e-MANTSHI

A KZNJETCOM Newsletter

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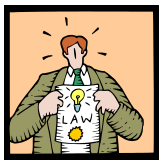
Welcome to the hundredth and sixty eight issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."

Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. Under section 1(2)(b) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), the Minister of Justice and Correctional Services, has published a rate of interest of 7,75 percent per annum as from 1 June 2020 for the purposes of section 1(1) of the said Act. The notice appeared in Government Gazette no 43703 dated 11 September 2020. The notice can be accessed here:

https://www.justice.gov.za/legislation/notices/2020/20200911-gg43703reg11173gon987-InterestRate.pdf

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Recent Court Cases

1. S v SS (CA&R 42/2020) [2020] ZAECGHC 97 (31 August 2020)

A Criminal court dealing with a child in must comply with the obligations imposed by section 63(3) and 63(4) of the Child Justice Act 75 of 2008 even if the child is legally represented.

Rugunanan, J

[1] This is an automatic review in terms of section 85(1) of the Child Justice Act[1] ("the Act"). The record of the proceedings in the Magistrates' Court at Kenton-on-sea was placed before me on 24 August 2020. Having read it on 25 August 2020, I formed the opinion that there were numerous irregularities that vitiated the proceedings such that the proceedings were not in accordance with justice. I directed that the accused be immediately released from the John X Merriman Child and Youth Care Centre ("*Merriman*"). What follows are my reasons.

[2] On 25 November 2019, the accused, who was born on 02 April 2003, was convicted of theft and assault with intent to do grievous bodily harm ("assault *GBH*"). The respective offences were alleged to have been committed during September and July 2019. At the time of the commission of the offences the accused was aged 16. He was legally represented[2] in the court *a quo* and his convictions followed a plea in the form of a written statement under section 112(2) of the Criminal Procedure Act.[3] For the purpose of sentencing, the offences on both counts were taken together and the accused was sentenced to undergo 2 years' compulsory residence in a child and youth care centre.

[3] Section 1 of the Act defines a child as:

"Any person under the age of 18 years …"

Since the accused was a child at the time of the commission of the offences and at the commencement of the trial proceedings, it was peremptory that his trial be conducted strictly in accordance with the provisions of the Act.[4]

THE PLEA PROCEEDINGS

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[1] Act No. 75 of 2008, as amended

[2] See ***S v Sekoere*** *2013 (2) SACR 426 (FB)* which laid down that all matters falling within the provisions of s 85(1) of the CJA must be referred to the High Court for automatic review in accordance with that section read with the provisions of chapter 30 of the CPA whether or not the child concerned was legally represented.

[3] Act No. 51 of 1977, as amended

[4] See ***J A v The State***, Unreported, Review Case No 20190063 (ECD) for an exposition on the peremptory provisions of the Child Justice Act

[4] Before the plea was tendered the magistrate was obliged under section 63(3) of the Act to have informed the accused of the nature of the allegations against him, to have explained the accused his rights and the procedures to be followed in his trial regardless of the fact that he was legally represented. In this context section 63(4) assumes significant relevance. It prescribes that every presiding officer:

"may elicit additional information from any person involved in the proceedings; and must, during all stages of the trial … ensure that the proceedings are fair and … are appropriate to the age and understanding of the child." [my own emphasis in bold]

[5] The plea proceedings of 25 November 2019 were not mechanically or digitally recorded. The record reflects a typewritten note that reads: [5]

"NO POWER AT COURT – PROCEEDINGS RECORDED BY HAND."

The magistrate's handwritten note reads as follows:[6]

"Miss Baloyi for accused hands up statement in terms of section 112(2) for count 1 and 2 after reading it into the record.

Accused confirms the contents as being true.

State accepts the pleas as affirmed."

[6] Nowhere does it appear in the magistrate's handwritten note (or anywhere in the record) that he complied with the obligations imposed by section 63(3). Moreover, it does not appear that the magistrate questioned the accused on the content of his written statement as required by section 112(1)(b) of the Criminal Procedure Act if it is considered that the magistrate might have (preliminarily) formed the opinion that the offences merited imprisonment without the option of a fine.

[7] Relevant to the count of theft, the charge specifically alleges that the accused stole items with a total value of R310.00. These included: a 6-pack of Coca-Cola (R120.00), 5 packets Topper biscuits (R30.00), 2 packs of chicken portions (R60.00), 4 packets of lemon creams biscuits (R20.00), and a 10 kilogram pack of cake flour (R80.00).

[8] In his written statement, the accused proffers the following explanation for the commission of the offence:

"5.2 On the day of the incident I was standing outside the shop smoking a cigarette which I had bought at the shop. While I was standing there a group of guys went into the shop and they put the shop owner on the ground.

5.3 The guys in the shop then told me to take whatever I want. I went into the shop and took a pack of White Star maize meal and rice."

[9] The items to which the accused admitted having stolen are not among those listed in the charge, nor was their value disclosed or ascertained. This discrepancy, in my view, necessitated that the magistrate ought to have sought clarification from both the prosecutor and the accused's legal representative, and that he ought to have purposefully questioned the accused with reference

[5] page 7
[6] Handwritten notes, page 8

to the alleged facts of the case to ascertain whether the accused properly understood the charge and admitted the allegations to which he pleaded guilty. My view is supported by the provisions of section 63(4) the Act.

