e-MANTSHI

A KZNJETCOM Newsletter

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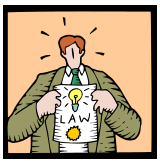
Welcome to the hundredth and fifty ninth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. Notice has been given in terms of Rule 276(1)(b) of the Rules of the National Assembly that the Minister of Justice and Correctional Services intends to introduce the *Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Bill*, 2019 in the National Assembly shortly. The *Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Bill* aims to amend the *Prescription Act,* 1969 (Act No. 68 of 1969) so as to extend the list of sexual offences in respect of which prescription does not commence to run under certain circumstances in respect of a debt based on the alleged commission of any of those sexual offences; to amend the *Criminal Procedure Act*, 1977 (Act No. 51 of 1977), so as to extend the list of sexual offences in respect of which a prosecution may be instituted after a period of 20 years has lapsed since the date of the alleged commission of a sexual offence; and to provide for matters connected therewith. The notice was published in Government Gazette no 42854 dated 22 November 2019.

Recent Court Cases

1. S v Gumede and Others [2019] ZAKZPHC 70 (1 November 2019)

There appears to be little scope for exercising a discretion in favour of proceeding under s 112(1) (a) of Act 51 of 1977 when the accused is unrepresented.

Olsen J (Vahed and Masipa JJ concurring)

[1] Seven shoplifting cases have come before us on special review at the request of the Acting Senior Magistrate, Durban, Mr B S E Khumalo. Both the memorandum from the senior magistrate and the commentary on it by the additional magistrate who presided in the seven cases, Ms J C Jonck, are helpful pieces of work. It is appropriate that at the outset I express our gratitude for the benefit of these inputs.

[2] In each of the seven cases the accused was represented by legal aid counsel, and was convicted on a plea of guilty accepted by the prosecutor. The learned presiding magistrate dealt with each of the cases in terms of the provisions of s112(1)(a) of the Criminal Procedure Act, 1977. The essence of the issue raised by the senior magistrate in each of the cases is the question as to whether the acceptance of the plea under s 112(1)(a) of the Act was in accordance with justice.

[3] It is as well at the outset to list the essential features of the seven cases sent on review. I identify each case, the item stolen, its value, and the sentence imposed.

(a) S v Mpumeleo Gumede - case number 23/16418/2018;
Pack of pampers; R269.99;
R600 or 30 days' imprisonment of which R400 or 20 days' imprisonment were suspended.

(b) S v Mfundo Mbanjwa – case number 23/16416/2018;
2 Ladies sandals; R239.98;
R600 or 30 days' imprisonment of which R400 or 20 days' imprisonment were suspended.

(c) S v Mthobisi Mbanjwa – case number 23/18980/2018;
1 pair of black shoes; R119;
R100 or detention until the rising of the court.

(d) S v Sibusiso Mbili – case number 23/18920/2018;
5 Chocolate slabs; R129.95;

R100 or detention until the rising of the court.

(e) S v Bongekha Mkhungo – case number 23/20327/2018;
1 “Mr Price On Cerise” [*sic*]; R129.99;
R200 or 10 days’ imprisonment.

(f) S v Sthembiso Majozi – case number 23/21990/2018;
1 Slab of chocolate; R24.95;
R100 or 5 days’ imprisonment.

(g) S v David Reddy – case number 23/984/2019;
3 People’s Magazine; R69.00;
R100 or detention until the rising of the court.

[4] Section 112(1) of the Act provides alternative procedures for dealing with a plea of guilty at a summary trial when that plea is not accompanied by a written statement by the accused referred to in s 112(2). Section 112(1)(a) involves a conviction without the accused being questioned by the magistrate. Section 112(1)(b) involves the magistrate questioning the accused with reference to the facts of the case in order to be satisfied that the accused is indeed guilty of the offence in question. Section 112(1) reads as follows.

‘112. **Plea of guilty**

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

(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and-

(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or

(ii) deal with the accused otherwise in accordance with law;

(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence .

[5] When the conditions for the application of s 112(1)(a) are satisfied the use of the procedure is discretionary. (The court “may” convict on the plea alone.) When the

conditions for the application of s 112(1)(b) arise, it is obligatory (subject only to s 112(2)) to follow that section. (The court "shall" question the accused.) On the language of the section, the issue as to whether s 112(1)(a) may be employed in preference to s 112(1)(b) turns on the opinion of the magistrate as to whether the offence merits punishment of imprisonment (or any other form of detention) without the option of a fine, or a fine exceeding the amount determined by the Minister from time to time. (The amount determined by the Minister is currently R5000.) Subject to one important exception, a negative opinion permits the magistrate to convict the accused without questioning him or her. The exception arises from s 112(1)(b), which requires the magistrate to question the accused if the prosecution requests that it be done.

[6] Section 112(1)(b) says nothing about the circumstances in which the prosecutor may request the court to question the accused instead of convicting him or her on a plea of guilty alone. Clearly, if the prosecutor is of the view that the conviction may justify a sentence which puts the matter outside the provisions of s 112(1)(a), he or she would request the magistrate to question the accused under s 112(1)(b). Such a request may be based not merely on the facts of the case, but perhaps more frequently on the accused's record of previous convictions to which the magistrate would not have access at that stage of the proceedings. It might also be the case that a prosecutor makes a request that the accused be questioned because the contents of the docket generate a concern on the part of the prosecutor that perhaps the accused's plea of guilty is not justified.

[7] As already mentioned, in all of the cases before us the accused was represented, tendered a plea of guilty, and was convicted without being questioned by the presiding magistrate. The senior magistrate has referred these cases to us on special review out of a concern that the convictions were not in accordance with justice. The following are the reasons he has stated for his concern in each case.

(a) Section 112(1)(a) of the Criminal Procedure Act was enacted to deal with trivial offences.
(b) Theft is not a trivial offence. A conviction of theft carries a stigma of being deceitful, and may result in it being difficult if not impossible for the convicted person to secure employment.
(c) Decisions in the Free State and Western Cape Divisions of the High Court are to the effect that s 112(1)(a) ought not to be invoked in cases of shoplifting, regardless of the value of the stolen items.
(d) Instead the magistrate must be satisfied that the accused has made an informed decision to plead guilty, being aware of the implications of carrying a previous conviction for theft; that in fact all the allegations in the charge are admitted; and that the plea of guilty is made freely and voluntarily.
(e) These considerations arise also when the accused is represented. It is "the duty of the court to always be alert and guard against [the risk of convicting an innocent person] even though the accused might be legally represented

because of the likelihood of undue influence or promises made to plead guilty, professional incompetency and lack of experience among the legal representatives which deprives the accused of a proper, effective, adequate legal representation and a fair hearing."

[8] The senior magistrate concludes by suggesting that:

(a) in the case of unrepresented accused (i.e. not the matters before us) the magistrate must proceed under s 112(1)(b) by questioning the accused; and
(b) in the case of a represented accused, the magistrate should insist upon the provision of a written statement in terms of s 112(2) of the Act.

