e-MANTSHI

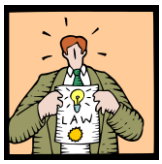
A KZNJETCOM Newsletter

February 2020: Issue 161

Welcome to the hundredth and sixty first issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is 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. Under section 6 of the Judicial Matters Second Amendment Act, 2013 (Act No. 43 of. 2013); and section 43 of the Judicial Matters Amendment Act, 2017 (Act No. 8 of 2017), the president has fixed 31 January 2020 as the date on which the Judicial Matters Second Amendment Act, 2013, with the exception of section 4; and sections 35 and 38 of the Judicial Matters Amendment Act, 2017, came into operation. The notice to this effect was published in Government Gazette no 42987 dated 31 January 2020. One of the amendments that are now in operation is the insertion of section 55A into the Criminal law (Sexual offences and related matters) amendment Act 32 of 2007. This section deals with the designation of Sexual offenses Courts which may also be district courts.

2. The Rules Board for Courts of Law has under section 6 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985) and with the approval of the Minister of Justice and Correctional Services amended the rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa. The notice was published in Government Gazette no 43000 dated 7 February 2020. The amended rules are rule 14 and 33 and annexure 1. The amended rules will come into operation on 9 March 2020. The notice can be accessed here:

https://www.justice.gov.za/legislation/notices/2020/20200207-gg43000rg11038gon107-RulesBoard_MC.pdf

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Recent Court Cases

1. C D and Another v S (A253/2019) [2019] ZAWCHC 147; 2020 (1) SACR 134 (WCC)

A Magistrate submitted a matter to the regional court despite having called for reports for sentencing purposes—Reasons for committal not set out and committal not explained to appellants—Procedure adopted irregular.

Thulare AJ

[1] The appellants were granted leave in respect of the sentence only following a petition. The appeal follows their conviction on a charge of housebreaking with intent to steal and theft in the District Court (DC) and their sentence of nine (9) years imprisonment of which two (2) years were suspended for five (5) years on conditions in the Regional Court (RC). Both appellants were found not guilty on the charge of assault with intent to do grievous bodily harm.

[2] The appellants submitted that the matter was not properly placed before the RC in terms of section 116 of the Criminal Procedure Act 51 of 1977. The appellants further argued that the RC erred in not obtaining a pre-sentence report which the DC had already ordered and that the sentence imposed was not balanced.

[3] The respondent conceded that the matter was not properly placed before the RC and that the RC ought to have referred the matter back to the DC. The respondents submitted that the offence is one justiciable in the RC and that with the history of previous convictions which the appellants had, the sentence imposed should still adequately take those factors into account and accepted that the appellate court may interfere with the sentence imposed.

[4] The appellants terminated the instructions to an attorney provided by Legal Aid South Africa at their instance and elected to conduct their own defence. Both pleaded guilty to count 1 and not guilty to count 2. The court questioned both appellants. The State did not accept the facts placed before court in respect of count 1 and the court noted a plea of not guilty.

[5] The State led the evidence of the complainant. The appellants gained entry into the yard of complainant's property, Searles Trading Post, Greyton, and saw a laptop inside the office. Appellant 2 opened the window and both went inside the office. They removed the cable on which the laptop was connected to charge and took the laptop. The State did not accept the facts upon which the appellants based their plea and as such a plea of not guilty was noted.

[6] The complainant arrived at the property at around 22:30 on Saturday 23 September 2017 and noticed that the office door was closed and the lights were switched off, which was unusual for him. His two Jack Russel dogs were standing in front of the door and barking incessantly. The Labrador dog was also barking frantically. He went to inspect and found both appellants inside the office. From the other lights in the property visibility was good. He grabbed both of them. Appellant 2 wriggled his way out of the complainant's grip, jumped through the window and fled. Appellant 1 had a large knife on him. He did not use it and the complainant was not assaulted.

[7] The complainant wrestled the knife from appellant 1. Appellant 1 pleaded that the complainant should leave him and offered to disclose the names of those who had sent him to commit the burglary. Appellant 1 managed to wriggle himself out of the complainant's grip and fled but the complainant managed to get hold of him before he escaped. The police were in the vicinity when called and managed to arrive quickly and arrested appellant 1. The complainant was some days later called for a photo identification parade and identified appellant 2.

[8] The complainant saw that the whole window pane was removed out of its frame through which entry was gained into the office. The wooden door, big screen and porcelain lamp were damaged during entry. The laptop, valued at around R12 000-00 was missing. The complainant did not see appellant 2 leave with the laptop. He recovered the laptop. The laptop still worked but was damaged.

[9] On the basis of these facts appellants were convicted and the State proved previous convictions against both appellants on 27 March 2018. The DC said the following:

"Due to the previous convictions of accused 1 and 2 relating to offences where dishonesty is an element, the court will be considering a reviewable sentence. For this purpose the court will request a probation officer's report and a correctional

supervision report before sentencing. We will now arrange a new date."
The appellants were remanded in custody for sentencing and no bail was fixed. The matter was thereafter postponed several times for purposes of sentencing.
[10] Except for the constitution of the court and an entry that the matter was remanded to 24 July 2018 for RC date for sentencing purposes attached to the charge sheet, there is no further record of proceedings around sentencing before or on that date. An instruction to the clerk of the court to type the charge sheet fortified the view that the proceedings were not mechanically recorded on that date.
[11] The sentencing in the RC received attention on 14 August 2018. After admitting the DC record the RC passed the following judgment:
"The accused before court is C D aged 36 and J J aged 31. The court has received the typed record of proceedings in the District Court. I have access to it and read the record and find that the finding of the District Court is in accordance with justice and the conviction is confirmed."
[12] Section 116(1)(b) of the Criminal Procedure Act, 51 of 1977 (the CPA) provides as follows:
"116 Committal of accused for sentence by regional court after trail in magistrate's court
(1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion-
(b) That the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court; the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction."
[13] The appellants pleaded guilty to count 1, the subject matter of this appeal. The DC found it to be an ill-considered plea of guilty. The factual information elicited to confirm the appellants' standpoint showed that a trial was necessary for the State to cover the essential elements of the offence which it had to prove. The legal basis for the guilty plea was not established during the questioning. Where an accused person pleaded guilty, and the court entered a plea of not guilty on their behalf, and an accused was thereafter convicted, such conviction satisfied a "conviction following on a plea of not guilty" as envisaged in section 116(1) of the CPA. Jurisprudential certainty, justice and fairness demanded that.
[14] The State put previous convictions to both appellants and both appellants admitted their previous convictions respectively. After conviction but before sentence the DC was not of the opinion that the previous convictions of the appellants were such that the offence in respect of which they were convicted merited punishment in excess of the jurisdiction of the DC court [*S v Kgomo* 1978 (2) SA 946 (T) at 947A-B].
[15] The DC started the sentence proceedings. The magistrate made an order for the acquisition of two reports, one from a probation officer and another from a correctional officer. The remarks on the record also showed that the magistrate had a *prima facie* view of what that sentence would be, to wit, a reviewable sentence. From the record it is not clear as to when and on what basis the opinion of the magistrate as regards the sentencing of the appellants changed. The order for the

acquisition of two reports for purposes of sentencing stood. They were never set aside by a competent court. They could not be simply be disregarded.

