the factors that complicate this task. These factors include: the complex and technical nature of expert evidence and the specialisation required to understand it, as well as bias at different levels of trial. The article also reviews some strategies meant to assist presiding officers in accurately evaluating often highly technical evidence, from adversarial safeguards to the development of strict admissibility rules. The article confirms that judges in bench trials are in as poor a position as laypersons on jury panels to accurately evaluate expert evidence. For this reason, South Africa should adopt research and policy strategies to encourage a more analytical approach during the admissibility stage in criminal trials. The aim of such an approach must be to conceptualise and apply effective rules to help judges identify and exclude unreliable expert evidence, and to invite prosecutors and legal representatives to partake in the process of rooting out unreliable evidence.

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

Contributions from the Law School

Practical problems with broad based approach in similar fact evidence

In a discussion of similar fact evidence, Zeffertt and Paizes, in treating similar approach as circumstantial evidence, adopted the approach set out in the Australian case of *Pfennig v R* (1995) 182 CLR 292 which posed the question: "whether there is a rational view of the evidence that is consistent with the evidence of the accused" (Zeffertt and Paizes *South African Law of Evidence* 305). This approach necessitated courts to work backwards in its process of reasoning to prove the "ultimate" or "primary fact" (Zeffertt and Paizes *supra*). Depending on which fact is to be proven, the court will have to identify the type of reasoning at each stage. The authors then explain how each fact in the process is proven:

"If that fact is essential to its process of reasoning, in that the next fact inferred from it cannot be established without its proof then to use the terminology of some judge the process must be likened to the intermediate fact in issue does not meet the same standard of proof. If the fact is not essential but is merely being relied on to add weight to several other items and it is the court's view that the next fact may be inferred if a certain number of these facts are proved even if they are not at all proved then the process is likened to rope in the sense that each strand may strengthen the probability of the inferred fact until the requisite standard is attained. The principle of legal relevance operates as follows: the primary facts upon which the evidence rests show little prospect of meeting the standard of proof required of them in the circumstances, the conventional features such as the raising of lengthy collateral issues, as well as having to fight an issue on several fronts may warrant its exclusion" (Zeffertt and Paizes *supra* 30.)

The central focus is therefore on "cogency and on techniques for dealing with reasoning in order to fashion coherent, compelling and rational arguments rather than problems of admissibility" (Zeffertt and Paizes *supra* 305).

The question therefore remains as to whether a move away from admissibility, being based on "different kinds of relevance" to focusing on "degrees of relevance" will be less problematic than the courts have experienced in the past (Hamer "The Structure and Strength of Propensity Inference: Singularity, Linkage and the Other Evidence" 2003 29 (1) *Monash University Law Review* 137 at 146). It is submitted that a move toward a single test for relevance has already been employed by the South African courts to varying degrees – and using different catch phrases in cases such as *Nduna v S*, 2011 (1) SACR 115 (SCA) where the court in determining whether the evidence had a "striking similarity" to previous crimes committed, emphasized the *modus operandi* in committing acts of robbery were what revealed a clear connection and provided confirmation of the identity of the accused (at par [18]). The court

focused specifically on the pattern (or system) of conduct that was committed by the accused:

“The appellant committed a series of rapes and robberies in a particular area and within a period of about four months. The crimes referred to in counts 5 and 6 were committed in the same area and in the middle of this series of similar crimes. The same pattern of conduct which was committed during the morning or really afternoon when the victims would likely be alone. The appellant would enter a particular house surreptitiously and confront the unsuspecting victim. He would first demand money and then rape the victim. The same pattern as followed by the assailant on counts 5 and 6. The appellant appeared to have a predilection for wristwatches. In almost every instance he removed the complainant’s wristwatch or at least asked for a watch” (at par [18]).