(The provision of a written statement would not necessarily meet all of the concerns expressed by the senior magistrate. It strikes me that questioning is the alternative also in the case of represented accused.)

[9] The response of the presiding magistrate may be summarised as follows.

(a) The present cases concern only represented accused. She always questions an unrepresented accused in terms of s 112(1)(b) before convicting.
(b) The authorities to which the senior magistrate referred all concerned unrepresented accused persons.
(c) Whilst it is uncontentious that a previous conviction for theft is a serious matter, that does not put shoplifting cases outside the ambit of s 112(1)(a).
(d) It is for the legal practitioner representing the accused to canvas the evidence of the offence with the accused, to ensure that a proposed plea of guilty is to be made freely and voluntarily, and without undue influence. The magistrate would "be treading on dangerous ground" by proceeding on the assumption that legal practitioners are failing to do their job, or are not acting in good faith and with due regard to the interests of justice, merely because a written statement in terms of s 112(2) is not produced.
(e) Prosecutors are trained professionals. They may be relied upon not to allow matters to proceed under s 112(1)(a) when that is not appropriate.

[10] In dealing with this matter we have had the benefit of argument from each of the Society of Advocates of KwaZulu-Natal, the office of the Director of Public Prosecutions and Legal Aid South Africa. These submissions have proved invaluable. We express our gratitude for this assistance.

THE VALUE OF LEGAL REPRESENTATION

[11] The senior magistrate discounts the influence of legal representation on the choice of procedure. Although the senior magistrate describes his concerns as aimed at "risks", the assumed risks are in my view quite startling. What the senior magistrate proposes is that the procedure should be adjusted to avoid what he describes as the "likelihood" of undue influence being brought to bear on an accused person, or of promises being made to him or her as to the outcome of a plea of guilty.

Similarly, according to the senior magistrate, procedural decisions must be directed at avoiding the consequences of professional incompetency or lack of experience on the part of legal representatives.

[12] None of the references to legal representation in s 35 of the Constitution is expressly qualified by the use of the term "competent". "Competence" has to do with being adequately qualified to perform the task at hand. It would not be suggested that the Constitution contemplates legal representation by someone not adequately qualified to represent an accused person. The Constitution assumes:

(a) the continuation of a legislative scheme for the education, training and certification of persons as legal representatives; and
(b) the competence of persons who thus achieve the status of legal representative.

[13] Legal representatives are officers of the court. Judicial officers "act on the assumption that a duly admitted lawyer is competent". (*S v Halgryn* 2002 (2) SACR 211 (SCA) para 12.) Whilst the assumption of competency may prove to be erroneous in any particular case, it is nevertheless the assumption upon which courts can and must act unless and until adequate reason not to do so emerges. The contrary assumption espoused in the present context by the senior magistrate simply undermines how courts work.

[14] As to the consequences beyond the criminal justice system of a conviction of theft, whilst they may well form the subject of advice given by a legal representative to the client, they are not matters which affect the adjudication of the guilt or innocence of the accused. It is not a concern of the magistrate as to what has passed between an accused person and his or her legal representative on the subject of the implications of a conviction for theft. As to the requirements to be satisfied for a conviction on such a charge, the assumption of competence on the part of a legal representative surely extends far enough to encompass an ability to convey to the client what the requirements for guilt are, to test the instructions given by the client against those requirements, and to advise the client accordingly as to:

(a) his or her guilt or innocence; and
(b) his or her right to a trial in which the State may fail to prove what the client confesses, in privileged communications, to be the truth.

THE REAL ISSUE: AN ERRONEOUS CONVICTION ON A PLEA OF GUILTY

[15] Counsel for the Director of Public Prosecutions has referred us to para 11 of the judgment in *S v Dzukuda & Others; S v Tshilo* 2000 (2) SACR 443 (CC) for a perspective on the concept of a fair trial.

'At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at

the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused.' (Footnote omitted.)
The learned Judge in *Dzukuda* went on to point out that there are other elements of a fair trial, such as the presumption of innocence, which cannot be explained "exclusively on the basis of averting a wrong conviction".

[16] Our current Criminal Procedure Act, that of 1977, introduced a new system regulating the plea stage of criminal proceedings. Nevertheless, as has been pointed out in particular by counsel for the Society of Advocates, there is an historical perspective to be gained on the issue before us which can be of some assistance.

The Position Prior to 1977

[17] The earliest ancestor in this line was a proviso to s 286 of the Criminal Procedure and Evidence Act, 1917, as it read before its amendment in 1935. The proviso was to the effect that in an inferior court:
'if no offence is charged other than a contravention of a statutory regulation or by-law, or drunkenness, a plea of guilty by the accused to the charge shall be sufficient to enable the court to convict him of such offence'.
The proviso also permitted the court in its discretion to hear evidence at the sentencing stage.

[18] That section of the 1917 Act was amended by s 5 of the General Law Amendment Act 46 of 1935. The new section was to the effect that where a plea of guilty is tendered and accepted, an inferior court could convict the accused on a plea of guilty upon proof (other than the unconfirmed evidence of the accused) that the offence was actually committed: but the section was subject to a proviso allowing the magistrate to convict on a plea of guilty alone (ie unsupported by any other evidence) if the magistrate was of the opinion that the offence "does not merit punishment of imprisonment without the option of a fine or of whipping, or of a fine exceeding fifteen pounds". In the event of a conviction under the proviso the sentence had to be one other than imprisonment or any other form of detention without the option of a fine, or of whipping or of a fine exceeding fifteen pounds.

[19] The 1935 amendment to the 1917 Criminal Procedure Act no longer spoke of statutory regulations or by-laws (or drunkenness), but in its terms left it open for the employment of the section on the basis only of an assessment of what punishment the charge would merit.

[20] In *Rex v Punt* 1936 CPD 264 at 265 Centlivres, J held that, in the light of the fact

that the previous provision had dealt with what he called “trivial offences”, it was reasonable to assume that in the section as amended in 1935 the “Legislature was also dealing with offences for which in its opinion the punishment meted out should be trifling”. Perhaps because it was unnecessary in that case, the learned Judge made no comment on the fact that the amended section said nothing about the types of offences covered by it other than the fact that they did not merit punishment in excess of what the section provided.