[16] The DC's order for committal to the RC was merely a ruling of a procedural nature [*S v Duma* 2012 (2) SACR 585 (KZP) at para 11]. The correct procedure for such committal as envisaged in section 116(1) (b) of the CPA was not followed. Although the committal was in peremptory terms, it was subject to the opinion of the DC magistrate [*S v Beyers* 1948 (4) SA 816 (NC) at 817G]. The opinion and the reasons therefore should be clearly expressed and the committal should unequivocally appear on the record of proceedings [*S v Beyers, supra* at 817H]. It does not appear from the record that the committal to the RC was explained to the appellants. In my view, the matter was not properly placed before the RC in terms of section 116(1) (b) of the CPA. The RC was misdirected in the view that the proceedings before the DC were in accordance with justice.

[17] This is a matter where the RC should have considered a request for reasons from the DC [section 116(3) (a) of the CPA]. It is also a matter where the RC should have considered transmitting the matter to the High Court for review under section 303 of the CPA. It is a matter where the High Court should interfere with the sentence.

[18] Appellant 1 had thirteen previous convictions. Three of which were malicious damage to property (two in 1997 and one in 1998), two of housebreaking (1997 and 2002), three of theft (two in 1997 and one in 2015), three of assault (2000 and two in 2008), one *crimen injuria* (2010) and one unlawful possession of drugs (2017). Appellant 2 had five previous convictions. Three of which were housebreaking (2004, 2005 and 2014), one theft (2010) and one unlawful possession of drugs (2013).

[19] Appellant 1 had one recent relevant previous conviction for theft in 2015 for which he was sentenced to 6 months imprisonment. Appellant 2 had a recent relevant previous conviction of housebreaking with intent to steal and theft and was sentenced to two years imprisonment in terms of section 276(1)(i) of the CPA.

[20] Appellant 1 was 37 years of age, unmarried and had two children aged 19 and 13. Their mother was the primary care giver. He attended school until grade 9. He was a general worker and earned R200 a day. He had been in prison awaiting trial for 11 months. The appellant's eldest child was at University and needed his financial support.

[21] Appellant 2 was 31 years of age and had two children aged 5 and 4 years. Their mother was the primary caregiver. He attended school until grade 10. He was a general worker and earned R1500 per week. He paid R800 child maintenance per child. He had a drug problem form a young age. He had been awaiting trial for 11 months.

[22] The appellants were convicted of a serious offence. They both in general have a history of being in conflict with the law. They showed no respect for another person's property. They had been in prison for almost a year before their sentencing in the RC. After careful consideration of all these factors I would make the following order:

(1) The appellants sentences are set aside and replaced with the following:

"Each of the accused is sentenced to four (4) years imprisonment of which two (2)

years imprisonment is suspended for five (5) years on condition that the accused is not convicted of housebreaking with intent to commit an offence or a charge of theft committed during the period of suspension.

2. Nkosi and Another v S (A161//2017) [2019] ZAGPJHC 394; 2020 (1) SACR 206 (GJ)

Evidence of identification of a person in a newspaper photograph placed at request of police could be allowed—Although dangers inherent in such identification, such constituting necessary means of apprehending criminals.

Spilg, J

Introduction

1. This appeal concerns the killing of the late Mr Lawrence Moepi who was a forensic accountant. At the time of his death Mr Moepi had been working on cases on behalf of, among others, the Public Protector's office and the then Scorpions. His killing therefore attracted media attention and speculation.

2. It was common cause that the deceased had been followed by two occupants of a white Volkswagen Golf motorcar *("the Golf")* into his office parking lot. The passenger of the Golf alighted, approached the deceased, who was still in his motor vehicle, and fired two or three shots at him through the door. The vehicle's door then opened and the shooter fired several more shots at the deceased. He then ran towards the Golf but saw Mr Sewpersad who had alighted from his own car. Sewpersad had entered the grounds just after the Golf and had parked his car a short distance away from the other two cars. As the shooter ran back towards the Golf he saw Sewpersad standing at his car, pointed the firearm at him, and entered the Golf which then drove off.

3. As the trial proceeded before Barn J, it was evident that the murder was unrelated to the deceased's forensic work. Firstly Mr Siphoro, who is cited in the notice of set down as the second appellant, and who was the second accused in the trial, pleaded guilty to a charge of assaulting his ex-partner with intent to do grievous bodily harm, being count 1 of the charge sheet. This offence had occurred in late August 2013, which was just two months prior to the murder. The second accused was identified, by another witness at the scene, as the driver of Golf from which the shooter had alighted. It was common cause that at the time the second accused's ex-partner had formed an intimate relationship with the deceased.

4. Both the first and second accused were found guilty of murdering the deceased.

5. The Supreme Court of Appeal granted the first accused leave to appeal against conviction only. At the time the matter was enrolled it was contended by one of the second accused's legal representatives that the SCA had not finally determined the fate of his petition.

GROUND OF APPEAL

15. A number of heads of argument have been filed; one set by counsel engaged by

the appellant directly and two by counsel from Legal Aid. Both the private firm and Legal Aid hold powers of attorney from the appellant to prosecute his appeal. Since we had read all sets of heads filed and because it was not possible to obtain instructions from the appellant, we decided to hear both counsel for the appellant, with Adv Kolbe presenting argument before *Adv Robertse.* The State had no objection to this course, which ensured that the appeal was not delayed while overcoming the possibility of prejudice to the appellant.

16. The appellant contends that the court erred in finding that the State had established his identity as the shooter beyond a reasonable doubt.

17. In support of this submission, and leaving aside the usual generalised submissions the appellant essentially contends that:

a. Mr Sewpersad was a single witness and although s 208 of the Criminal Procedure Act 51 of 1977 allows a conviction in such circumstances, the court failed to subject his evidence to proper scrutiny. See *S v Pi/lay* [2016] ZASCA26.

b. The court could not have been satisfied as to the honesty or reliability of the witnesses' evidence and failed to carefully scrutinise his evidence because in his first statement the witness said that he would not be able to identify the shooter yet he claimed to have done so in court which meant that he was prepared to make a false statement under oath.

The appellant also contends that the witness's identification of him as the shooter amounted to a dock identification. Indeed one of the key criticisms is that *"Mr Sewpersad only identified appellant ... in court .... More than* a *year after the event in circumstances where the involvement of the appellants was suggested to him by their presence in court* ...."

SINGLE EYEWITNESS

18. Many serious offences such as rape, assault, hijackings and *"smash and grabs"* are committed on a daily basis where only the victim is present. Similarly there may only be a single eyewitness who had an unobstructed view of the assailant.

19. As appears from *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C the real issue is whether the court can discount "... *the fallibility of human observation".* This seems to be the reason why in the judgment Holmes JA was not prepared to limit the considerations which might be taken into account, despite a rather extensive list of possibilities being mentioned in his judgment. Each case will depend on its own facts and circumstances.

WITNESS' HONESTY AND RELIABLITY

20. Sewpersad made a statement to the police in which he said that he would not be able to recognise the shooter. During his evidence he pointed the appellant out as the shooter.

21. It is accepted that once a court is made aware of a material discrepancy between a witness's testimony and the statement he or she made to the police then a court must be careful in weighing that person's credibility.