Other cases made use of the term “circumstantial evidence” (*Savoi* v *National Director of Public Prosecutions* 2014 (1) SACR 545 (CC) par [55]). The problem is that employing a single term does not practically solve the problems surrounding the admission of similar fact evidence. This approach of using “circumstantial evidence” was similarly endorsed by Zeffertt and Paizes when they made reference to the Australian case of *Pfennig v R* (1995) 182 CLR 292 to explain how such a test would practically apply in South African law. These authors suggest that by adopting the “rational view” approach, it has been suggested that the ratio in *Boardman v DPP* 1975 AC at is not “displaced, threatened or even weakened by it” (at 21) but rather:

“All that our approach does it to relieve the relevance enquiry of a burden it was never designed to bear – that of excluding evidence by reason of those ‘prejudicial’ features which are concerned with the danger of wrong conviction; features which are extremely difficult to articulate let alone qualify or measure against so incommensurate a notion as probative value” which are usually part of such a relevance inquiry.” (Zeffertt and Paizes *supra* 308)

However, the Australian courts when attempting to answer this question in *Roach v The Queen,* (2011) 242 CLR 610 had limited the formula to a very specific set of circumstances and for a specific purpose:

“The rule in Pfennig operates as an exclusionary rule with respect to similar fact evidence tendered for a particular purpose. Separate and distinct from that rule is the common law discretion to exclude relevant evidence in criminal proceedings. It permits a judge to exclude evidence where its prejudicial effect exceeds its probative value. It is commonly applied to similar fact evidence.” (Field *A Statutory Formula for the Admission of Similar Fact Evidence against a Criminal Accused* (Unpublished doctoral thesis, Bond University) (2013) 187).

The problem was that Roach did not articulate what that purpose was (Field *supra* 188). The courts will then, it seems, have to be very specific as to what purpose such circumstantial evidence will need to be used for in South African cases. Second, does evidence of "uncharged acts" fall within the scope of the Pfennig test? (Field *supra*). Such evidence could be prejudicial if utilized for incorrect purposes. Furthermore, due to an absence of sound directives to lower courts on how such evidence should be utilized caused the test to be applied incorrectly (Field *supra*). The main problem with the "contextual approach" highlighted in *Pfennig* and which will apply to South African similar fact evidence law, is that "there is no one term which satisfactorily describes evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged (at 484). The use of the test of relevance is therefore circular: to establish relevance, cogency needs to be established. This can only be done by referring to the previous terminology such as "striking similarity' and 'probative value', which courts are already using to explain why the evidence is cogent.

Third, the rational view test, as expounded in *Pfennig,* is that where there are two more complainants that are linked to a case, and that such similar fact evidence is excluded due to the possibility of collusion, this would explain the existence of the evidence in question (Bagaric and Amarasekara "The Prejudice against similar fact evidence" 2001 5 *International Journal of Evidence and Proof* 71 at 77.) This rational view test also raises the question of why the reasonable doubt standard does not govern the voluntariness of "confessional evidence" in determining admissibility (Arenson "The Propensity Evidence Conundrum: A Search for Doctrinal Consistency" 2006 8 *University of Notre Dame Law Review* 31 (1999) *Melbourne University Law Review* 273). This is pertinent, because full confessions are direct evidence of guilt as opposed to similar fact evidence (Arensons *supra*). Furthermore, an accused is not prevented from raising the possibility of a collusion, which would necessarily exclude such evidence (Arensons *supra* 274).

The majority of the court in *Pfennig* expressly stated that similar fact evidence is admissible, even if it's only relevance is via propensity (Bagaric and Amarasekara *supra* 85). This issue has also largely been the subject of controversy: is similar fact evidence admissible where its relevance is derived from propensity reasoning? (Bagaric and Amarasekara *supra*). Another problem that has been raised is the distinction between propensity and non-propensity reasoning. Propensity reasoning has "indistinct edges". This essentially means that there are "closely related inferences", which fluctuate in progression (Hamer "The Legal Structure of Propensity Evidence" http://ssrn.com/abstract=2743029). For example, consider the modus operandi in *S v D* 1991 (2) SACR 543 (A). To avoid the issue of showing that the accused had a propensity to burgle, the court relegated the modus operandi to cases where it is 'genuinely distinctive' and 'unique' that both offences can only be credited to one accused (Hamer *supra*). This has the effect that:

"[t]o manage the prejudicial risk, the exclusion operates more broadly. The threshold question [is] whether the proposed evidence [is] discreditable to the accused. It covers all prosecution evidence that either directly or indirectly reveals the discreditable or stigmatizing character of the accused" (Hamer *supra*).