[21] The amended section received the attention of a full court of the Eastern Cape in *Rex v Vabaza* 1948 (2) SA 451 (E). In that case the accused was convicted of two counts of theft on a plea of guilty where the prosecution tendered no evidence as to the commission of the offence. The sentences imposed were in excess of the maximum stipulated in the proviso to s 286 of the Criminal Procedure Act, 1917. The judgments of Pittman JP and Hoexter J held that the convictions had to be set aside. Gardiner J dealt with the issue rather more expansively. He said that it was clear that in enacting s 286(1)(b), and particularly its proviso, the legislature provided a method of disposing of petty cases expeditiously. He continued as follows at 455.
‘Decisions interpreting the section abound in our law reports. I mention a few: *Rex v Punt* (1936 CPD 264); *Rex v Jobe* (1939, EDL 9); *Rex v Langeveld* (1943 CPD 170); *Rex v Disapela* (1946 OPD 383); *Rex v Rakgoale* (1947 (4) SALR 636 at page 638).
In these cases it is stated that the section should be applied to “trivial offences” or “cases of trifling importance”; and where “the punishment to be meted out should be trifling”. These tests are simple in theory; but at times, difficult to apply. In *Rex v Punt* the examples given were contraventions of a statutory regulation or by-law and drunkenness.”
The learned Judge continued (at 455-456) to deal with trivial incidents of crimes such as theft and assault, concluding that, whilst he could not say that all common law offences could be excluded from the proviso to the section, he thought that as a rule they should be. His conclusion (at 456-457) was that the section should be restricted to trivial offences such as contraventions of statutory offences, regulations and by-laws in which the maximum punishment is the fine of £15 then referred to in s 286(1)(b) of the Criminal Procedure Act, 1917; and that as a rule, the section should not be applied to common law offences where the magistrate’s jurisdiction extends to six months imprisonment with hard labour or a fine of £50. It seems fair to say that the learned Judge favoured a marriage of s 286 of the 1917 Act before it was amended, and the version introduced by its amendment in 1935.

[22] The provision was approached differently by a full bench of the Cape Provincial Division in *R v Mpisa* 1954 (3) SA 813 (C). The following appears in the judgment of Van Wyk AJ at 814-815.
‘Section 286(1)(b) merely provides that if the court is of the opinion that the offence does not merit punishment of imprisonment without the option of a fine or of whipping or of a fine exceeding £15, it may, if the prosecutor tenders no evidence, convict the accused upon his plea of guilty without other proof of the commission of the offence.

The said section does not refer to “trifling offences” and this expression in the judgments referred to must be interpreted with due regard to the actual wording of the said proviso, and as already indicated the proviso merely refers to the punishment which the court imposes and not to any disqualifications or hardships which the accused may suffer as a result of such punishment. I agree that disqualifications or hardships which may follow from punishment should be taken into consideration in determining the punishment, but this can only result in a lesser punishment being imposed, and may well be a reason in a particular case for a magistrate to consider that a relatively serious offence does not merit a heavy sentence.’

[23] Concerning an argument that s 286(1)(b) could not be employed where the law permits a greater sentence to be imposed for the offence described in the charge sheet, the court in *Mpisa* approved what was stated by Murray AJP in *R v Windt* 1954 (1) SA 100 at page 102F-G.
‘No case, however, binding upon this court was cited to us laying down as an absolute bar to the invocation of the proviso that the offence is either a common law one, or a statutory one providing a maximum fine of over £15. And, it does not appear to be necessary, on general principles, that such a bar should exist. In both instances, it may well be that the particulars of the charge-sheet show the common law offence (e.g. an assault) or the breach of a bye-law, statute or statutory regulation to have been so trivial that the magistrate would have every justification in forming the opinion that the punishment he would impose would be within the limits defined by the proviso.’

[24] Section 286 of the Criminal Procedure Act, 1917, became s 258 of the Criminal Procedure Act, 1955. In that guise the section and its proviso was considered (per Miller J) by a full bench of this division in *S v Mia* 1962 (2) SA 718 (N) where at page 719 the learned Judge said the following.
‘It is true that s 258(1)(b) ought not to be invoked, as a general rule, in a case of theft or in any common law offence which is not trivial, but there is no justification for holding that it is never to be invoked in a case of theft. Sec. 258 (1) (b) does not in terms limit its applicability to minor statutory contraventions nor do any of the decisions, so far as I am aware, lay it down as a rigid rule of practice that that section is never to be invoked in a case of a common law offence. In enacting sec. 258 (1) (b) the Legislature clearly had in mind trivial and petty offences and was concerned to enable such offences, whatever they might be, to be dealt with swiftly and expeditiously.’

[25] Section 258(1) of the Criminal Procedure Act, 1955 was finally considered by the Appellate Division in *S v Cook* 1977 (1) SA 653 (A) where the following appears at page 658. (I quote the relevant portion of the English headnote which appears to me to be an accurate translation of the Afrikaans text.)
‘If the plea of guilty is accepted by the prosecutor and he adduces no evidence in connection with the commission of the offence, it is the duty of the magistrate to

decide whether the offence is of such a trivial nature that it meets the requirement of the proviso in s 258(1)(b) and, if he is of the opinion that it does meet the requirement, he should convict the accused.'
The court observed that it is important that the magistrate is made aware of the particulars of the charge before the accused pleads, and that the prosecutor is empowered to disclose particulars of the offence to the magistrate and the accused in open court (albeit informally, as contemplated in *R v Malgas* 1937 TPD 119) before the accused is asked to plead.

[26] It appears to me to be clear that by the time the present Criminal Procedure Act was introduced in 1977 the position in our law was that an accused person could be convicted by a magistrate on a plea of guilty alone if the magistrate formed the opinion that the offence did not warrant the imposition of a sentence in excess of that stipulated in the applicable section. Common law offences were not beyond the reach of the provision which permitted the magistrate to convict in those circumstances.

THE 1977 ACT

[27] The benefit of guidance from judgments concerning the earlier Criminal Procedure Acts has emerged in some judgments on the subject of s 112(1)(a) of the Criminal Procedure Act, 1977. (See, for instance, *S v Mkhafu* 1978 (1) SA 665 (O) and *S v Aniseb and Another* 1991 (2) SACR 413 (Nm).) The provisions in question had and have the obvious aim of advancing the cause of efficiency in our courts, especially the magistrates' courts. Both the present and past regimes offer and offered the waiver of a requirement which would ordinarily need to be fulfilled in order to convict on a plea of guilty. It appears that the principal efficiency advantage, in both the present and previous regimes, is the saving of court time.

[28] Under the Criminal Procedure Act, 1977 the time saved is the time that it would take the magistrate to question the accused about the alleged facts of the case in order to ascertain whether the accused is actually guilty of the offence to which a plea of guilty has been tendered. In most but not necessarily all cases the time taken in this exercise is not likely to be long. If such an enquiry reveals that in fact a plea of not guilty should be entered, no time has been wasted at all, given that its employment has avoided unjust proceedings and perhaps an unjust conviction.