[10] The accused's statement relating to his plea on the count of assault *GBH* sets out the detail and circumstances regarding the commission of the offence. His statement, in relevant part, reads thus:

"6.1 … I did intentionally, wrongfully and unlawfully stab N[…] S[…] with a knife on her back with the intent to do grievous bodily harm.

6.2 On the day of the incident my sister was drunk and she was swearing at me and saying that my father doesn't care about me and that he only cares about her because he gives her money but he doesn't give me money.

6.3 I got really upset so I took out a knife and stabbed her on the back.

7 I admit that my actions were wrongful and unlawful at all material times during the commission of this offence."

[11] On the face of it the allegations in the charge appear to be admitted but it is doubtful if the statement contains sufficient factual content to have supported a conviction. Grievous bodily harm is regarded as *"harm which in itself is such as seriously to interfere with health"*.[7] Proof of the commission of the offence requires *"an intent to do more than inflict the casual and comparatively insignificant and superficial injuries which ordinarily follow upon an assault. There must be proof of an intent to injure and to injure in a serious respect."* [8] When considering whether grievous bodily harm has been inflicted a general proposition is that the whole complex of objective factors involved in the assault are to be considered, including the results which flowed from the wounds inflicted.[9] There is no indication in the statement of whether the complainant sustained an injury as a result of the accused's conduct and, if so, the nature and extent thereof. There is accordingly a lack of detail in the charge and indeed in the accused's written statement to support this proposition.

[12] The magistrate's ostensible failure to have heeded the provisions of section 63(4) of the Act renders it doubtful if the proceedings were brought within the range of understanding of the accused. My sense is that the magistrate's failure to have complied with his statutory duty on the count of theft similarly tainted the plea on the remaining count of assault *GBH*. On the latter count, and regard being had to what is stated in the preceding paragraph, I am reluctant to assume or infer that the accused understood the allegations against him.

[13] The approach adopted by this court in its assessment of the plea proceedings leans in favour of accentuating one that is consistent with the preamble to the Act and which fundamentally emphasises *"the best interests of children and singles them out for special protection"* as a measure for giving effect to their constitutional rights. Accordingly, on both counts it cannot be assumed that statutory compliance by the magistrate did occur notwithstanding indications

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[7] Burchell, *Principles of Criminal Law*, 3rd ed at page 689

[8] Burchell *op cit* at page 689

[9] ***S v Maselani and Another*** *2013 (2) SACR 172 (SCA) at paragraph [12]*

that the proceedings were held in camera, that the accused's mother was present, as also a court interpreter, and that the accused was legally represented.

THE PROCEEDINGS ON SENTENCE

[14] The most egregious misdirections by the court *a quo* relates to the sentence proceedings. On 23 January 2020, the magistrate handed down a sentence in the following terms:

"… in terms of section 76 of the Child Justice Act … you are sentenced to compulsory residence in John X Merriman Child and Youth Care Centre for a period of two years, pending your removal you will remain in custody."

[15] The order on sentence reflects that the accused be detained until his admission to *Merriman*. Section 76(4)(b)(iii) of the Act reads:

"(b) When making an order referred to in subsection 1 the child justice court must-

(iii) give directions where the child is to be placed for any period before being admitted to the centre specified in the order, preferably in another child and youth care centre referred to in … the Children's Act, but not in a police cell or lock-up."

[16] Clearly, the magistrate's order does not specify where the accused should have been placed pending his admission to *Merriman*. It cannot be casually assumed that the accused was immediately placed in *Merriman* consequent to the magistrate's order. For this reason, the provisions in section 76(4)(b)(iv) of the Act assume relevance. They read as follows:

"(b) When making an order referred to in subsection (1), the child justice court must-

(iv) direct a probation officer to monitor the movement of the child to the centre specified in the order, in compliance with the order, and to report to the court in writing once the child has been admitted to the centre."

[17] The record offers no indication of a directive in the nature contemplated by the above section.

[18] In addition, section 76(4)(d) of the Act states:

"Where a presiding officer has sentenced a child in terms of this section, he or she must cause the matter to be retained on the court roll for one month, and must, at the re-appearance of the matter, inquire whether the child has been admitted to the child and youth care centre."

[19] After sentencing the accused, the magistrate immediately directed that the matter be sent for review by a higher court but failed to retain the matter on the roll of the court *a quo* for a month as required by the above section. The magistrate did so without stating reasons for departing from this peremptory requirement.

[20] Evident from the aforementioned statutory provisions is that they are purposely intended to provide as much protection as reasonably possible for children who have violated the law by ensuring that they are not treated on the same footing as adult detainees, that their movement to a specified centre is monitored and documented, and that a court has confirmation of their admission to a specified child and youth centre. Courts are thus required to scrupulously adhere to the

provisions of the Act. As Malusi J appositely pointed out in *J A v The State* [10]:

"The promulgation of the Child Justice Act ushered in a new era in the criminal justice system for children. It was, to borrow a phrase, 'no longer business as usual' when dealing with a child from the moment of arrest until after the child is sentenced. The courts are required to scrupulously adhere to the provisions of the Act unless reasons exist to depart therefrom. A wholesale departure or lackadaisical application of the provisions of the Act will not pass muster."