It could be argued that such individualisation is nothing other than an illusion in law:

"It should be not be enough that modus operandi reasoning merely raise[s] the probability of a common perpetrator. But the trace evidence analogy calls this solution into question. Experts on forensic science describe the notion of individualization as a fallacy. It is impossible to prove any human characteristic to be distinct in each individual without checking every individual, which has not been done. The concept of uniquely associated with must be replaced with a probabilistic association. While the match probability of DNA evidence might be low enough to conclude that the profile is most unlikely to be possessed by anyone else on the planet, it's still a probability. Most other forensic evidence is weaker, lacking a solid statistical basis, and its contribution may be expressed on a scale, ranging from weak or limited support up to extreme strong support" (Hamer *supra*).

Another problem that has confused judges is the courts' reference to coincidence reasoning, which has a close connection to propensity reasoning (Hamer "The Legal Structure of Propensity Evidence" *supra* 13). Many courts have adopted the "doctrine of chances" or coincidence reasoning in support of non-propensity inferences, and as a means of circumventing the "narrow exclusionary rule" such as in *Makin v Attorney General* (1894) AC 57 (PC) 65 and *R v Smith* (1915) 11 Crim App R (Hamer "The Structure and Strength of Propensity Inference: Singularity, Linkage and the Other Evidence" 2003 29 *Monash University Law Review* 137 at 159). In both these cases financial gain could only be achieved by ensuring the deaths of parties concerned in each case: the wives in the case of *Smit*h and the babies in the case of *Maki*n (at 233):

"From there, it was a simple process of arguing deductively that the death for which the accused was on trial was part of that scheme. The need for greater or lesser similarity between each of these 'scheme' events will vary according to how the logic is being employed. In *Makin*, the 'abnormal' event was so many babies dying whilst under the care of the Makins; in Smith it was the bizarre manner of the relevant deaths. If, in Smith, one of the three wives had died after falling down a flight of stairs, while a second had died from arsenic poisoning, could the Court have adduced evidence of their deaths in order to persuade the jury that the wife who had died in the bath had been murdered by Smith? All three had died whilst living in the same house as him, but there was insufficient similarity in their deaths to incite anything other than a vague suspicion of Smith's involvement" (Field supra 333).

Coincidence reasoning focused not on the accused as a proven criminal, but around the criminal enterprise of killing his wives for money. Thus while there is evidence that links the accused with other crimes, on the premise of "shared singularity" this can bolster the evidence which incriminates the accused in the offence for which he is charged. The build-up of such evidence establishes linkage (Hamer *supra*). It is the "by-product of the accused's guilt" (Hamer *supra*). As Hamer notes, "it is only after the argument has been made, and because it succeeds, that [the accused's] bad disposition is established". Coincidence reasoning therefore appears to be less prejudicial than its counterpart, since the accused's propensity to commit criminal acts is not recognised prior to a guilty verdict and therefore is free of the exclusionary rule (Hamer *supra*). While this perspective may be justified by the contradistinction between propensity reasoning and coincidence reasoning in their uncontaminated form, it is difficult to draw a clear distinction in practice:

"In essence the distinction is one between the stronger notion of 'linkage' and the weaker notion of 'association'; it is one of degree. Classification is rarely straightforward, and most cases will present the possibility of either or both forms of reasoning. Even where cases appear susceptible to clear classification the significance of the distinction is questionable; coincidence reasoning involves the recognition of the defendant's propensity, and the operation of propensity reasoning can be described in terms of the rejection of coincidence." (Hamer *supra*).

The "locus classicus" case of *Makin* still has commentators questioning whether it involved propensity reasoning or coincidence reasoning. Since the accused's liability for previous deaths had not been firmly established before the trial, the case was viewed as coincidence reasoning. However, while applying such reasoning to these "other deaths", the jury could then have proceeded to the charge of murder using propensity reasoning:

"The prosecution's case was that Makin took in a large number of children into his care, that his disposition was murder, and that this supported their case that he murdered the child in respect of which he was charged" (Hamer 2003 *Monash University Law Review* 161).