22. The defence asked Sewpersad why initially he had told the police that he would

be unable to identify the shooter. Sewpersad replied that *"I was scared for my life at that stage when I was pointed with the firearm by the accused".*

23. Attorney Leisher, who then represented the appellant put to the witness whether it was correct that he did not tell the truth when the police took down his statement. The reply again revealed the witnesses professed state of mind at the time. He said; *"I was actually under stress at the time and feared the hell in my life that I did not want to give the correct statement to the police on site, because I feared for my life."*

24. While there is no doubt that the evidence of a witness on identity who first claimed that he would not be able to identify a suspect is to be treated with great circumspection, it does not *per se* render his evidence on identity untruthful. That is to be determined by broader considerations, such as the explanation given for the statement, whether it was retracted and if so the circumstances prevailing at the time of its retraction, the credibility of the explanations and the overall credibility of the witness bearing in mind that the contradictory statements made under oath must *a fortiori* count against him or her. Other variables may come into consideration in appropriate cases such as what is put to the witness but is in fact contradicted by an accused's own testimony.

25. There will also be the need to test the basis on which the witness claims to have recognised the accused, whether it is consistent with anything else contained in the police statement regarding features, apparel, posture, voice or the like; particularly if the only occasion when the witness claims to have identified the accused was in the witness box (with all its inherent dangers as correctly submitted by Adv Kolbe). At this stage I am only considering the honesty of the witness, although it may impact on his or her reliability.

26. The trial court was well aware of the issues arising about the honesty of the witness and confronted them (at pp 162 to 163 and 165 to 166).

27. Since one cannot simply reject the evidence out of hand because a person states shortly after the incident that he would not be able to identify a suspect, the first question that arises is whether there is an acceptable explanation for the statement. A witness may be unduly cautious, may still be traumatised, or when confronted by the accused in a line up may recall some facial characteristic or particular mannerism.In the present case the witness claimed to be scared for his life and if that is to be believed then the follow up enquiry must be the circumstances which led to a change of mind.

28. In the present case Sewpersad had witnessed what would have appeared to be the actions of a cold blooded killer who with an accomplice had tracked his victim down to his offices, who did not conceal his identity but had no compunction to kill in broad daylight in the proximity of others and who not only would be able to recognise the witness but had in fact pointed the firearm he had just used to kill someone else.

29. Accordingly the explanation for not being willing to identify the shooter because he was scared for his life is understandable. But something more must be required before one can conclude that the witness can still be regarded as trustworthy after changing his version.

30. Sewpersad changed his statement less than a week after the first statement was made. In his subsequent statement of 23 October 2013 he claims that he would be able to identify the shooter. I juxtapose the significant portions of the two statements.
In the first statement the witness said in regard to the appellant that:
" I can 't be able to identify the tall guy ..... He is a *black male he was wearing* a *"white jacket and blue jeans."*
In the second statement he said:
"... *by the time he was pointing me with the gun I saw his face and build. He was tall, light complexioned and also the shape of his shoulders. .... The black male who fired the shots was wearing* a *white jacket with a white hoody (hat) and* a *blue jean. I can be able to identify the tall guy I can see him"*
31. Three things are significant about the second statement. Firstly the witness provides more detail regarding the appearance of the shooter. Secondly the statement was taken nine months before the appellant was apprehended. Accordingly the witness was able to add to the original description well prior to seeing the appellant for the first time and without any external influence since not even the co-accused had been detained by that time.
Thirdly in the second statement the witness does not claim that he can identify both the shooter and the driver. On the contrary he states that he did not manage to see the driver whereas in the first statement no mention is made of whether or not he had seen the driver. The only reasonable inference is that the witness was requested to make the second statement in order to provide further information to provide the investigation team with leads.
32. One can eliminate the possibility of duress or coercion since there is no suggestion of that, nor is it likely where the police had no apparent leads at the time the second statement was taken.
33. Nonetheless something more is required for a court to be able to rely on the witness' second statement that he could now identify the shooter. In the present case I believe it is to be found in Sewpersad providing quite definitive details regarding the shooter's features and distinctive clothing some nine months before the appellant was arrested, the fact that the appellant did have the features described and the witness' unchallenged testimony that he recognised the appellant as the shooter from a photograph in *The Star* newspaper of 17 March 2014 (which was admitted into evidence).
34. This is particularly significant because the accompanying article describing the person in the photograph as someone who *"can assist us in identifying the second suspect";* not that the person was in fact the suspect. It required the independent mental process of the witness, unaided by any external factor, to link the person in the photograph as the person he saw shooting the deceased and not as a person described in the article who could assist the police to locate the shooter.
In this respect the reliability of the identification of the appellant well prior to his arrest reinforces the otherwise discreet enquiry of the witness' honesty , even if this is not necessarily so in other cases. A further factor is that on 20 September 2014 the witness made a third statement which explained why the investigating office, Warrant

Officer Heyns who was a very experienced detective of some 33 years' service aborted the identification parade to which he was taking Sewpersad. The statement reads:

On 2014.09.20 ... I was picked up at my place of residence ... by investigating officer W/0 Heyns to attend an ID parade at SAPS Germiston.

While on our way ... I was asked by the investigating officer whether I have seen the suspect's picture in the newspapers. I informed .. ..that I did see the suspect's picture in the Star newspaper. The picture I saw ... is the same person who shot and killed the deceased ...."

35. The statement therefore confirms that the witness had seen the accused's photograph in the newspaper. Moreover an independent factor going to the veracity of the witness' credibility is that the identification parade was aborted. The curtailment of the identification parade goes to the credibility of the claim Sewpersad made in the second statement about being able to identify the shooter and to his evidence that he did identify the appellant on seeing his photograph in the newspaper some five months later. It also goes to the genuineness of the witness' explanation that he was in a state of fear when he made the first statement on the afternoon of the incident.

36. Eye witnesses are generally ordinary people caught up in situations not necessarily of their making, who may believe that fate dealt them a cruel hand on the day in question and would dearly love to distance themselves from the events. Eyewitnesses do not come with a particular sense of civic responsibility nor will they necessarily be fearless of possible consequences. They can be family men or women who would have preferred not to be involved and who may genuinely be fearful of repercussions.

37. Accordingly the court cannot expect a higher standard by requiring them to react in a civic minded or fearless manner where, unlike the case of a loved one, they may have no particular association with the victim. In short they did not select themselves for the job by reason of possessing any particular attributes-some may have a connection with either the alleged perpetrator or the victim but others may have been at the scene through entirely random circumstances.

38. I therefore do not consider it a sufficient criticism of Sewpersad, when all relevant factors are taken into account, that he did not promptly contact the police with information, as advanced by Adv Kolbe. After all the article asked for people who could assist in *locating* the appellant to contact the police, and his whereabouts certainly were not known to Sewpersad.

39. I am satisfied on the facts of this case that there are sufficient externally objective facts and circumstances to accept the explanation of the witness as to why he was not prepared initially to state under oath that he could recognise the shooter.

IDENTIFICATION BY REFERENCE TO A NEWSPAPER PHOTOGRAPH

40. Once the court is satisfied as to a witness' credibility in claiming to be able to identify an accused it becomes necessary to consider the probative value of such evidence by which I include the reliability of the identification.

41. Clearly the probative value of evidence as to identity is greatest where a suspect

is apprehended immediately at the scene of the crime. At the other end it may be problematic where there is only a dock identification.

Adv Kolbe correctly pointed out that a properly held identification parade provides certain safeguards and in particular, for present purposes, that an identification parade may not even include the suspect. This ensures that a witness cannot be influenced into believing that the suspect must be among those he is asked to point out in a line-up.

42. Adv Kolbe submitted that the court was dealing with a dock identification. This is not so. The credible evidence received by the trial court and with which it was satisfied was that the witness identified the appellant at the time he saw the photograph. He simply confirmed this observation at the trial, as every other witness is asked to do whether or not he or she had attended an ID parade.