[21] On both plea and sentencing, the proceedings in the court *a quo* amounted to a gross departure from the provisions of the Act. It was imperative for the magistrate to have ensured that the plea proceedings were brought within the understanding of the accused; and that on sentence, any need for the departure from the express provisions of the Act rendered it imperative for the magistrate to have provided reasons for such departure. In all the circumstances, the material departures from the Act did not render the proceedings *a quo* in accordance with justice.

DELAY

[22] The importance of timeous despatch of the record cannot be overemphasised. The automatic review procedure envisaged by section 85(1) of the Act as read with the provisions of section 304 of the Criminal Procedure Act[11] is an integral part of the constitutional right to a fair trial and demands that the process unfolds expeditiously otherwise serious injustice may result.[12]

[23] The record on review was received by the registrar of this court on 21 August 2020. In terms of section 303 of the Criminal Procedure Act the clerk of the court should have forwarded the record to the registrar within one week after the case was determined on 23 January 2020. The expansive delay is attributed to various factors,[13] such as the retirement of the presiding magistrate at the end of January 2020 and the inadequacy of the record. Amongst other factors are those considered systemic and others considered fortuitous in the light of the national lockdown brought on by the Covid-19 pandemic which saw closure of the magistrates' offices during April and July 2020. Understandably, while these events undoubtedly occasioned difficulty and inconvenience for officials and support staff to discharge their duties, the administration of justice should not be compromised and personnel should not lose sight of the importance of fulfilling their roles in the administration and in rendering an efficient service.

[24] In the circumstances the following order issues:

(a) The convictions for theft and assault with intent to do grievous bodily harm and the combined sentence of 2 years' compulsory residence in the John X Merriman Child and Youth Care Centre are hereby set aside, and in view of the fact that the

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[10] fn 4, see paragraph [15] of the judgment

[11] ***S v Sekoere*** *supra* at paragraph [28]

[12] See ***The State v S[…] B[…] P***[…] at paragraph [12] http://www.saflii.org.za/za/cases/ZAFSHC/2014/89.pdf (accessed 25 August 2020)

[13] Explained in a covering letter dated 18 August 2020 (Ref 1/4/13) under which the record was despatched to the registrar of this court

accused S[…] (a.k.a. S[…]) S[…] has served approximately 7 months' of the sentence, it is further ordered that:

(i) The matter is referred to the Director of Public Prosecutions, Eastern Cape, to decide whether the accused is to be re-arraigned.

(ii) In the event that he is re-arraigned, the trial must commence before another magistrate.

2. Leshilo v S (345/2019) [2020] ZASCA 98 (8 September 2020)

Where more than one accused is charged for the offence of 'possession' of a firearm it is not the principles of common purpose that have application, but rather those relating to joint possession.

Nicholls JA (Dambuza and Van Der Merwe JJA and Ledwaba and Goosen AJJA concurring):

[1] The primary issue in this appeal is whether the appellant was in joint possession of a firearm. The appellant, who was accused 1 in the trial court, was charged with three counts. The first count was house breaking with the intent to rob, and robbery with aggravating circumstances. A firearm was used in the commission of the offence. The second and third counts were the unlawful possession of the firearm and the unlawful possession of ammunition, respectively.

[2] On 11 June 2014, the regional court, Pretoria convicted the appellant of the lesser offence of house breaking with the intent to commit an unknown offence, in respect of count 1. He was also convicted on counts 2 and 3. For the purposes of sentencing the three counts were taken together and a sentence of 15 years imprisonment was imposed. The appellant's co-accused, who was accused 2 in the trial court, was acquitted on all counts on the basis that the state had not proved his identity as one of the perpetrators, beyond reasonable doubt.

[3] The regional court granted leave to appeal against sentence and conviction. On 12 October 2017 the High Court, Gauteng Division dismissed the appeal in its entirety. Special leave was granted by this Court both on conviction and sentence. The appellant appeals against his conviction only in respect of counts 2 and 3, and the globular sentence of 15 years.

[4] The facts briefly set out are as follows. The complaint, Mr Mahlangu and his partner, Ms Maraba, ran an informal spaza shop from their home in Mamelodi East. When they went to sleep on the night of 27 August 2013, they left a cash sum of R1

700 on the table. In the early hours of the morning of 28 August 2013, at approximately 3h00, two men entered their home while they were asleep with their child.

[5] According to Mr Mahlangu the first assailant to enter the house was accused 2 who pointed a firearm at him. He recognised him as one of the customers who would buy airtime from their spaza shop from time to time. This identification the trial court held was insufficient to ground a conviction. Mr Mahlangu jumped out of bed, threw a blanket over the first intruder and wrestled with him to get hold of the firearm. In the ensuing struggle a shot went off. This prompted the first assailant to flee. By this stage another intruder, the appellant, had entered the room. Mr Mahlangu pointed the firearm at him and it appears there was a scuffle over the firearm. At no stage did the appellant possess the firearm.