[29] Under the previous regimes (ie from 1935 onwards) what was waived was the duty of the prosecution to prove that the offence was actually committed. The implications of this, from the point of view of saving of court time, delay in finalisation of the proceedings and the application of prosecutorial effort and resources, was considerably in excess, at least potentially, of what is offered by s 112(1)(a) of the Criminal Procedure Act, 1977. The following passage from the judgment of Schreiner JA in *R v Nathanson* 1959 (3) SA 124 (A) at 126D-127A illustrates the point. (The

provision to which the learned Judge refers is s 258(1)(b) of the 1955 Act, requiring proof that the offence was actually committed.)
'This provision has given rise to some difference of judicial opinion but in a series of cases decided last year the Provincial Divisions have substantially concurred in an interpretation which seems to me, with respect, to be the correct one. Once the plea of guilty has been entered it is not further regarded in applying the provision. Before the inferior court has power to convict on the plea the actual commission of the crime by someone, not necessarily the accused, must be proved by any admissible and sufficient evidence. The plea is not included in such evidence: If the accused himself gives evidence to the effect that the crime was committed, that evidence is not sufficient by itself to prove the commission of the crime for the purposes of the sub-section. …. At the hearing of the appeal counsel for the Crown relied on a passage in [*R v Kula* 1958 (4) SA 675 (C) at p. 680], in which it was suggested that there might have to be a qualification of the proposition that the plea of guilty is to be wholly disregarded in deciding whether the commission of the offence has been proved for the purposes of the sub-section. With respect, I do not think that the provision admits of such a qualification. Of course, the sub-section only deals with the conditions which must exist before an inferior court has power to convict. When the court is deciding *whether* to convict it must take into account not only the plea but also any evidence which may make it probable or improbable that the plea represents the truth, in its implication of the accused, for the court must be satisfied before convicting that there is no reasonable doubt as to the accused's guilt. But only in that sense and at that stage would the inferior court be right in treating the plea as evidence.'

[30] It seems clear, in the circumstances, that the context in which the Appellate Division in *Cook* said that upon satisfaction of the requirements of the section the magistrate "should convict" is not the same as the one which now prevails. It is logical to proceed upon the assumption, then, that the mandate provided by s 112(1)(a) to proceed to conviction on a plea of guilty alone is not the same as the mandate furnished by the earlier legislation.

[31] The right to a fair trial now ensconced in s 35 of the Constitution is fundamental, and should guide our consideration of the questions posed to us by the senior magistrate. As pointed out in *Dzukuda* it is an important element or component of a fair criminal trial that adequate steps should be taken to ensure that innocent people are not wrongly convicted. Although the question of how to deal with unrepresented accused persons is not before us in these review proceedings, it is not possible to reach a finding in the cases at hand, where there was legal representation, without considering the proper approach absent legal representation.

[32] In my view there is little room for the application of s 112(1)(a) where an accused is unrepresented. Not asking such an accused who pleads guilty any questions at all means that no steps are being taken to avoid an incorrect conviction. In a case

where the essential elements of the crime are easily and simply stated, that factor may appear to generate a fair inference that a plea of guilty alone is sufficient to warrant a conviction. But in those simple cases only a little effort and time needs be applied and taken up in order to ensure that the plea of guilty does in fact reflect true guilt. In the case of offences where, despite their petty nature, the essential elements of the charge are more complex, save in exceptional circumstances a magistrate choosing to follow s 112(1)(a) would have no grounds upon which to be assured that the facts which the accused relies on when tendering a plea of guilty do in fact reflect guilt.

[33] The situation is fundamentally different when s 112(1)(a) is sought to be applied when the accused is represented. As already discussed, until and unless, for substantial and good reason, a magistrate is thrown into doubt as to the competence of a legal practitioner, such competence must be assumed to exist, and to have been exercised in advising the represented accused before a plea of guilty is tendered.

[34] Counsel in the present proceedings have some personal knowledge of how matters such as those before us are dealt with in the magistrates' courts. They all represent bodies which have institutional knowledge of the proceedings of courts in which such cases are heard. We received their assurance that it is so that advantages of efficiency are indeed achieved by the employment of s 112(1)(a) in cases which involve what is customarily called "petty crime". (This must be accepted to be so despite the observations already made that the potential gains in efficiency available now are not as substantial as they were under the earlier regimes.) It is argued that these advantages should not be lost in the case of represented accused. Counsel for the Society of Advocates in particular pressed the argument that it is not only the fact of legal representation which protects the accused, but also the safety-net provided by s 113 of the Criminal Procedure Act which should always be read together with s 112.

[35] Section 113 reads as follows.

'113. **Correction of plea of guilty.**-

(1) If the court at any stage of the proceedings under section 112 (1)(a) or (b) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution. Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.

(2) If the court records a plea of not guilty under subsection (1) before any evidence

has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.'
Section 113 (1) was amended in 1996 to make clear the construction placed upon it by the Appellate Division in *Attorney-General, Transvaal v Botha* 1993 (2) SACR 587 (A), that it encompasses all proceedings under s 112. The court confirmed that upon its proper construction, s 113 permits a plea of not guilty to be entered after conviction, as long as sentence is not yet passed. Concerning the issue of the applicability of s 113 to proceedings conducted under s 112(1)(a), the following remarks of Smalberger JA at 591D-E bear repeating in the present context.
'There is no reason to believe that the Legislature intended to exclude s 112(1)(a) from the operation of s 113(1) simply because it deals with lesser offences. An accused person's right to protection against a wrong conviction is no less important if the offence is minor than if it is major. In either case there is an equal possibility of an unjustified plea of guilty, and in the case of a minor offence the primary protection afforded by preconviction interrogation is lacking. What is more, such a limited interpretation does not conform to the well-known rule of interpretation that the Legislature intends all persons affected by its enactments to be treated equally.'

[36] As mentioned at the outset, the senior magistrate has referred us to the fact that some cases have held that s 112(1)(a) of the Criminal Procedure Act cannot be employed in cases of theft by shoplifting.

[37] In the case of *S v Van Wyk* (35/2014) [2014] ZAFSHC 43 (20 March 2014) the court considered a case where the accused was convicted without being questioned on a plea of guilty to a charge of theft of a pair of shoes valued at R499.95. Whilst more than one issue was raised in that review the following extract in para 2 the judgment reflects how the court dealt with the issue now under consideration.
'A provision similar to section 112(1)(a) did not exist under the previous Criminal Procedure Act 56 of 1955. Even if the accused pleaded guilty, the commission of the offence still had to be proved, there had to be evidence *aliunde*, as it was put. The 1977 Criminal Procedure Act created the possibility that a person can be convicted on a plea of guilty alone without any questioning, but then the sentencing options are limited. Section 112(1)(a), where there is no questioning by the presiding officer, is aimed mainly at the case where the accused virtually stands with the fine money ready, almost similar to the admission of guilt situation, and the accused does not want to waste the court's time and wishes to get the case over and done with. Section 112(1)(a) is not intended for lazy or incompetent presiding officers who do not want to, or are unable to, question the accused under s 112(1)(b) to determine whether the accused admits all the elements of the offence. Section 112(1)(a) is intended for minor cases. Presiding officers should use s 112(1)(a) only where the offence is of a minor nature, in the nature of a "petty". Shoplifting is a serious offence, and there could be cases where first offenders are given sentences of imprisonment. The charge in this case was not one which should have been dealt with under s 112(1)(a).'