43. The evidence was corroborated by not only the evidence of W/0 Heyns and the witness' third statement which was put to him by the defence but also by the undisputed objective fact that W/0 Heyns had already set up an ID parade to which he was taking Sewpersad and which he then aborted. The only rational explanation was the one provided; it would be a pointless exercise for the witness to attend an ID parade if he already had identified the shooter by reference to the photograph in the newspaper. Indeed the investigating officer could have been criticised by the defence if he persisted with an ID parade in the face of such information.

44. It may also have watered down the veracity of Sewpersad's testimony about recognising the shooter from the photograph if still had attended the ID parade. Indeed Adv Kolbe accepted that the investigating officer was correct not to proceed with the ID parade in such circumstances.

45. This brings the court to consider the reliability of Sewpersad's identification of the appellant. I believe that the earlier analysis with regard to Sewpersad's credibility, the description he gave to the police in his first two statements which was done months prior to the appellant being apprehended all lead to the reliability of the identification.

46. Something further ought to be said about the sufficiency of an identification based on a newspaper photograph that finds its origins in a media release by the police requesting assistance in locating a person. There is the risk as pointed out by Adv Kolbe that a person seeing the photograph may be influenced in believing that the photograph is that of the suspect and therefore an essential safeguard of an ID parade is absent. That may be so, but in the pursuit of apprehending an alleged criminal in the interests of justice it may be the only course.

47. In the present case there can be no doubt that the appellant was on the run. He had fled the area in which he had been staying. Moreover neither his partner, with whom he had a child, nor his friends knew of his whereabouts. When he was tracked down to Ladysmith by the investigating officer, the unchallenged evidence of W/O Heyns was that the appellant attempted to flee.

48. There will be more and more occasions where the only reasonable means of locating a suspect is by circulating his or her photograph or police sketch in the printed or electronic media. It would be absurd to suggest that the only means of apprehending a suspect has in it the very seed by which that person will

comfortably escape justice.
Nonetheless it does require a court to be satisfied as to the veracity of the witness' evidence regarding the circumstances in which he or she came to see the image, the reaction if any, the circumstances under which the witness disclosed this to the police, the wording of the article in which the image appeared, the description that the witness gave of the suspect in any prior statement and of course the actual opportunity to observe the person concerned at the scene of the crime.
There may be other factors as well which either militate against, or reinforce, accepting the witness' evidence, including the overall credibility of the witness and the accused as well as the version put to the witness or given by the accused when testifying. In this case an additional factor is that the appellant's partner was the sister of the second accused. Despite these links the appellant claimed that he had no contact with her, even though they had a child together.
The appellant also claimed not to have had contact with the second accused, one of whose vehicles he was using, save for one occasion during the entire nine months until his arrest. This was said to have taken place with the second accused in the presence of W/O Heyns yet its contents were not put to him in circumstances where it clearly should have.
49. In the present case the trial court, which had the advantage of assessing all the witnesses while they were testifying accepted the evidence of Sewpersad as honest and reliable, was satisfied with the explanation tendered and found the appellant's version to lack credibility and that it was untruthful.
50. In my respectful view the trial court's acceptance of Sewpersad's identification of the appellant as the shooter must stand. And having regard to the other evidence presented, including that of the appellant, the conviction is sound.

ORDER
51. In the circumstances the appeal is dismissed.

(The above is an edited version of the judgment which excluded the issue of the right to appeal. The full judgment can be accessed here:
http://www.saflii.org/za/cases/ZAGPJHC/2019/394.html

From The Legal Journals

Adelstein, R

"Plea Bargaining in South Africa: An Economic Perspective"

Constitutional Court Review 2019 Volume 9, 81–111

Abstract
This essay applies a simple economic model of the plea bargaining process to the two-tiered structure of negotiated pleas and sentences in South Africa. Bargaining in South Africa proceeds along one of two tracks. A formal procedure, authorised and regulated by s 105A of the Criminal Procedure Act, gives defendants represented by counsel access to precise information about the terms of the bargain before the plea is made and permits them to withdraw their pleas should the sentencing judge reject the agreement. In contrast, an older, informal procedure, governed by s 112, applies to defendants without counsel and grants them significantly less information and agency in the bargaining process than does the s 105A procedure.The model illuminates the central role of information and uncertainty in the defendant's decision to plead guilty or insist on a full trial, and suggests that if all plea bargains were governed by the formal procedures of s 105A, the system would more effectively represent the interests of both prosecutors and defendants by producing more bargains, and fewer trials, in cases where both sides want to avoid trials and consummate plea bargains. The final section considers the constitutionality of plea bargaining under ss 35 and 36 of the Constitution of the Republic of South Africa.It reviews the constitutional history of plea bargaining in the United States to emphasise the differing perspectives on the constitutionality of plea bargaining demanded by significant variations in substance and interpretative style in the two constitutions. The essay concludes by briefly suggesting the arguments that might be made against the constitutionality of plea bargaining under s 35 and the corresponding contentions that might be raised during limitations analysis under s 35 to justify the practice should it be found to violate s 35.

Metz, T

"Reconciliation as the Aim of a Criminal Trial: Ubuntu's Implications for Sentencing"

Constitutional Court Review 2019 Volume 9, 113–134

Abstract

In this article, I seek to answer the following questions: What would a characteristically African, and specifically relational, conception of a criminal trial's final end look like? What would the Afro-relational approach prescribe for sentencing? Would its implications for this matter forcefully rival the kinds of penalties that judges in South Africa and similar jurisdictions typically mete out? After pointing out how the southern African ethic of ubuntu is well understood as a relational ethic, I draw out of it a conception of reconciliation that I advance as a strong candidate for being the proper final end of a criminal trial. I argue that, far from requiring forgiveness, seeking reconciliation can provide strong reason to punish offenders. Specifically, a reconciliatory sentence is one that roughly has offenders reform their characters and compensate their victims in ways the offenders find burdensome, thereby disavowing the crime and tending to foster cooperation and mutual aid. I argue that this novel account of punishment is a prima facie attractive alternative to more familiar retributive and deterrence rationales, and that it entails that widespread practices such as imprisonment and mandatory minimum sentences are unjust.

Powell, C H

"Judicial Independence and the Office of the Chief Justice"

Constitutional Court Review 2019 Volume 9, 497–519

Abstract

This article investigates the extent to which the Office of the Chief Justice (OCJ) promotes the independence of the judiciary in South Africa. Judicial independence is widely understood to be protected by security of tenure, financial independence and administrative independence, three characteristics which are meant to support the judiciary as an institution, as well as the independence of individual judges. However, current jurisprudence and scholarship fail to engage with the relationship between individual and institutional independence, and to identify mechanisms of protection for the institution as such. The factors which have received the most emphasis are the financial independence of the judiciary and the judiciary's control over its own administration. The article reveals that the OCJ has taken over broad areas of the administration of the judiciary, but questions whether the increased control enjoyed by the leadership of the judiciary has translated into improved control for individual judges. It draws on the legal philosophy of Lon L Fuller to suggest how the independence of individual judges relates to the independence of the institution. In particular, it applies Fuller's theory of 'interactional law' to suggest that a process of mutual engagement is needed within those institutions which have to uphold the rule of law. From this perspective, it appears that the OCJ may not be in a position to protect the institutional independence of the judiciary, because it does not contain the mechanisms to accommodate the input of individual judges on the best conditions for effective and independent work.