[6] The gunshot and the screams of Ms Maraba had awoken the neighbours. Mr Nkosi, the next-door neighbour, went outside, thinking the attack was in his yard, but then rushed to the next-door house where Ms Maraba opened the security door for him. He saw the appellant in a skirmish with Mr Mahlangu. The firearm was lying on the floor. He managed to apprehend the appellant as he was trying to exit the security doors. He also picked up a cell phone which had been dropped in the commotion. Mr Nkosi then went outside and handed the appellant over to members of the community who had gathered in the yard while he went into his house to fetch his cell phone and call the police. When he returned, he found that the community had assaulted the appellant and tied him to the gate pole from his waist.

[7] Ms Maraba confirmed Mr Mahlangu's evidence that the appellant came into the room after the first assailant had entered and pointed a firearm at them. After the first assailant fled leaving the firearm in the possession of Mr Mahlangu, the appellant had a skirmish with her husband over the firearm and then tried to also run away. He was apprehended by Mr Nkosi at the door and taken outside

[8] When the police arrived the appellant was handed over to them, together with the firearm, the cell phone found in Mr Mahlangu's house and a bullet that had penetrated Mr Nkosi's home. At some stage the R1 700 disappeared from the table at Mr Mahlangu's home. None of the witnesses saw it being taken.

[9] It is not disputed that the appellant gained entry to the premises by removing a piece of corrugated iron from the structure, with the intention to commit a criminal act. The only issue for determination on conviction is whether the appellant should have been found guilty of possession of an unlawful firearm and ammunition. A finding in the appellant's favour would impact on the combined sentence of 15 years for all three offences.

[10] There has been some confusion regarding the application of the principles of common purpose and joint possession where firearms are utilised in the course of a

robbery or a house breaking. Accused persons are frequently convicted of robbery with aggravating circumstances on the basis of common purpose, even if their role is relatively minor. In the absence of proof of a prior agreement, what has to be shown is that the accused was present together with other persons at the scene of the crime; aware that a crime would take place; and intended to make common purpose with those committing the crime as evidenced by some act of association with the conduct of the others.[14] However, the principles of common purpose do not find application when convicting an accused for the unlawful possession of the firearm used in the same robbery. Instead it is the principles of joint possession that apply.

[11] The test for joint possession of an illegal firearm and ammunition is well established. The mere fact that the accused participated in a robbery where his co-perpetrators possessed firearms does not sustain beyond reasonable doubt, the inference that the accused possessed the firearms jointly with them. In *S v Nkosi* it was held that this is only justifiable if the factual evidence excludes all reasonable inferences other than (a) that the group had the intention to exercise possession through the actual detentor and (b) the actual detentor had the intention to hold the guns on behalf of the group. Only if both requirements are fulfilled can there be joint possession involving the group as a whole.[15]

[12] This Court in *S v Mbuli*[16] pointed out that where the offence is 'possession' of a firearm (or in that case a hand grenade) it is not the principles of common purpose that have application, but rather those relating to joint possession. A conviction of joint possession can only be competent if more than one person possesses the firearm. The court found that mere knowledge by others that one member of the group possessed a hand grenade, or even acquiesced to its use in the execution of their common purpose to commit a crime, was not sufficient to make them joint possessors thereof. In coming to its conclusion this Court overruled its previous decision in *S v Khambule*[17], where it was held that the mere intention on one or more members of the group to use a firearm for the benefit of all of them would suffice.

[13] The Constitutional Court, in *Makhubela v S*[18], confirmed the reasoning in various cases of this Court and, in particular, that *S v Khambule* had been correctly overruled by *S v Mbuli*.[19] As observed by the Constitutional Court[20] there will be few

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[14] *S v Mgedzi* 1989(1) SA 687 (A) at 705-706.
[15] *S v Nkosi* 1998 (1) SACR 284 (W).
[16] *S v Mbul*i 2003 (1) SACR 97 (SCA).
[17] *S v Khambule* 2001 (1) SACR 501 (SCA).
[18] *Makhubela v S, Matjeke v S* [2017] ZACC 36; 2017(2) SACR 665 (CC).
[19] *S v Molimi and Another* [2006] ZASCA 43; 2006 (2) SACR 8 SCA para 38 which stated that *Khambule* was overruled by *Mbuli*; see *Ramoba v S* [2017] ZASCA 74; 2017 (2) SACR 353 (SCA) para 11 wherein Mbha JA said the principles of joint possession in relation to the crime of unlawful possession of firearms in instances of robbery committed by a group of people are trite, the only question being whether there was necessary intention or animus to render the physical possession of the guns to the group as a whole.
[20] *Makhubela v S* para 55.

factual scenarios which meet the requirements of joint possession where there has been no actual physical possession. This is due to the difficulty inherent in proving that the possessor had the intention of possessing the firearm on behalf of the entire group, bearing in mind that being aware of, and even acquiescing to, the possession of the firearm by one member of the group, does not translate into a guilty verdict for the others.