In my respectful view the conclusion reached in *Van Wyk* is somewhat overshadowed by the erroneous belief that the Criminal Procedure Act, 1955 did not permit of a conviction on a plea of guilty alone. The court did not consider the earlier judgments which dealt with the issue of conviction on a plea of guilty alone in the case of common law offences like theft. In particular the court was not able to bring to account the judgment of the Appellate Division in *Cook* which established that whether the case qualified as one which might be disposed of on a plea of guilty alone turned on an assessment of the sentence which the conviction might generate. I am also respectfully of the view that the court's observations concerning an accused standing cash in hand and not wishing to waste the court's time, and it's concerns regarding "lazy or incompetent presiding officers" who wish to avoid questioning under s 112(1)(b), lends no weight to the conclusion (unsupported by cited authority) that shoplifting is an offence which falls outside the purview of s 112(1)(a).

[38] The case of *S v Tshabalala* (102/2015) [2016] ZAFSHC 90 (5th May 2016) concerned a conviction of theft on a plea of guilty alone in terms of s 112(1)(a) where the accused was fined R1500 or three (3) months imprisonment. The judgment in the main concerns the administration of reviews. The issue on review arose because, having first accepted the plea "in terms of s 112(1)(a)", which resulted in a conviction under that section, the prosecutor then produced a long list of previous convictions which persuaded the magistrate that she ought not to have proceeded under s 112(1)(a) at all. In the course of the judgment the court held that s 112(1)(a) could only be invoked where the offence is trivial. At para19 the court held that
"[t]aking into account the far reaching consequences of theft out of supermarkets or cash and carry stores as in this case; including loss of employment for the employees of those stores, it can never be regarded as trivial".
The court in para 20 quoted a passage from para 9 of the judgment in *S v Mohata* [2015] JOL 33312 (FB) where the court agreed with the senior magistrate that s 112(1)(a) should only be used for minor offences and continued as follows.
'It is almost in the nature of an acknowledgment of guilt fine. The accused should, it can almost be said, stand with the money, ready to pay the fine or qualify for a deferred fine. Magistrates should rather, in appropriate cases, consider using s 112(1)(b) and ask a few simple questions to make sure of the guilt of the accused. Then sentencing becomes much simpler.'

[39] Neither *Tshabalala* nor *Mohata* dealt with the fact that s 112(1)(a), like the other provisions in place between 1935 and 1977, does not set the limits of the discretion the magistrate has to sentence on a plea of guilty alone by listing crimes which are regarded as "petty" enough to justify the truncated procedure, but by stipulating the maximum sentence which may follow a conviction on a plea of guilty alone.

[40] Each of the seven cases which serves before us illustrates the proposition that it is simply incorrect to state that a charge of theft (or theft by shoplifting) cannot fall within the purview of the magistrate's discretion to accept a plea of guilty under s

112(1)(a) of the Criminal Procedure Act, given that the ambit of cases which may be dealt with in that fashion is defined not with respect to the crime but with respect to the punishment which the crime warrants. The sentences imposed in each of the seven cases fall well below the limits set by the section. None of those sentences is out of the ordinary. Each of the cases constitute what has traditionally been called "petty theft". I do not wish to contradict the proposition that theft is broadly speaking a serious matter. It is generally regarded as such by the public because of the element of dishonesty which it involves; thus its consequences beyond the criminal justice system. However, if its seriousness is to be judged by the sentences imposed for the crime, then the law does not regard it as serious in all cases. The law long ago abandoned an inclination to impose horrible punishments for the theft of a loaf of bread.

[41] Finally, it is necessary to pull together the threads of the conclusions we have reached in these review proceedings.

(a) If the magistrate is of the opinion that the offence does not merit punishment in excess of the limits set by s 112(1)(a) he or she has a discretion to convict on the basis of a plea of guilty alone. The option of proceeding on that basis may however be denied by the prosecutor.
(b) The discretion must be exercised judicially.
(c) In exercising that discretion the magistrate must recognise that the advantage sought to be gained by the employment of s 112(1)(a) is one of efficiency. That, however, must be weighed against the fact that an important component of the right to a fair criminal trial is the achievement of an adequate assurance that innocent people are not wrongly convicted, bearing in mind that protection against a wrong conviction is no less important in the case of a minor offence.
(d) In the case of a represented accused, the default position is that the magistrate may rely on the competence of the advice given by a legal representative to the accused person who pleads guilty. However, it cannot be regarded as compulsory for a magistrate to proceed without questioning a represented accused.
(e) There appears to be little scope for exercising a discretion in favour of proceeding under s 112(1)(a) when the accused is unrepresented. When the elements of the crime concerned are simple the saving of time in refraining from questioning the accused under s 112(1)(b) is likely to be insignificant. When the elements of the crime are more complex the questioning may take longer, but becomes indispensable because there are no other adequate procedural measures to guard against the risk of an incorrect conviction.
(f) Section 112(1)(a) is not restricted as to its scope of operation by the nature of the crime concerned. It is restricted in its scope of operation by the opinion of the magistrate as to whether the offence merits punishment in excess of that stipulated under the section.
(g) The remedy of entering a plea of not guilty in terms of s 113 of the Criminal

Procedure Act is available if it should emerge at any time before sentence is passed that one of the circumstances set out in s 113(1) of the Act justifies that course. The prior conviction of the accused on a plea of guilty is no obstacle.

[42] For the reasons set out above this court concludes that the proceedings in the seven criminal cases sent to us on special review were in accordance with justice.

From The Legal Journals

Buchner-Eveleigh, M

"Is it a competent child's prerogative to refuse medical treatment?"

2019 De Jure Law Journal 242

Abstract
The purpose of this article is to analyse the legal position pertaining to the refusal of medical treatment by a competent child as an expression of his or her rights to physical integrity and autonomy guaranteed in the Constitution of the Republic of South Africa, 1996. The article also examines how the Children's Act gives effect to the child's right to refuse medical treatment in order to determine whether it demonstrates respect for a child's rights to bodily integrity and autonomy. Thereafter the question whether the refusal of a competent child should be overridden with specific reference to the child's best interests is addressed.

This article can be accessed here:
http://www.scielo.org.za/pdf/dejure/v52n1/15.pdf

Songca,R

"Children seeking justice: safeguarding the rights of child offenders in South African criminal courts."

2019 De Jure Law Journal 316

Abstract
This contribution makes an argument for the use of witness tools as prescribed in section 170A of the Criminal Procedure Act 51 of 1977 in criminal cases involving child offenders if they choose an active defense. The argument based on the assumption that children who violate the law are themselves victims and their vulnerability is already elevated by the time they experience the criminal justice system. The use of witness tools in the criminal justice system is in the best interests of the child because the flexible nature of the best interest determination allows for a case-bycase approach that takes into account the unique characteristics and lived experiences of each individual child. Thus, this contribution advocates the use of section 28(2) of the Constitution to implement and interpret safeguards under section 170A of the Criminal Procedure Act. This approach to child justice ensures the establishment of the truth and is an essential component of a fair trial and in line with the ethos enshrined in the Constitution.