Dlamalala, C. N & Du Preez, N

"The role of the probation officer in the protection of children in conflict with the law"

Child Abuse Research in South Africa, Volume 20 Number 1, 2019, p. 62 – 72

Abstract
This article looks at children as a vulnerable group in society who need protection, especially those who come into conflict with the law. In particular, those accused of committing crime need to be diverted from entering the criminal justice system and if this is not possible, measures should be put in place to prevent the stigmatisation associated with having a criminal record. Section 28 of the Constitution of the Republic of South Africa (1996) endorses such protection. This article outlines the role played by a probation officer in the diversion process. It examines international and national instruments that promote the protection of children in conflict with the law. It looks at how probation officers and other stakeholders in the justice system regarding the handling of children accused of committing crimes.

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

Contributions from the Law School

The offence of failure to give satisfactory account of possession of implement

Introduction

In terms of s 82 of the General Law Third Amendment Act 129 of 1993, a new unified housebreaking offence was created, the antecedent provincial statutory housebreaking offences having been repealed (for a more detailed discussion of this offence, see Milton, Cowling & Hoctor *South African Criminal Law and Procedure* Vol III: Statutory Offences 2ed (revision service 2017) J5). Thus Snyman's call (in 'Reforming the law relating to housebreaking' (1993) 6(1) *SACJ* 38 at 49) for a repeal of the statutes creating statutory forms of housebreaking, and a consolidation of the

provisions relating to possession of housebreaking implements into a single offence, applying throughout the country, was heeded. The rationale underlying this provision appears to be that the offence has been created by the legislature to make it easier to intercept housebreakers (or breakers into motor-vehicles) in preparatory acts or after the breaking in has taken place (Feeney 'Burglary' in Kadish (ed) *Encyclopedia of Crime and Justice* Vol I (1983) 129 at 130). It seems that the legislature has transformed a form of 'attempt' into a separate substantive offence (cf Torcia *Wharton's Criminal Law* 14ed (1980) #344n71). The offence also extends to possession of an implement in terms of which there exists a reasonable suspicion that it *was* used to commit housebreaking or vehiclebreaking, thus serving not only as an anticipatory offence, but also as a type of catch-all offence, more easily proven than the common-law crime of housebreaking.

Elements

This offence, which carries a punishment of a fine or imprisonment for a period not exceeding three years, is defined as follows:

'Any person who possesses any implement or object in respect of which there is a reasonable suspicion that it was used or is intended to be used to commit housebreaking, or to break open a motor-vehicle or to gain unlawful entry into a motor-vehicle, and who is unable to give a satisfactory account of such possession, shall be guilty of an offence.'

The essential elements of this crime are: (a) possession (b) implement or object (c) reasonable suspicion (d) inability to give a satisfactory account (e) intention

(a) possession

As the specified offence consists of simply 'possessing' rather than 'being found in possession' (as required in the antecedent provision in s7(b) of the Crimes Ordinance 26 of 1904 (Tvl) (for discussion of the provincial offences preceding this offence, see Hoctor 'Statutory regulation of housebreaking and intrusion in South Africa – an historical perspective (2017) 23(1) 39)), it is submitted that it is not required that the accused be in direct control of the implement (ie in 'actual' possession), and that 'constructive' possession will suffice (see generally on possession, Snyman *Criminal Law* 6ed (2014) 62ff, in the Australian case of *R v Wilson and Flanders* [1969] SASR 218 at 223, the requisite possession for the analogous South Australian provision was described as being 'sufficient if it is under his immediate control and so readily accessible to him that he can use it ...with only a minimum and immaterial delay'.) Nevertheless, the physical element (*corpus*) of possession must be satisfied (for a case where the court was not satisfied that the physical element of possession was established, see *S v Mosoinyane* 1998 (1) SACR 583 (T)). If the accused exercised control over the implements through an agent, this would constitute sufficient

possession for the purposes of liability (Snyman *Criminal Law* 64). In determining this element, it may be submitted that the central enquiry (applying Jhering's termininology) will be as to the knowledge of the accused with regard to the implements - at least an intelligent consciousness of the fact of his possession will be required.

(b) implement or object

The courts have been granted a wide-ranging discretion as to whether a particular implement (or object) should be regarded as an implement of housebreaking. It seems that this approach (as opposed to an attempt to list notorious housebreaking implements, along with a catch-all category, as reflected in the provincial housebreaking ordinances) concedes that legislators realistically cannot expect to know and specify every one of a myriad of implements, instruments and objects, which vary from the sophhisticated to the simple, that are utilized in present-day housebreaking (and vehicle-breaking). The category of implements included in this offence is thus potentially very wide (as is evident from the all-encompassing alternative term 'object').

The specified limitation in the definition is that the implement must be such that it could 'reasonably' be suspected that the implement could be used for one of the unlawful acts mentioned in the section. One test which has been employed in this regard in US law is the 'rational connection' test, which requires that there be some rational relationship - in common experience - between the fact proved and the fact presumed (Comment: 'Criminal Law: Proof of Intent under Burglary Tool Statutes' (1957) *Washington University Law Quarterly* 276 at 279; in this regard, in South African decided cases on this section, it was held in *S v Maja* 1998 (2) SACR 673 (T) that an Allen key is used to break into motor vehicles, but in *S v Mailula* 1998 (1) SACR 649 (T) it was held that an ignition mechanism of a motor vehicle did not fall within the ambit of the section, and in *S v Ngwenyama* 2013 JDR 2019 (GNP) it was held that it had not been established how bolt cutters and a handsaw could be used to commit housebreaking or to break open a motor vehicle). Since this requirement could, in principle, easily be fulfilled by the testimony of a competent police witness, it is significant that a second test has to be met - that the accused must be unable to give a satisfactory account of his possession.

(c) reasonable suspicion

Along with the testimony of an expert witness as to the feasibility of the implement being used to commit the specified offence, it seems that evidence would invariably have to be adduced by the State that the implement was discovered in 'suspicious circumstances', that is, discovered in the possession of the accused at a time (such as being found late at night or in the early hours of the morning (see, e.g., the US cases of *State v Gibson* 14 NC App 594, 188 SE2d 526 and *State v Beard* 22 NC

App 596, 207 SE2d 390; the Canadian cases of *R v Robert* [1969] 3 CCC 165 (BCCA), and *R v Tanka* (1969) 11 CRNS 229 (Ont.C.A.); and *S v Mailula supra*) or in a place (for example, in the US case of *State v Emerson* (284 Minn 540, 169 NW2d 63) the defendant, who was a stranger in the community, was apprehended whilst crouched behind a tree at about 11pm in wintertime in an isolated wooded area, near a school building, laden with burglary tools) or following the receipt of information by the authorities, which gave rise to a reasonable suspicion of wrongdoing on the part of the accused.

The content and nature of this 'reasonable suspicion' may, it is submitted, be constituted as follows:

(i) The suspicion must be formed in the mind of some person substantially contemporaneously with the discovery of the implements in the possession of the accused (a similar requirement applies to the unexplained possession of suspected stolen goods, in terms of s 36 of the General Law Amendment Act 62 of 1955, discussed in Milton, Cowling & Hoctor *South African Criminal Law and Procedure* Vol III: Statutory Offences 2ed (revision service 2016) J6; see *S v Zondo* 1999 (1) SACR 54 (N)). Where the suspicion existed before the accused was discovered in possession, this should not necessarily entail an acquittal, all that should be required is that the previously formed suspicion should persist when the accused is found in possession.
(ii) Although a suspicion by definition does not involve certainty (or it would be a fact), the suspicion must be based upon grounds actually in existence at the time of its formation, otherwise it cannot be regarded as reasonable.
(iii) The reasonable suspicion must coincide, at some point, with the possession of the accused.