[14] In this case the regional court found the appellant guilty on counts 2 and 3 on the basis that he must have known that the first intruder had possession of a firearm and acted in concert with him. The full court correctly held that the doctrine of common purpose was not applicable but found the appellant guilty on the basis of joint possession. Relying on a decision of that division, *S v Motsema*,[21] the full court found that because the appellant entered after the first intruder had 'bridged' his firearm this was an indication of his intention to benefit from the possession of the firearm and the first intruder's intention to possess and use the firearm for the benefit of the appellant. Therefore, so it was held, the state had proved that the appellant intended to possess the firearm through the first intruder.

[15] The reasoning of the full court cannot be supported. In this instance an intention to possess the firearm on the part of the appellant is not the only inference to be drawn from the established facts. It is common cause that the first intruder was the one who possessed the firearm and that the appellant was unarmed. Even accepting that the appellant knew that his co-perpetrator possessed the firearm and knew that he would use it in the execution of a common purpose to commit the housebreaking, he cannot be considered a joint possessor, on the principles set out in the cases above. Knowledge of the firearm, and even acquiescence to its use for fulfilling the common purpose of robbery, is insufficient to establish guilt as a joint possessor. There is no evidence from which it can be said that the only reasonable inference to be drawn is that the appellant intended to possess the firearm jointly with the physical possessor. Accordingly, the appeal on conviction in respect of counts 2 and 3 should succeed.

[21] *S v Motsema* 2012(2) SACR 96 (GS) para 23 where it was held that the common purpose to disarm the security guards embraced the intention on the part of each member of the group that the individual robbers who were to take possession of the guards' weapons did so on behalf of the entire group.

From The Legal Journals

Barnard, J

"Suppliers, consumers and redress for defective vehicles — The reach of the National Consumer Tribunal: *Tshehla v Aucamp Eiendoms Beleggings"*

2020 SALJ 229

Abstract
The National Consumer Tribunal has been inundated with disputes regarding the supply of defective motor vehicles by unscrupulous suppliers in terms of the Consumer Protection Act 68 of 2008. The purpose of this note is to disseminate the recent Tribunal decision of Tshehla v Aucamp Eiendoms Beleggings t/a CA Motors [2019] ZANCT 160 to illustrate the recurring prohibited conduct by suppliers as motor dealerships regarding not only the sale of defective goods, but also the representations, conduct and content of the preceding consumer sale agreements. The discussion will illustrate the Tribunal's efforts to provide effective redress and enforcement as a mandated enforcement institution in terms of the Act, despite the obstacles faced in this regard specifically because of the problematic wording and application of the Act.

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

Contributions from the Law School

Lost Self-Control: Are we moving towards a defence of diminished capacity?

The purpose of this note is to briefly consider whether the South African approach relating to non-pathological incapacity has failed abused woman by failing to take into consideration the subjective factors of an abused woman into consideration in light of the landmark ruling of *Eadie*, which effectively put an end to the provocation defence and which also employed an objective test. This note will consider the definition of battered woman syndrome, the context it is used in and its relationship to case law in light of the recent decision of S v *Eadie* 2002 (1) SACR 663 (SCA) as well as suggestions by Burchell to introduce a diminished capacity defence to make sense of the current provocation conundrum. Such a defence could potentially mirror the Model Penal Codes EED defence adopted in the United States.

Courts internationally have acknowledged that battered woman syndrome (BWS) is considered a subcategory of post-traumatic stress disorder (PTSD) as set out in the Diagnostic Manual of Psychiatric and Mental Disorders. This syndrome alters the normal psychological and behavioural states of a victim. The purpose of using battered woman syndrome as a defence in cases of provocation is meant to assist the law in eradicating disparities that are demonstrated through the treatment of victims of domestic violence. Experts on the topic have identified the essential elements of the 'battered woman syndrome', as being "a woman is a woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights. [In] order to be classified as a battered woman, the couple must go through the battering cycle at least twice" (Walker *The Battered Woman* (1979) 16). At the core of battered woman syndrome lies the theory of "learned helplessness" and the cycle of violence theory (55-77). Learned helplessness is defined as a psychosocial theory for lack of response or passive behaviour in the face of the ability to act or respond to a threat. This was developed by Martin Seligman as a psychological theory based on laboratory experiments conducted on animals. It demonstrated that animals and people can learn to be helpless when faced with traumatic and frustrating conditions from which there appears to be no escape. For example, caged dogs learned to jump a caged partition when given a mild electric shock. If a light was switched on just before the shock, they learned to avoid the shock completely. However, where the dog was placed in a position where it was unable to avoid the shock, it was then extremely difficult for the dog to later learn an avoidance response (Walker *The Battered Woman Syndrome* (1984) 43). When such an analogy was applied to