Therefore, it is unlikely that this case is prone to "exclusive categorisation" since:

"The evidence may have been admitted for both purposes, or more plausible, the purpose may not have been clearly specified … Windeyer J indicated that '[t]he evidence went to shew a system pursued by the prisoners of receiving children in this way, and the evidence of such a system made it probable that they took Murray's child, a stated in pursuance of it. However, his Honour added that the 'finding of other babies … was not only admissible to shew system, but to shew that it was not by mere accident or coincidence that the prisoners happened to live in a house in the back yard of which babies happened to be buried.' It seems that even in the purest

coincidence case the jury may give pre-emptive consideration to the defendant's criminal propensity and it is doubtful whether any trial judge's direction to the contrary would be effective" (Hamer *supra*).

While the difference between propensity and coincidence reasoning is distinct in practice, it cannot provide a coherent basis for determining purview of the exclusionary rule (Hamer *supra*). It has been suggested that the above criticisms have over-conceptualised the "logical process whereby similar fact evidence operates (Bagaric and Amarasekara *supra* 85).

Conclusion

The use of different terminologies to indicate whether or not similar fact evidence is admissible in South African law has created much confusion in the development of this area of law in South Africa. Some of these terms have included "striking similarity", "prohibited lines of reasoning", "balancing probative force against prejudicial value", "high degrees of relevance", and "circumstantial evidence". This article examines whether the concept of relevance as advocated by Zeffertt and Paizes as the single rule that would make evidence admissible, would address shortcomings identified in South African case law. The courts have already used such an approach all along, albeit disguised under a matrix of catch phrases and terminology. The problem appears to be that by treating the terms such as "striking similarity" and *modus operandi*, for example, as statements of law rather than as guiding principles, the courts have treated terminology such as "striking similarity" as "statements of law" rather than "guiding principles" –our courts have erred. No principle in isolation can adequately explain "the numerous and complex factors involved in a singularity assessment, many of them a matter of degree".

Samantha Goosen
Lecturer,
School of Law
University of KwaZulu-Natal, Pietermaritzburg

Con Court cannabis judgment: what was the reasoning and what does it mean?

On Tuesday the Constitutional Court decriminalised the possession and cultivation of cannabis in private by adults for personal private consumption. The court relied on the right to privacy to reach this result. Although the order was suspended until Parliament can fix the defect in the law, the court provided interim relief that will make it unlawful for the Police to arrest adults who privately cultivate, possess or use relatively small amounts of cannabis.

Several years ago, Gareth Prince (one of my former students) approached the Constitutional Court, arguing that legislation prohibiting Rastafarians from possessing and using cannabis (widely known as "dagga" in South Africa) unjustifiably limited the right of Rastafarians to religious freedom as guaranteed by section 15 of the Bill of Rights. In that case (decided in 2002), the Constitutional Court voted 5 votes to 4 to dismiss Mr Prince's application, but as we say in Afrikaans *"aanhouer wen"* (he who perseveres, triumphs), and this week the Constitutional Court in a unanimous judgment came to a different conclusion.

As Deputy Chief Justice Raymond Zondo pointed out in his judgment in *Minister of Justice and Constitutional Development and Others v Prince,* the situation has changed since the Constitutional Court ruled against Mr Prince in 2002. There are now 33 jurisdictions across the world in which the use and possession of cannabis have been decriminalised or legalised.

This case also differs from the original 2002 case in that it was not based on the right to freedom of religion and did not require the legislature to provide for a special exemption for Rastafarians only. Instead, the argument before the court was that the criminal prohibition of the private cultivation and possession of cannabis for private consumption unjustifiably limited the right to privacy guaranteed by section 14 of the Bill of Rights.

The right to privacy can be understood as a right to live one's own life with a minimum of interference by the state and by other private institutions or persons. The right can be imagined as a multi-layered onion, with protection being more intense at its core, and less intense as one peels away the layers and reaches to the outer layers of the onion. As the Court explained, a very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place… This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.