It seems that if the court accepts that there was a reasonable suspicion that the implement was to be used for breaking in or open, it could, in turn, draw an inference that the implement has been used or is intended to be used for such purpose.The State will nevertheless have to prove, beyond reasonable doubt, each element of the offence: (a) the possession by the accused of the specified implement(s), (b) the suitability of the implement(s) for the prohibited purpose, (c) that the accused's account of his possession is unsatisfactory, and (d) the intention to use the implement(s) for the prohibited purpose.

(d) inability to give a satisfactory account

A satisfactory account is one which may in all the circumstances reasonably be true and which shows that the accused *bona fide* believed his possession to be innocent in nature having regard to the objects of the criminal legislation. The accused must be unable at any time (from the moment of discovery through to the trial) to give a satisfactory account of his possession (thus the accused may still escape conviction

even where he gives no account, where the court is not satisfied that his failure to give a reasonable account proves his inability to do so). There is no onus on the accused to prove his account satisfactory - it is for the State to prove it unsatisfactory. The constitutionality of this requirement was affirmed in *S v Zondo supra*.

(e) intention

It seems that for liability, it would have to be establsihed beyond reasonable doubt that the accused had knowledge of possession of the article, and an intention that the article be used to commit housebreaking, or vehiclebreaking, or to enable unlawful entry into a motor vehicle. Thus the accused must have it in mind that, when he uses the article, he will do so with the intention required by any of the specified forms of the crime.

Concluding remarks

In conclusion, it is significant that this offence should be widened in its ambit to include the unlawful ingress of motor-vehicles. This seems to reflect an attempt to deal with the widespread social evil of theft from parked vehicles (usually of audio systems) in a new way, going beyond the traditional common-law crimes of theft and malicious injury to property. Whether it could be regarded as elevating the protection of motor-vehicles to the same level as protection of a home or premises is not clear, although it does place an interesting gloss on the notion of ‘premises’ in the crime of housebreaking with intent. What is interesting in the light of the antipathy of the writers for the ‘breaking’ element of the housebreaking crime (see, e.g., Snyman 1993 *SACJ* 38 at 41), is that the legislature has created a new ‘breaking’ offence in this section, alongside an ‘unlawful entry’ offence. If the legislature regarded the ‘gravamen’ of the housebreaking crime to be the unlawful entry (as was stated to be the case in *R v Faison* 1952 (2) SA 671 (SR)), it is submitted that it would not have brought a further ‘breaking’ offence into being in this way - if the unlawful entry is all-important, then surely an unlawful entry offence would suffice?

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A FEW OBSERVATIONS ON ISSUING WARRANTS OF ARREST IN TERMS OF SECTION 43 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 (CPA) AND SUBPOENAS IN TERMS OF SECTION 205 CPA

A S v De Vries & Others [2008] JOL 22153 (C); (67/2005) [2008] ZAWCHC 38

In the matter of *S v De Vries & others* [2008] JOL 22153 (C) the Court stated as follows in paragraph 26 and 32 (my underlining):
"[26] Section 43 provides that the written application for an arrest warrant must state that:
". . . from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence."
"The correct approach to the discretion to be exercised by the magistrate considering the application for the warrants was set out more than 50 years ago in May v Union Government 1954 (3) SA 120 (N) at 125B in relation to a similarly worded clause:
". . . s 34 does not prescribe, as an essential prerequisite of the issue of a warrant, that all the material facts necessary to obtain a conviction should have been deposed to on oath. The section requires only reasonable grounds of suspicion but these reasonable grounds must appear from the sworn information . . . I have no doubt that the sworn information must be looked at in its context of all the known facts of the situation, whether deposed to on oath or not. Nor have I any doubt that, in forming his suspicion the official concerned is not obliged to accept the sworn information as true. He may believe some of it and disbelieve some; he may even, perhaps, disbelieve it all. Information on oath he must have and from that information, looked at in its proper context, he must be able to form a reasonable suspicion."
"[32] In summary then, I find that, even entirely excluding any evidence obtained from the section 205 subpoenas, there was enough information on oath before the magistrate for him to have formed a reasonable suspicion that the accused were involved in the Darling robbery. The warrants were defective only in so far as the issuing magistrate did not have the territorial jurisdiction to authorise them."

I suggest that the Court in *De Vries* misread *May v Union Government*. A fuller extract from *May*, indicates that *May* had in mind the prosecutor making the application, not the magistrate considering it (my underlining):
"The warrant was issued under sec. 34 of Act 31 of 1917 on the written application of the public prosecutor, asking for the issue thereof for the arrest of the plaintiff on a charge of falsity
'there being from information taken upon oath reasonable grounds of suspicion against him that the alleged offence was committed during January, 1945, in the Johannesburg district'.
In my opinion sec. 34 does not prescribe, as an essential prerequisite of the issue of a warrant, that all the material facts necessary to obtain a conviction should have

been deposed to on oath. The section requires only reasonable grounds of suspicion. But these reasonable grounds must appear from the sworn information. I do not think that the official who makes the application is restricted to the sworn information in forming his suspicion; Mr. Fannin *indeed argued that, if there was information not on oath which tended to negative the suspicion, an inference that the suspicion was not reasonable would derive support therefrom. I have no doubt that the sworn information must be looked at in its context of all the known facts of the situation, whether deposed to on oath or not. Nor have I any doubt that, in forming his suspicion, the official concerned is not obliged to accept the sworn information as true. He may believe some of it and disbelieve some; he may even, perhaps, disbelieve it all. Information on oath he must have, and from that information, looked at in its proper context, he must be able to form a reasonable suspicion.*

Perhaps the court in *De Vries* ought to have consulted *Prinsloo and Another v Newman* 1975 (1) SA 481 (A) where the majority in passing said the following:
"(With regard to the lastmentioned case, [Groenewald v Minister van Justisie, 1973 (3) S. A. 877 (A. D.) at pp. 883 4] I should mention that the statement at p. 883H of the report that
"hy (the magistrate) moet die gronde waarop die Staatsaanklaer steun, oorweeg..."
[he (the magistrate) must consider the grounds on which the Public Prosecutor relies] is not a correct statement of the requirements of sec. 28. As I have already stated, the magistrate is not called upon to consider the correctness of the prosecutor's conclusion with regard to reasonable grounds of suspicion. But that does not mean that the magistrate does not exercise a discretion in considering whether to issue a warrant. He must satisfy himself that the alleged offence is an offence in law, and that it is of such a nature and gravity as to justify the issue of a warrant)."

Section 28 in the quotation above refers to the previous Criminal Procedure Act, 56 of 1955. It read as follows:
"**Section 28 - Warrant of apprehension by judge, magistrate or justice**
(1) Any judge of a superior court or any magistrate or justice may issue a warrant for the arrest of any person or for the further detention of a person arrested without a warrant on a written application signed by the attorney-general or by the local public prosecutor or any commissioned officer of police, setting forth the offence alleged to have been committed and that, from information taken upon oath, there are reasonable grounds of suspicion against that person, or upon the information to the like effect of any person made on oath before the judge or magistrate or justice issuing the warrant: Provided that no magistrate or justice shall issue any such warrant, except where the offence charged is alleged to have been committed within his area of jurisdiction, or except where the person against whom the warrant is issued is, at the time when it is issued, known, or suspected on reasonable grounds, to be within the area of jurisdiction of that magistrate or justice.