battered women, the correlation becomes evident: learned helplessness is a psychological paralysis that battered women experience and which contributes towards keeping them in abusive relationships. It is a psychosocial learning theory, whereby women, after repeated abuse, come to believe that they cannot control the abusive situation they find themselves in: “once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive and helpless”. A battered woman’s cognitive perceptions and motivation to act are altered since “repeated batterings… diminish the woman’s motivation to respond. She becomes passive. Secondly, her cognitive ability to perceive success [in the relationship] is changed. She does not believe her response will result in a favourable outcome, whether or not it might… She cannot think of alternatives” (Walker 49-50). The purpose of the court placing itself in the position of an accused, from a subjective perspective is to understand her distorted mental state, which can be achieved by referring to social sciences such as psychology. Initially South African courts did not acknowledge battered woman syndrome as a matter of course, but acknowledged that factors such as emotional stress and provocation under certain conditions could result in a lack of capacity. This was set out in s 78(1) of the *Criminal Procedure Act* 51 of 1977. According to this section, a person who commits an act or omission which constitutes an offence and who at this time suffers from a mental illness or mental defect which makes him/her incapable of: (a) Appreciating the wrongfulness of his or her act or omission; or (b) Acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such an act or omission. This line of reasoning was followed in a number of cases including *S v Arnold* 1985 (3) SA 256 (C); *S v Nursingh* 1995 (2) SACR 331 (D); *S v Moses* 1996 (1) SACR 701 (C). These findings were critical in light of the fact the accused in the cases cited all exhibited goal directed behaviour but were still acquitted. For instance, in *Moses* the accused committed at least fourteen instances of goal-directed actions, which were eventually conflated by the court into two actions: stabbing and hitting (Louw “S v Eadie: Road rage, incapacity and legal confusion” (2001) *South African Journal of Criminal Justice* 206 at 214). Perhaps it could be suggested as theorists such as Burchell do, that the accused in the above mentioned cases were suffering from diminished responsibility. However, our law does not acknowledge such a defence. The only point at which the courts are willing to take account of factors relating to any type of diminished responsibility is at the sentencing stage (Speirs “Should provocation/emotional stress be regarded as a complete defence to criminal liability” (2002) *Responsa Meridiana* 65 at 75).

With the landmark decision of the Supreme Court of Appeal in *S v Eadie* 2002 (3) SA 719 (SCA) the Supreme Court dispensed with provocation as a defence altogether and instead held that a non-pathological incapacity is a defence that is based not on losing one’s temper, but rather the focus is on losing self-control (182I-J). What was of importance was that Griesel J indicated the difference between automatism and capacity, which was a distinction without difference. As Navsa JA noted: “There appears to be some confusion between the defence of temporary non-pathological

incapacity, on the one hand, and sane automatism, on the other. The academic writers…point out that they are in fact two distinct and separate defences. At the same time, however, it is clear that in many instances the defences of criminal incapacity and automatism coincide. This is so because a person who is deprived of self-control is both incapable of a voluntary act and at the same time lacks criminal capacity (178A-B). Such definitions create the impression that battered women can only rely on the defence of non-pathological incapacity if they lacked total capacity/or totally lost self-control.

This is problematic for battered women since response patterns demonstrated by these women suggest that they did not lose self-control when acting since "[B]attered women appear calm during and after the killing and they generally use a weapon to strike the victim in stealth. Furthermore, the method of killing may be influenced by gender specific norms. For instance, their superior physical strength and training is more likely to make men use their fists when angry. Women act with stealth because of smaller size, lesser physical strength and lack of physical training in fighting with their hands" (Yeo"The Role of Gender in the Law of Provocation" (1997) *Criminal Law Journal* 431 at 453). Under the previous precedent the court had the option of acquit or convict the accused. In light of the recent *Eadie* judgment which held that policy considerations dictate that an accused be convicted of acting under provocation, it leaves the abused woman's position unclear with relation to this defence, except that it is unlikely that she will escape liability unless she acts like an automaton. In addition, her conduct would be objectively assessed. For instance it is arguable that a new test for conative capacity, exists, which consisting of both a subjective and objective criterion (Burchell and Milton *Principles of Criminal Law* (1997) 293. Such an approach, (even in cases where intention is the fault element required), would be closer to the Rumpff Commission approach (that severe emotional tension or impulsiveness should not be regarded as excluding volitional control) and the Roman-Dutch Law.

Such a position could be viewed as untenable as it leaves an accused without a defence or at least high threshold which has to be met in terms of non-pathological incapacity. It is submitted that the courts have already opened the door for a defence of diminished capacity in the case of *S v Engelbrecht*, 2005 (2) SACR 163 (W) be introduced into South African law. In this case, the court referred to the trial court's judgement that on the basis of psychiatric testimony presented, the accused suffered from diminished capacity when she murdered her husband with premeditation (at para 24). The court bolstered this contention, by referring to the Canadian case of *R v Lavallee* [1990] 1 S.C.R. 852 where evidence on the psychological effects of abuse on wives and common law partners is relevant and necessary to understand the position of an abused woman (at para 24). Likewise the case of *S v Marx* [2009] 1 All SA 499 (E) and *S v Schwarz*, (1999) JOL 5626 (A) (unreported) advocated a similar approach and indicated that it could only be achieved in South African law by returning to the rules relating to provocation followed in South Africa prior to 1971. According to the specific intent doctrine, policy considerations require that an

accused should not be completely acquitted. However, these considerations also require that an accused not be convicted of murder but of culpable homicide. This compromise solution (of culpable homicide) can only be reached by treating provocation as a special defence, one which is not strictly adjudicated in terms of the general principles relating to culpability (mens rea). Rather, it must be treated as a special defence with its own rules (Snyman "Die erkenning van objektiewe faktore by die verweer van provokasie in die strafreg" (2006) *Tydskrif vir Regwetenskap* 57). This approach is not unique but in fact applied in United States and bears resemblance to the EED defence as provided for by the Model Penal Code. In that jurisdiction, provocation not as an exculpatory defence but rather mitigates punishment for intentional homicides by reducing the crime from murder to voluntary manslaughter (Heller "Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases" (1998) *American Journal of Criminal Law* 22). The central question in respect of the provocation defence is: when is an actor not personally accountable for being provoked to kill? The answer to this is that the actor is not liable for her provoked act if she could not have acted otherwise, that is, if she could not have avoided responding to the provocative act by killing her provoker (Heller supra).