This article can be accessed here:
http://www.scielo.org.za/pdf/dejure/v52n1/19.pdf

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

Contributions from the Law School

Abolishing the parental chastisement defence

One of the most significant legal developments of 2019, from the point of view of its impact on society as a whole, is the declaration that the defence of disciplinary chastisement administered by parents is unconstitutional. This development follows a trend in the constitutional era in South Africa. The punishment of whipping was held to be unconstitutional by the Constitutional Court in *S v Williams* 1995 (2) SACR 251 (CC) on the basis of the unjustifiable infringement of the right to dignity (s 10 of the Interim Constitution (Act 200 of 1993)) and the right not to be subjected to cruel, inhuman or degrading punishment (s 11(2) of the Interim Constitution). Shortly thereafter, in terms of s 10 of the South African Schools Act 84 of 1996, corporal punishment was prohibited from being administered at a school to a learner, and the constitutionality of this development was confirmed in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

The validity of the sole lawful form of corporal punishment remaining in South African law – parental disciplinary chastisement - was debated, with some authors in favour of this form of punishment being banned (like Burchell *Principles of Criminal Law* 5ed (2016) 204), while other authors (such as Snyman *Criminal Law* 6ed (2014) 138) argued that the disciplinary chastisement defence, which renders reasonable and moderate chastisement lawful, should be retained. Punishment is regarded as 'reasonable' where it is applied in response to actual wrongdoing, while what is 'moderate' punishment depends on 'the circumstances of each case, such as the character of the offence, the age, gender, build and health of the child, and the degree of force applied' (Snyman 138; see further *S v Lekgathe* 1982 (3) SA 104 (B) 109B-C).

The catalyst for the declaration that the defence of disciplinary chastisement be struck down as unconstitutional was, ironically, a case in which the assault was so egregious that there was no question of the defence being applicable on the facts: *S v YG* 2018 (1) SACR 64 (GJ). Upon considering an appeal from the trial court on a conviction for assault, the High Court not only dismissed the appeal, but, in the absence of any constitutional challenge, of its own accord, held the defence of reasonable and moderate chastisement to be constitutionally invalid. The subsequent application to the Constitutional Court for leave to challenge this finding resulted in a unanimous bench of the Constitutional Court dismissing such application (in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34, hereafter '*FORSA*'). The court held that the chastisement defence, which accompanied conduct falling within the definition of the crime of assault, constitutes an unjustifiable infringement of the right to be free from all forms of violence (s 12(1)(c) of the 1996 Constitution) and the right to dignity (s 10 of the 1996 Constitution), read with the injunction that 'a child's best interests are of paramount importance in every matter concerning the child' (s 28(2) of the 1996 Constitution). The court (per Mogoeng CJ) in particular noted the availability of less restrictive means to achieve the purpose of instilling discipline in children (paras [68]-[70]).

This conclusion was reached despite the Chief Justice being at pains to emphasise that a parent's choice to administer physical punishment to his or her child is not in

itself without some merit. The court notes that: 'there are indeed sound and wisdom-laden, faith-based and cultural considerations behind the application of the rod' (para [44]); that '[m]eaningful consequences must arguably follow repeat or serious wrongdoing'; that parental chastisement is 'significantly different' from other institutional forms of corporal punishment (para [51])); that it is debatable whether parental chastisement 'invariably produces negative consequences' (para [53]); and that in fact that it 'could arguably yield positive results and accommodate…love-inspired consequence management', which is why most comparable democracies have retained this defence (para [54]). Nevertheless, the court regarded itself as constrained, on the material before it, and in the light of the constitutional considerations, and the available option of engaging in non-physical discipline, that the defence should be struck down.

The decision of the Constitutional Court has been praised by child rights activists as providing a means to prevent parents from inflicting punishment which causes physical and emotional harm to children (see, e.g. Rapiti 'You can't beat discipline into a child' *Mail and Guardian* (Oct 4 to 10 2019) 35). There are however a host of unresolved issues that the Constitutional Court decision leaves in its wake, having passed the ball to Parliament and the law enforcement agencies to deal with the ramifications of the judgment. The court – understandably – makes no suggestions as to the specific aspects of the disciplinary regime which should be employed by parents beyond 'educating a child about good behaviour' and 'more effective parent-child communication'. Even the Child Justice Act 75 of 2008, which instituted a new and enlightened way of dealing with child offenders, recognizes that although this should be strenuously avoided wherever possible, in certain circumstances it is an appropriate sentence for a court to send a child to prison (s 77). The recognition of this possible eventuality is mirrored in the Constitution, which reflects that children may be detained 'as a measure of last resort' (s 28(1)(g)). Parliament may have crafted a sentencing measure of last resort for child offenders (with all due qualifications and safety measures), but what measure of last resort do parents have to deal with repeat or serious wrongdoing, in the light of the *FORSA* judgment?

A further complicating factor is that while the judgment seeks to address the harm caused by physical chastisement, it has nothing to say about disciplinary measures which involve threats or disparagement. The crime of assault does not only punish unlawful touching, but also the creation of the subjective belief on the part of the complainant – which need not be reasonable - that impairment of his or her bodily integrity is imminent (Snyman 447; Burchell 594). Will the law enforcement authorities assiduously pursue parents who are responsible for this form of assault? What of the emotional anguish caused to a child by a parent who threatens to abandon him or her as a consequence of his or her wrongdoing? What of the hurtful words employed by an angry parent which demean or disparage a child who has done something wrong? There is ample evidence that such words can cause lasting psychological harm to a child – should prosecutions for *crimen iniuria* not follow? And what of the punishment of being confined to one's room? Is this not a form of kidnapping? It may simply be noted that the basis of the abolition of the chastisement defence – that treating an

adult in the same way would result in criminal liability – requires that in logic all other actions used in instilling discipline in children require scrutiny, and may well fall within the definition of a crime, in the same way as the slightest application of physical force to a child would.

What possible defence might a parent have to a charge of assault (for example) committed in the course of disciplining his child, now that the justification ground of disciplinary chastisement is no more? Burchell raises the possibility of such an accused, who genuinely lacks knowledge of unlawfulness, raising a defence based on lack of intention (Burchell 204). This defence may indeed apply where there is genuine ignorance of wrongdoing, but it is omitted from the discussion in the *FORSA* judgment. Mogoeng CJ explains that the application of force to the body of another, which would otherwise constitute an assault, would not do so if the *de minimis non curat lex* rule applies (that the law does not concern itself with trifles) (para [35]). Later in the judgment, where he clarifies that 'the chastisement aspect of their religiously or culturally ordained way of raising, guiding and disciplining their children' is no longer available, even to parents who believe that by their own lights they are acting in the best interests of their children, and that what awaits such parents is 'criminal prosecution, possible conviction and possible imprisonment', Mogoeng CJ states that 'the *only* safety valve' (my emphasis) available to such parents is the *de minimis* rule (para [52]).