(2) A warrant referred to in sub-section (1) may be issued on a Sunday as on any other day and shall remain in force until it is cancelled by the person who issued it, or until it is executed.
(3) When a warrant is issued for the arrest of a person who is being detained by virtue of an arrest without a warrant, such warrant or arrest shall have the effect of a warrant for his further detention."

B A few other observations section 205 subpoenas and warrants of arrest

In respect of section 205 requests I humbly agree with *De Vries* that -
"Whilst it would not be irregular, in my view, to consider such an application by having regard to no more than the contents of witness statements in the docket, a preferable procedure would be for the investigating officer to set out in an affidavit the grounds on which the subpoena is sought and, if appropriate, identify therein the particular witness statements upon which the application is based.

I suggest that this proposed procedure should, in general, also apply to applications for warrants of arrest in terms of section 43 CPA. In respect of both these matters (J50 applications and section 205 requests) I suggest that since it is the prosecutor who is the applicant (or requester), the prosecutor must identify the statement(s) attached to the application or request and indicate that it as a supporting statement.

In respect of J50s, it is my impression that such supporting affidavits are regarded by prosecutors as a requirement of issuing magistrates and are not their concern. This could possibly be because the J50 form in use (which comes from time immemorial) does not provide for the attachment of supporting statements. In respect of requests in terms of section 205, however, prosecutors generally do indicate that supporting statements are attached.

To elaborate on the aspect of supporting statements and the role of the prosecution in applications and requests in this regard: the National Prosecuting Authority *"perform their duties with a degree of independence, which places them outside the usual administrative structures of government*."[1] This degree of independence brings responsibilities. One such responsibility is surely that a prosecutor must apprise himself or herself to the contents of the police docket and apply his or her mind to statements contained in the application or request put before (or prepared by) him or her before submitting applications and requests to a magistrate. In my experience this is what magistrates expect from the prosecution, but they often disappointed. For example: the prosecutor signs a "Schedule of Information" attached to the investigating officer's statement thereby indicating his or her agreement with it, but

[1] Constitutional Law of South Africa (2nd edition), Edited by Stuart Woolman and Michael Bishop, Jutastat e-publications, Chapter 12.3(b).

the Schedule simply indicates "video footage", without a date, or time, or even a place of the footage. Another example is where information in respect of bank account is required, but the schedule does not identify a bank account or the period for which it is required. If the subpoena is issued in such a case the person subpoenaed may not ignore it, but shall have to appear and then may raise this enquiry at his appearance[2]. I must explain here that in this Province and at apparently in Gauteng too, the practice is that when the magistrate issues the subpoena she co-signs this schedule of information attached to the investigating officer's statement. In the subpoena the magistrate indicates that a schedule of information is attached. The subpoena and schedule are then served on the person (witness).

It has come to my attention that there are magistrates who, when considering the issue of a J50 warrant, would require amended or additional supporting statements to indicate, eg, why the suspect needs to be arrested vis-à-vis the issue of a summons even in matters involving Schedule 5 or 6 CPA offences. Since it is usually the investigating officer who hands these applications to the magistrate, the investigating officer would then comply with the request and re-submit the application. I suspect that that such improved applications are re-submitted without the applicant-prosecutor being involved in them. I do have a few reservations, generally speaking, on this procedure of having to convince the magistrate on the merits of an arrest as opposed to a summons.

Firstly, while I have no issues with the magistrate immediately merely clearing up a matter or two in the supporting statement, it is the prosecutor, being the applicant, who should re-submit an amended application.

Secondly, when a summons is issued, the investigation is complete, the prosecutor has decided to prosecute and has drawn up the charge(s)[3], the suspect becomes an accused and this accused is summoned for trial and pre-trial procedure. But in the case of a warrant of arrest, the police are not obliged to arrest the suspect[4]. And if arrested the police may continue investigating the matter. In *Sekhoto* SCA, *supra,* footnote 4, the following was said in this regard:
"[31] The law in this regard has always been clear. Such an arrest is not bona fide but in fraudem legis *because the arrestor has used a power for an ulterior purpose. But a distinction must be drawn between the object of the arrest and the arrestor's*

[2] *Davis v Additional Magistrate, Johannesburg, and Others* 1989 (4) SA 299 (W).
[3] Section 54 CPA.

[4] *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) (2011 (5) SA 367; [2011] 2 All SA 157; [2010] ZASCA.*141).*
In *Minister Van Die Suid-Afrikaanse Polisie en 'n Ander v Kraatz en 'n A*nder 1973 (3) SA 490 (A) the court used the example of a prosecutor applying for a warrant of a person in respect of whom she has information that he is seriously ill. She does not know whether this information is reliable and has the intention of instructing the police officer who must execute the warrant, not to arrest the person if it appears that the information is correct.

motive. This distinction was drawn by Schreiner JA in Tsose *and explained by GG Hoexter J in a passage quoted with approval by this court in* Kraatz *(supra) at 507C–508F. Object is relevant while motive is not. It explains why the validity of an arrest is not affected by the fact that the arrestor, in addition to bringing the suspect before court, wishes to interrogate or subject him to an identification parade or blood tests in order to confirm, strengthen or dispel the suspicion."* (Footnotes omitted.)

Thirdly, we, as judiciary, must be mindful not to interfere with or overstep into executive domain and risk the accusation of creating a "fifth jurisdictional fact"[5]. This Court (*Sekhoto* SCA) continues, in paragraph 28:
"Once the jurisdictional facts for an arrest, whether in terms of any paragraph of section 40(1) or in terms of section 43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present, the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest. This was made clear by this court in relation to section 43 in Groenewald v Minister of Justice*.* (Footnotes omitted.)

Also, in *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) the following appears:
"[46] As far back as 1986, the Appellate Division (now the Supreme Court of Appeal) enunciated the correct legal approach in Duncan[6] as follows:
'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words he then has a discretion as to whether or not to exercise that power . . . . No doubt the discretion must be properly exercised.'
"This salutary approach was confirmed in Sekhoto as follows:
'Once the jurisdictional facts for an arrest . . . in terms of any paragraph of section 40(1) . . . are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. *In other words, once the required jurisdictional facts are present the discretion whether to arrest or not arises. The officer, it should be emphasised, is not obliged to effect an arrest*.' [Emphasis added.]"

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[5] *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) (2011 (5) SA 367; [2011] 2 All SA 157; [2010] ZASCA.*141)* where the Court rejected a "fifth jurisdictional fact" that:

> "If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest."

[6] [1986] 2 All SA 241; (1986 (2) SA 805) (A).

MR is a good example of exercising this discretion consistent with the Constitution: the police arrested a 15 year old girl for interfering with them in the execution of their duties when arresting her mother at their home and detained her until the following day, not considering the child's best interests.

Lastly, in respect of serious offences, I submit that a magistrate considering an application for a warrant of arrest, should be mindful of legislative limitations of the police's discretion and the related duties of the courts. Compare in this regard *Manga v Minister of Police* [2015] JOL 33170 (GJ), paragraph 23, where the suspect was arrested without a warrant:
"In the instant matter, the claim of the plaintiff of unlawful detention in respect of his detention at the Hillbrow Police Station can, in my view, be dismissed on one clear ground only. That is that, in the light of the serious nature of the offences that he was arrested for, which attracted the minimum sentencing regime in the event of conviction, there was conceivably no way in which the police could have, or should have, invoked their discretion to release him pending his first appearance in court."
The issuing magistrate should therefore bear in mind that this is an executive discretion and be careful when interfering with it.