While the doctrines of provocation and extreme emotional disturbance allow mitigation of the killing based on the subjective pressures faced by the accused, it also imposes secondary objective requirements. These requirements reflect the community values as to what degree of human weakness is understandable and therefore considered deserving of leniency. An accused would have to show not only that she lost self-control but given the nature of the provocation experienced, losing control was a reasonable response. In almost all jurisdictions, physical abuse would clearly constitute reasonable provocation. In the case of the Model Penal Code, an accused must demonstrate that there is a reasonable explanation or excuse for the extreme mental or emotional disturbance experienced at the time of the killing. The reasonableness of the mental or emotional disturbance is "determined from the viewpoint of a person in the actor's situation under the circumstances as she believes them to be. In respect of the battered woman the MPC formulation of voluntary manslaughter does not require that her violent reaction be an immediate one. The result is that prolonged tension can serve as a reason for the defendant's emotional disturbance (see also People v Patterson, supra (n 914) where New York Court of Appeals explained: "It is sufficient that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicable coming to force". This would account for the goal directed behaviour found in various cases such as *Nursingh* and *Moses*, both of whom were abused. The expansion can be accomplished by "transforming cooling time and rekindling into subjective standards that focus on the unique internal and external qualities of the defendant. Doing so would not only be consistent with the underlying purpose of the defence but also appropriate considering our modern

understanding of the psychological effects of trauma and reactivity to provoking stimuli".

The MPC's EED standard is viewed as having degree of volitional impairment just short of insanity. However, insanity can be distinguished from EED insofar that an insanity defence requires "an almost complete loss of self-control whereas EED contemplates more of a 'diminished' capacity than a total lack thereof" (Pinsky, Heating up and Cooling down: Modifying the Provocation Defense by Expanding Cooling Time, 54 (2020) *Georgia Law Review* 773-774). By focusing on a specific on extreme emotional disturbance rather than *"a* specific provoking event" the courts in that jurisdiction have managed to bypass the requirements of "suddenness" as well as "cooling time" which exists at common law and subsequently also been an issue in South African law. As Pinksy notes, emotional disturbance is not dependant on a specific wrongful act committed against the defendant. Rather it develops due to any number of factors such as depression, anxiety, grief, paranoia or even shock. All of which are by products of continued abuse (at 774).

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Matters of Interest to Magistrates

Aligning legislation and criminal sanctions with the norms of society

By Jonathan Witts-Hewinson

It is essential for the stability of our society, and respect for the rule of the law, that parliament pass laws and promulgate legislation which will bear scrutiny when

evaluated against the norms of our society, the expectations of the everyday life of South Africans, and the values enshrined in our Constitution.

A critical aspect of our social fabric is that laws and regulations must be respected, must be capable of being enforced and must, in fact, be enforced. Promulgating laws and regulations merely for the sake of it serves no purpose.

It is equally important that parliament should not seek to criminalise what most South Africans might regard as normal or acceptable behaviour. Part of the reason why criminal sanctions serve (as of course they should) as a deterrent to criminal conduct, is because society shuns criminal behaviour. People, therefore, attempt to conduct themselves in a manner which will avoid criminal consequences, and the blemish which a criminal record ought to have on a person's reputation.

If laws and regulations are promulgated which tend to make criminals of all of us, then something will have gone wrong. If everyone is a criminal, then there is little, if anything, reprehensible in receiving a criminal conviction, and one of the most important deterrents, discouraging people from criminal conduct, will have been laid to waste.

We have seen what happened in South Africa when over-zealous politicians sought to enforce certain aspects of the COVID-19 pandemic lockdown, which resulted in public opinion turning full circle against what society had initially regarded as a sensible and necessary process. Popular support for the lockdown turned into dismay, ridicule and, eventually, an outright disregard for many of the measures sought to be implemented. This is what happens when a government seeks to enforce laws and regulations which the public at large regards as inappropriate, or applies an overreach of the measures which ought properly to be adopted for purposes of achieving an appropriate goal.

As an example, one now reads of proposed amendments to legislation aimed at curbing road deaths caused by drunken driving. So far so good. No one is seriously going to argue that proper steps should not be taken to address this problem. If, however, measures are introduced which, on a common-sense basis, amount to overreach, then one runs the risk that no-one will respect the measures. If there is the potential for everyone to become a criminal because their conduct is not regarded by general society as wrong or reprehensible, then the state is inviting disobedience from its citizens.

It is often helpful to use a silly example to illustrate a good point. So, if one wished to eradicate deaths on the road, then government might consider banning motor vehicles and making it a criminal offence to drive any vehicle. If there are no cars on the road, there will be no accidents.