Given this definition of the right to privacy, the Court had no difficulty in finding that the prohibition of the mere possession, use or cultivation of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy provided for in section 14 of the Constitution. The only question in the case

was therefore whether such a drastic infringement on the right to privacy was justifiable in terms of the limitation clause contained in section 36 of the Constitution.
The court raised several compelling arguments to justify its conclusion that this limitation of the right to privacy was not justifiable in terms of the limitation clause.
First, it quoted with approval from the High Court judgment which noted that much of the history of cannabis use in this country "is replete with racism", and noted that there is a long history of the use of cannabis by indigenous South Africans.
The Court did not note that the use and possession of cannabis was outlawed by the colonial authorities in South Africa partly to prevent interracial socialisation and sexual activity which some legislators at the time thought would be encouraged by the widespread use of dagga. Neither did it comment on the argument that the criminal law often imposes more severe penalties on those convicted of the possession of drugs mostly used by poor people and by black people than on the possession of drugs mostly used by rich people and white people.
However, the Court did make the following comment about the long history of cannabis use by black South Africans:
[W]e do not, of course, intend to minimise the fact that the use of dagga is a great social evil in South Africa. Nevertheless, the long-standing indulgence in the use of the substance by a group of which an accused person belongs may well constitute a circumstance to be taken into account in mitigation at any rate where he has been convicted of the use or possession of a small quantity.
Second, while the infringement on the right to privacy by the criminal law was severe, the purpose of the prohibition (protecting individuals from drug addiction and the harms associated with drugs) was not as pressing as previously thought because the harm of cannabis use was not as severe as previously argued by government "experts". The court relied on findings by the World Health Organisation and others about the relative harm of cannabis compared to other widely available substances like alcohol and tobacco.
Relying on these findings, the court pointed out that the adverse health and social consequences of cannabis use reported by cannabis users who seek treatment for dependence appear to be less severe than those reported by persons dependent on alcohol or opioid. The court also noted that the harmful effects caused by cannabis are incomparable to those caused by tobacco. Although the court did not spell this out, the logical consequence of this is that it makes little sense to criminalise the use and possession of cannabis but to allow the use and possession of alcohol and tobacco.
Lastly, as noted above, attitudes in other open and democratic societies towards cannabis use have changed drastically over the past ten years, providing another reason why the severe limitation on the right to privacy could not be justified.
The court thus declared invalid the relevant sections of the Drugs and Drug Trafficking Act and read words into these sections to ensure that the judgment would have immediate effect – although it also ruled that Parliament could pass its own amendments within the next 24 months to manage the regulation of the private

possession, cultivation and use of cannabis – as long as such legislation did not infringe on the right to privacy of individuals.

The effect of the reading-in is that an adult person may use or be in possession of cannabis in private for his or her personal consumption in private. One would be able to use cannabis in private even when this private place is not ones home or dwelling. Moreover, the cultivation of cannabis by an adult in a private place for his or her personal consumption in private is no longer a criminal offence. As the court explained:

An example of cultivation of cannabis in a private place is the garden of one's residence. It may or may not be that it can also be grown inside an enclosure or a room under certain circumstances. It may also be that one may cultivate it in a place other than in one's garden if that place can be said to be a private place.

This ruling does not extend to the use, including smoking, of cannabis in public or in the presence of children or in the presence of non-consenting adult persons. Furthermore, the use or possession of cannabis in private other than by an adult for his or her personal consumption is not permitted.

The ruling also does not extend to the cultivation or possession of cannabis with the intention of selling it. This means that it is still a criminal offence to grow dagga commercially or to deal in dagga.

Dealing in cannabis is a serious problem in this country and the prohibition of dealing in cannabis is a justifiable limitation of the right to privacy.

The judgment is somewhat vague about how a court will decide when you cultivate or possess cannabis for private use and when you intend to sell that cannabis to others. The court did not impose specific limits on the quantities that you are allowed to possess before it will be assumed that you are dealing in dagga and are no longer merely possessing it for private use. However, judge Zondo provided the following guidelines:

In determining whether or not a person is in possession of cannabis for a purpose other than for personal consumption, an important factor to be taken into account will be the amount of cannabis found in his or her possession. The greater the amount of cannabis of which a person is in possession, the greater the possibility is that it is possessed for a purpose other than for personal consumption. Where a person is charged with possession of cannabis, the State will bear the onus to prove beyond a reasonable doubt that the purpose of the possession was not personal consumption.