I may add here that a prosecutor, being the applicant or requester, may directly approach a magistrate for the issue of a warrant or subpoena. This is quite common in smaller offices. If the magistrate requires additional information the prosecutor may produce a statement by the investigating officer. The prosecutor may also inform the magistrate, in writing or orally, of reasons in this regard. It is suggested that the magistrate ought to keep record of such proceedings for future reference.

Another irritation of magistrates is that prosecutorial applications or requests for warrants and subpoenas often do not indicate statutory references to offences (where applicable), but merely give the magistrate a short, even vague, description of the offence? Surely the magistrate must consider the existence[7] of the alleged offence and may want or need to probe this?[8] Consider, in addition, the provisions of

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[7] In *S v Matisonn* 1981 (3) SA 302 (A) the Court did not decide the issue, but said on page 312E-F:
> *"The question whether the issuing magistrate must exercise an independent judgment not only as to the existence, in law, of the alleged offence, but also as to the likelihood of the prospective witness being able to give material evidence regarding the offence, does not arise for decision in the present appeal, and I find it unnecessary, and also undesirable, to express an opinion thereanent. I shall, however, assume that, as contended on behalf of the appellant, the question has to be answered in the affirmative."*

[8] It is suggested that the situation is similar with the particulars in search warrants. Compare *Goqwana v Minister of Safety and Security NO and Others* (20668/14 [2015] ZASCA 186, where it was stated:
> "Furthermore, there is no statutory offence known as 'illegal interactive gambling (online gambling)' – this being the 'offence' described in the search warrant. This underscores the importance of it ordinarily being desirable that when dealing with a statutory offence, as opposed to a common law crime, the warrant should pertinently refer to the specific statute and the section or subsection thereof in order to enable the person in charge of the premises to be searched (assisted, if needs be, by his or her lawyer) and

section 39(2) CPA in respect of which the Court in *Minister of Safety and Security v Kruger* 2011 (1) SACR 529 (SCA) stated (from the headnote) –
"Section 39(2) requires a person who effects an arrest without a warrant to inform the arrested person of the cause of the arrest. Where the arrest is effected in execution of a warrant the arrestor must, upon demand of the arrested person, hand him or her a copy of the warrant. Quite clearly, that contemplates that the cause of the arrest will appear from the warrant. Moreover, s 43(2) provides that a warrant of arrest must direct the arrest of the person named in the warrant 'in respect of the offence set out in the warrant'. I think those two provisions make it abundantly clear that it was considered by the draftsman to be self-evident that a warrant must describe the offence, and it was not considered necessary to express that in terms. I also think that it must be taken to be axiomatic that a warrant that is formally defective in a material respect — as the warrant was in this case — is invalid."

In the *Kruger* case common law offences were involved. The Court made it clear that the offence must be described in the warrant and surely a proper description includes a meticulous reference to the statute that created the offence.

Examples of poor descriptions in this regard: a section 205 request that referred to the offence as the "Posts and Telecommunications Act". When this Act (actually the Post and Telecommunication-Related Matters Act, 44 of 1958) was consulted the chapter dealing with offences and penalties was found to be repealed; requests indicating the offence as "missing person" and "domestic violence".

I must immediately point out that, in the case of section 205 requests, particularly in the early stages of an investigation it may not be possible for the prosecutor to exactly pinpoint the section, sub-section or paragraph number(s) of the statute involved, or, for that matter, even where the offence or offences were committed[9], but a description should be indicated so far as is reasonably practicable[10].

> also the police official authorised in terms of the search warrant to know precisely that for which the search has been authorised. The need for particularity in a warrant, especially where one is dealing with statutory offences, is salutary. This should present no difficulty in practice because search warrants are issued by magistrates who are trained and experienced in law."

See also *Van Rooyen v Minister of Police* 2019 (1) SACR 349 (NCK) – *Goqwana* was not referred to in this matter.

[9] Consider, eg, internet or cyber fraud.

[10] *Matisonn v Additional Magistrate, Cape Town, & another* 1980 (2) SA 619 (C). *Van Rooyen v Minister of Police, supra,* is comparable in this regard. *T*he search warrant in that case stated that information on oath suggested reasonable grounds for believing that offences in respect of the Prevention and Combating of Corrupt Activities Act 12 of 2004; contraventions of the Northern Cape Gambling Act 3 of 2003 and contraventions of the Prevention of Organised Crime Act 21 of 1998 (POCA) were being committed at the premises. The warrant was attacked, inter alia, on the absence of the sections of the abovementioned Acts. The court dealt with this as follows:

> *"[50] In my view, it cannot be expected of police, at the initial stages of an investigation, to include in a warrant when, where and what specific offences were committed. The answer is obvious. At the initial investigation the police must still thoroughly investigate to determine which offences were*

Another example in this regard is “intimidation”, which is apparently perceived to be a common law offence. It has actually happened on quite a few occasions, when the facts were interrogated, that the “offence” falls squarely under those provisions declared unconstitutional[11]. In this regard I suggest that, although the magistrate is not called upon to consider the correctness of the prosecutor's conclusion with regard to the alleged offence committed[12], there is nothing preventing her to do so in appropriate instances.

In any event, the supporting statements usually provide brief, but adequate information in respect of the offence allegedly committed and is seldom a problem. If on occasion the magistrate has doubts and needs additional facts it is recommended the prosecutor should furnish them. I suggest one should be slow to consider (supporting) affidavits contained in a police docket. Leaving aside the question or possibility of docket privilege[13], I do not see any necessity to consult the police docket which sometimes consists of multiple statements, and various forensic reports.

A final note in passing: is there any significance in section 43 requiring an application for a warrant by the prosecutor and section 205 requiring a request by the prosecutor? Compare this with section 21 (search warrants) requiring information on oath before the magistrate (or justice of the peace) without indicating any procedural requirements.

H C Nieuwoudt
Acting Additional Magistrate, Durban
2020-02-12

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allegedly committed. It cannot be expected of police officials to state the offences with so much clarity when reference is made to when, where and how the crimes were allegedly committed. In my judgment that is not what is envisaged in this section.

[11] *Moyo and Another v Minister of Police and Others* [2019] ZACC 40.

[12] *S v Matisonn* 1981 (3) SA 302 (A)

[13] If a police docket is, at the stage when a warrant of arrest is applied for, a privileged document, shouldn’t the magistrate have the consent of, possibly, the prosecutor concerned to consult the docket? In the absence of such prosecutorial consent is an investigating officer who hands the application to a magistrate, perhaps a mere constable, authorised to give such consent to the magistrate?

A Last Thought

..the *Riotous Assemblies Ac*t (of 1956). It is a law drafted specifically in response to another momentous historical moment of struggle, the adoption of the *Freedom Charte*r in 1955. The preamble of the Act says its purpose is “the prohibition of the engendering of feelings of hostility between the European and non-European inhabitants of the Union”.

Though large chunks of the *Riotous Assemblies Act* have been repealed since 1994, some sections remain in force, including the odious preamble. Even counsel for the minister of justice, who was defending the legislation, said it was “inexplicable” that the preamble remained on our statute books. …. The *Riotous Assemblies Act* was not just law passed in the era of apartheid, said counsel for the Economic Freedom Fighters, Tembeka Ngcukaitobi. This was not the Banks Act, he said. It was a law that was specifically passed to enforce apartheid — “to deal with Mandela” and the other political leaders agitating to fight the system. The Act makes it a crime to “incite, instigate, command or procure” another person to commit “any offence”.

As per Franny Rabkin in a report in the *Mail & Guardian* on 19 February 2020