I have earlier written about the *de minimis* rule in *e-Mantshi* (issue 80, September 2012, 9-15), as well as in a more recent and much more lengthy piece ('Assessing the *de minimis non curat lex* defence in South African criminal law' in PJ Schwikkard & SV Hoctor (eds) *A Reasonable Man: Essays in Honour of Jonathan Burchell* (2019) 119-150). Would the *de minimis* rule be an appropriate mechanism to regulate the criminalisation of parental chastisement for disciplinary purposes? Doubt has been expressed whether the *de minimis* rule could indeed function to exclude assault in all deserving cases in this context, as the level of violence required to be inflicted in certain cases would exceed the measure of triviality (Stewart 'Parents, Children, and the Law of Assault' (2009) 32 *Dalhousie LJ* 1 at 21). Moreover, given that the *de minimis* rule does not exclude the unlawfulness of the act (Snyman 139), it does not present as an exclusive solution to resolving the problem of parental disciplinary chastisement – in some scenarios, such physical chastisement, particularly in the form of restraining action (such as removing a child having a temper tantrum from a store, or physically forcing a disobedient child into his room for a 'time-out' punishment (remaining in the room for a set period of time)), could simply be regarded as the right thing to do.

There is a further difficulty with relying on the *de minimis* rule to ensure that only blameworthy parental chastisement forms the basis for a conviction. The *de minimis* rule operates as a rule of efficiency, to conserve scarce resources from being wasted on trivialities. The use of such resources in a multitude of parental assault prosecutions in the already over-taxed South African criminal justice system, in order to screen out trivial, non-blameworthy cases, rather undermines this primary purpose of the *de minimis* rule.

It therefore seems as if the court is using the *de minimis* rule as a *deus ex machina* – a somewhat contrived way of saving a 'seemingly hopeless situation' (*Concise Oxford Dictionary* 8ed (1991)) . The 'hopeless situation' – or rather, in this case, 'significant difficulty' - in question is the abrupt removal of physical chastisement as a disciplinary option, despite its deeply ingrained cultural and religious justification, resulting in parents who use any kind of physical chastisement, however mild, being potentially liable for criminal prosecution and conviction for assault.

As noted above, it remains to be seen whether the *de minimis* rule is indeed equipped to fulfil this all-encompassing role to ensure that justice is done in each individual case in this context. One may further wonder on what basis a court may conclude that a particular parental assault is too trifling to be considered for the purpose of conviction. It would be ironic, although perhaps not entirely surprising, were a court to draft the concepts 'reasonable' and 'moderate' into its deliberations as to whether a particular act of physical chastisement should be regarded as *de minimis*, particularly in the context of the very broad definition of the conduct which falls within the definition of an assault.

In his opening remarks in the *FORSA* judgment, Mogoeng CJ noted that the case challenged the court to apply Solomonic wisdom to resolve the matter of child discipline (para [1]). What is abundantly clear is that the legislature will indeed have to exercise the celebrated wisdom of Solomon in drafting an appropriate regulatory framework. While no effort should be spared to fully engage the evils of child abuse, and the rights of children must be fully realized and protected, there is a particular danger in creating criminal liability in situations where the conduct is not regarded as either immoral or illegal by the vast majority of the population, and where the law enforcement authorities are likely to be extremely loathe to apply the law strictly. Unreasonable and immoderate chastisement is obviously criminal, but as the Constitutional Court itself has indicated, a great deal of physical chastisement by parents does not fall into this category.

In his argument as to why the defence of disciplinary chastisement is constitutional (ignored by the Constitutional Court in *FORSA*) Snyman makes the point that any prohibition of parents' right to chastise their children even moderately would be 'almost impossible to enforce' (138). Inconsistent enforcement or lack of enforcement of this prohibition would be problematic, as the existence of a criminal prohibition which is not enforced in a particular context undermines the authority of the criminal law. However, rigorous enforcement would require that prosecutions ensue for all forms of assault, whether actual touching ensues or is merely threatened, as well as for statements that fall within the ambit of *crimen iniuria*, as well as for restriction of movement that falls within the ambit of kidnapping. Acts which would be criminal in respect of adults must be criminal in respect of children, limited only by the *de minimis* rule – this is the lesson of the Constitutional Court in *FORSA*. Will the legislature and the law enforcement authorities grasp this nettle? Time will tell.

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Matters of Interest to Magistrates

Unlocking the issue: When to arrest without a warrant when a dangerous wound is inflicted

In practice, a police officer may arrest a suspect with or without a warrant. In the latter instance only when there are prescribed jurisdictional factors, prior to effecting an arrest. In this article, the analysis predominantly focuses against the backdrop where a police officer effects an arrest – without a warrant – on reasonable suspicion that a dangerous wound has been inflicted. This analysis seeks to lay out the dynamics and circumstances, which needs to be considered to determine whether such an offence, namely assault where a dangerous wound is inflicted, falls under sch 1 of the Criminal Procedure Act 51 of 1977 (the CPA).

Arrest without a warrant

Section 40(1)(*a*) and (*b*) of the CPA provides that: 'A peace officer may without warrant arrest any person –

(*a*) who commits or attempts to commit any offence in his presence;

(*b*) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.'

The focus of this article will fall on s 40(1)(*b*). The latter provides that the offence of assault where a dangerous wound is inflicted, is an offence for which a police officer may arrest the suspect without a warrant if there is a reasonable suspicion for commission of the said offence.

Reasonable suspicion

According to www.lexico.com (accessed 7-10-2019), 'suspicion' is defined as 'a feeling or belief that someone is guilty of an illegal, dishonest, or unpleasant action'.

In the matter *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) it is stated at para 6 that the following facts needs to be present for a s 40(1)(*b*) defence, to apply –

- the arrester must be a peace officer;
- the arrester must entertain a suspicion;
- the suspicion must be that the suspect committed an offence referred to in sch 1; and
- the suspicion must rest on reasonable grounds.

Let me hasten to say to rely on the suspicion of someone else would render the arrest unlawful (see *Ralekwa v Minister of Safety and Security* 2004 (2) SA 342 (T) at

para 11 – 14). In *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658 E – J, Jones J held: 'The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(*b*) is objective … . Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? … This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. This section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it [would] be flighty or arbitrary, and not a reasonable suspicion.' Accordingly, an officer does not have to be convinced that there is in fact evidence proving the guilt of the suspect beyond reasonable doubt. The quality of the information on which the arrestor acts must be analysed and assessed. Acting on information, where the quality of which has not been subjected to scrutiny, will render an arrest unlawful (see *Mawu and Another v Minister of Police* 2015 (2) SACR 14 (WCC) at para 31).