This means that if a police officer finds a person in possession of cannabis, he or she may only arrest the person if, having regard to all the relevant circumstances, including the quantity of cannabis found in that person's possession, it can be said that there is a reasonable suspicion that a person has committed an offence in terms of the Act.

This leaves some discretion to the Police to arrest individuals who are found in possession of cannabis. However, the judgment minimises the possibility that this power will be abused by an overzealous Police officer by making clear that when in doubt, the Police officer should not arrest an individual found in possession of cannabis. Zondo explains the practical effect of this as follows:

It is true that there will be cases where it will be clear from all the circumstances that the possession of cannabis by a person is for personal use or consumption. There will also be cases where it will be clear from all the circumstances that the possession of cannabis by a person is not or cannot be for personal consumption or use. Then, there will be cases where it will be difficult to tell whether the possession is for personal consumption or not. In the latter scenario a police officer should not arrest the person because in such a case it would be difficult to show beyond reasonable doubt later in court that that person's possession of cannabis was not for personal consumption I will, therefore, not confirm that part of the order of the High Court because we have no intention of decriminalising dealing in cannabis.
Parliament may of course pass legislation to provide different guidelines to Police officers, but Parliament is now constitutionally prohibited from passing legislation that would criminalise the private cultivation, possession, and consumption of cannabis. While Parliament can tweak the laws to ensure the effective enforcement of laws to criminalise the commercial manufacture and dealing in cannabis (for example, by providing a precise definition for what would constitute a "private space"), any such law would have to respect the rights of an adult to cultivate, possess and consume cannabis in private.

(The above entry of Prof. Pierre de Vos was published on his blog *Constitutionally Speaking* on 18 September 2018).

A Last Thought

'The Ubuntu Approach to Conflict Resolution and Reconciliation
Hence, how then were the principles of Ubuntu traditionally articulated and translated into practical peacemaking processes? Ubuntu societies maintained conflict resolution and reconciliation mechanisms which also served as institutions for maintaining law and order within society. These mechanisms pre-dated colonialism and continue to exist and function today. Ubuntu societies place a high value on communal life, and maintaining positive relations within the society is a collective task in which everyone is involved. A dispute between fellow members of

a society is perceived not merely as a matter of curiosity with regards to the affairs of one's neighbor; in a very real sense an emerging conflict belongs to the whole community.
According to the notion of Ubuntu, each member of the community is linked to each of the disputants, be they victims or perpetrators. If everybody is willing to acknowledge this (that is, to accept the principles of Ubuntu), then people may either feel a sense of having been wronged, or a sense of responsibility for the wrong that has been committed. Due to this linkage, a law-breaking individual thus transforms his or her group into a lawbreaking group. In the same way a disputing individual transforms his or her group into a disputing group.
It therefore follows that if an individual is wronged, he or she may depend on the group to remedy the wrong, because in a sense the group has also been wronged. We can witness these dynamics of group identity and their impact on conflict situations across the world.
Ubuntu societies developed mechanisms for resolving disputes and promoting reconciliation with a view to healing past wrongs and maintaining social cohesion and harmony. Consensus building was embraced as a cultural pillar with respect to the regulation and management of relationships between members of the community...
Depending on the nature of the disagreement or dispute, the conflict resolution process could take place at the level of the family, at the village level, between members of an ethnic group, or even between different ethnic nations situated in the same region.'

Dr Timothy Murithi ('Dr Murithi'), in his study on The Practical Peacemaking Wisdom from Africa: Reflections on Ubuntu as quoted in *Harmony Goldmine Company Limited v Raffee N.O. and Others (JR1205/15) [2018] ZALCJHB 169; (2018) 39 ILJ 2017 (LC) (8 May 2018)* per Nkutha-Nkontwana J at para 10.