Assault where a dangerous wound is inflicted

In our legal system, the offence of assault emanates from common law. Furthermore, assault comprises of –

- common assault; and
- assault with intent to cause grievous bodily harm (assault GBH).

In addition, to assault GBH, there is assault where a dangerous wound is inflicted, both of which are distinct concepts. In South African jurisprudence, there is no specific crime known as assault where a dangerous wound is inflicted. In the matter of *Rex v Jones* 1952 (1) SA 327 (E) the court held that assault GBH is not a sch 1 offence unless a dangerous wound is inflicted. At para 332 D – F Jennett J in the *Jones* case had the following to say about a 'dangerous wound' as referred to in the 'first schedule' to the Act 31 of 1917: 'The expression "dangerous wound" is not easy to define. One may well ask, "Is a serious wound always a dangerous wound?" A minor wound may be dangerous because of the extra possibility it creates for septic infection. Then, however it is not the wound which causes the danger but the sepsis. It seems to me that by a dangerous wound is meant one which itself is likely to endanger life or the use of limb or organ. The officer effecting the arrest has only to have reasonable grounds for suspecting that such a wound has been inflicted'.

The authority in the *Jones* case has been followed and endorsed in a number of other leading cases on the subject, such as in the *Goliath v Minister of Police* (ECG) (unreported case no CA107/2017, 14-11-2017) (Bloem J) decision and in the case of *De Klerk v Minister of Police* [2018] 2 All SA 597 (SCA) at para 10. Likewise, a person who commits assault GBH does not necessarily attempt to commit an assault in which a dangerous wound is inflicted and such arrest stands to be unlawful (see SE van der Merwe (ed) *Commentary on the Criminal Procedure Act* (Cape Town: Juta 1987) at 5 – 14B). In *Minister of Police v Lewies* [2015] JOL 32807 (ECG) an

appeal against the judgment of the lower court, which awarded damages to the plaintiff for wrongful arrest and detention. In addition to the denial of unlawful arrest and detention by the appellant, the latter relied on s 40(1)(*b*) of the CPA by adducing evidence to the effect that the arresting officer reasonably suspected that the respondent had committed an offence referred to in sch 1 of the CPA, namely, the assault where a dangerous wound was inflicted. Furthermore, the arresting officer received the docket on 14 August 2012 relating to the commission of offence of assault GBH, which was allegedly committed on 11 August 2012. The interview with the complainant was conducted on 15 August 2012 (four days after the incident) and the arresting officer was given a J88 form with the following clinical finding 'Wound on the scalp – no fracture seen – Wound on the left chest at the back. No lung injury seen on x-ray. Patient was observed overnight and discharged the following day'. The court held at para 15 as follows: 'Although loss of consciousness was mentioned in [the complainant's] affidavit, by the time [the arresting officer] interviewed him nearly four days had passed since he was injured and he had been discharged from hospital the morning after the injuries were inflicted. The scalp wound which [the arresting officer] observed and [the complainant's] complaint of pain would not in themselves appear to be symptoms of life-threatening injuries. Most importantly, even if [the arresting officer] thought that head injuries are inherently dangerous, she was aware of the conclusion in the J88 form that the wounds were superficial. It was not for her to go beyond the doctor's expert conclusion and speculate that something more serious might develop in the future'. The appeal court dismissed that appeal and concluded that the court *a quo* correctly inferred that the arresting officer reasonably suspected that the respondent had inflicted the complainant's injuries and that the arresting officer did not have grounds to believe that the wounds were dangerous.

Conclusion

It is prudent for the arresting officers to be vigilant where the arrest without a warrant encapsulates assault. Although in terms of our common law, assault that is legally recognised comprises of common assault and assaults GBH; the assault that is covered by the statute (sch 1 of the CPA) is assault where a dangerous wound is inflicted. The arresting officer – when effecting an arrest under the circumstance – must formulate reasonable suspicion that an assault where a dangerous wound was inflicted was committed by the suspect. The court must look at the circumstances of each case beyond the J88 form, which will state the nature and degree of injuries, the period of arrest and the date of infliction of the injury and the expert evidence to determine if the arresting officer's suspicion was justified. A dangerous wound is one, which itself, is likely to endanger a life or the loss of a limb or organ.

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A Last Thought

"We have got to be interested, to know how people get elected to office.
- You have got to observe carefully; you have got to watch carefully how people are being interviewed because there are times when you can tell certain people are being shielded from being asked critical questions; and the question is when that happens who is doing it and what is the agenda?
- How can you have an independent and competent judge or magistrate who when questions are sought to be put to him or her, people build a scrum around him or her? Any competent judge or magistrate, or a candidate aspiring to be appointed to that position must demonstrate his or her capacity by fielding the toughest of questions. But if now people were caucusing about a certain candidate, you must know there is an attempt to corrupt the judiciary.
You must know, there is an attempt to capture the judiciary and a captured judiciary will never be able to use the Constitution as an instrument of transformation, because any captured member of the judiciary will simply be told or will know in advance, when so and so; and so and so are involved, we better know your place.
Or when certain issues are involved, well the decision is known in advance, so and so can't lose. Be on the lookout, be vigilant and be forceful in making uncomfortable anybody who seeks to establish a pliable judiciary.
Madiba himself said "*Our constitutional democracy hinges on the judiciary. We should guard the judiciary jealously*."
- Another way of doing so is being very critical of us when we do wrong things.
- Madiba said, one of the things we needed to do as judges is give reasons for our decisions that an ordinary man can understand.
- You must be worried when you read a judgment and you are struggling to make sense of it. Judges were enjoined by Madiba and we know, and ought to know that partly we account to our judgments to the public.
- Now, if you write in such a way that the public doesn't understand what you are doing; what kind of accountability is that?
- We don't write for lawyers, we don't account to lawyers only, we account to every South African citizen.
- So, you must watch us carefully.
- Who do we associate with the most?

- Who are we uncomfortably or indecently friendly to and check judgments when those people are involved?
- Does it make sense?

Madiba said, on the occasion of inaugurating the Constitutional Court ***"****You must be true to your oath don't be rubber stamps."*

- We are the ones who administer an oath to the President, the Deputy President, Ministers, Deputies and Members of Parliament. And we do so expecting them to be loyal to their affirmation of office.
- How hypocritical can we be if we expect people before they take office, in line with the Constitution to commit to doing what the Constitution demands of them when we don't do the same thing ourselves; so please watch us closely, otherwise our Constitution is gone.
- I am not saying there is anything wrong with the judges by the way. No. I have absolute confidence in us, but complacency can set in; and remember we wield extensive powers as the South African judiciary.
- I'm tempted to say I'm not aware of any judiciary in the world that wields the kind of power that we do. There is almost nothing we cannot do in the instrumentality of the constitution.
- Now power corrupts, and absolute power corrupts absolutely."

As per Chief Justice Mogoeng Mogoeng in the 17th Nelson Mandela Annual Lecture delivered on 23 November 2019 entitled "*Constitutionalism as an instrument for transformation*"