Self-evidently, this would be ridiculous.

Why, one is then driven to ask, does our government sense that it might be commendable to introduce legislation which places an absolute prohibition on driving any vehicle whilst having any (even the minutest amount) alcohol in one's system? The problem on our roads, after all, is accidents caused by drunken drivers. The problem is not accidents caused by people who are driving after one drink, or within the existing alcohol limits.

Proposed legislation threatens to make a criminal of people who behave in a responsible manner and which has, until now, been considered normal. For example, those who:

- enjoy a bottle of wine with three friends over a lunch or dinner (i.e. not much more than a glass each).
- enjoy a beer after a game of golf.
- visit a wine farm and enjoy a wine tasting (even if you use the spittoon liberally).
- enjoy just one drink at a work gathering.

The ostensible reason for the proposed Draconian legislation is that existing legislation is not curbing road deaths. The assumption seems to be that a change in the permitted alcohol limit will miraculously change the habits of the real drunk drivers (i.e. those who drive at twice the legal limit or more). If some people are currently happy to drive after having six or eight beers, or four double brandy and Cokes, why would those same offenders choose to change their behaviour simply because government legislates against those who drink responsibly? Self-evidently, the premise motivating the new legislation is misguided.

Why then do we have so many road deaths and accidents caused by drunken driving? It seems to me that it is far more likely that the answer lies in the way the criminal justice system is functioning (or not functioning). The stories of people escaping arrest by paying bribes to willing police officers or traffic officials are legend. If that is not bad enough, others are paid to make dockets go missing. This is the rot which must be eliminated.

All that the new legislation is likely to do is to expose a greater number of the public to accusations that they are "driving under the influence" and that, unless they accompany the officer to the nearest ATM machine (to pay over a bribe), they will simply have to spend the night in jail, until a court has dealt with their bail application in the morning (or God forbid, on Monday after a weekend). And this is the common experience, or threat, faced by average South Africans.

What our politicians and state officials need to do is to fix the underlying problem; eliminate the rot of bribery, dishonesty and corruption within the law enforcement agencies, and restore efficiency to the prosecutorial system.

What we do not need is ill-conceived legislation which threatens to exacerbate existing problems or, worse still, leads to a deterioration in the respect which the general public has for the credibility and legitimacy of the law. This has the potential to detract from the social fabric of our society. Put differently, promulgating over-zealous legislation against the background of a poorly functioning criminal justice system is likely to instigate, by way of response from the public, a general disregard for the law, to the detriment of the well-being of an orderly society.

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A Last Thought

The Constitutional Court confirmed the test to be applied when a judge or other presiding officer is asked to recuse him or herself in 1999 in its judgment in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*. In that case, between then President Nelson Mandela and then head of the South African Rugby Football Union, Louis Luyt, 5 justices of the Constitutional Court were asked to recuse themselves because of their personal relationship with Mr Mandela and the ANC. Most notably, the applicant complained that Mr Mandela had attended the wedding of the son of Arthur Chaskalson, then President of the Court. He also complained that some of the justices were closely associated with the ANC before their appointment to the bench. Applying a stringent test for recusal, the Constitutional Court rejected the recusal application.

The Court linked the duty of a presiding officer to recuse him or herself to the right to a fair trial in section 35 of the Constitution as well as the section 34 right guaranteeing for everyone the right "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." This suggests that a duty to recuse oneself primarily applies to anyone presiding in a court or other quasi-judicial and administrative proceedings in which a dispute is being resolved.

The first question that arises is to what extent this duty to recuse also applies to the chairperson of a Commission of Inquiry. A commission is not a court of law and does not resolve disputes. Its findings and recommendations are not binding and have no legal effect on the rights of individuals unless the findings and recommendations are implemented or otherwise acted on. Moreover, a Commission operates in an inquisitorial manner, which means the commission is an active participant in the investigation. An individual implicated by other witnesses or by evidence gathered by the commission retains the right to give their own version of events, but does not enjoy all the procedural safeguards enjoyed by an accused person in a criminal trial.

While all this suggest that the chair of a Commission of Inquiry would seldom have to recuse him or herself, it does not mean that it would not be wise to do so in certain limited instances. The exercise of public power must at least be rational, and I have no doubt that a court would set aside the report of a Commission of Inquiry if

the bias of the chairperson tainted the veracity of the report. Moreover, given the fact that the findings and recommendations of a Commission of Inquiry is not binding, its success depends in part of the legitimacy of the process followed by the Commission and the legitimacy of a Commission of Inquiry will be tainted in cases where the chairperson is clearly biased.

Assuming for arguments sake that the test for recusal as developed by the Constitutional Court in the *SARFU* judgment would be applicable in the present case, let's have a closer look at the test applied there. In that case the court held that it is the presiding judge who must make the decision on whether he or she should recuse themselves. The person applying for recusal bears the onus to prove that a reasonable person will apprehend that the judge is biased.

In considering a recusal application, the judge (or other presiding officer) must ask whether, considering all the circumstances, the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the question involved in it.

It is important to note that it will not be easily assumed that a reasonable person (as opposed to the average Twitter user) would fear that a judge is biased. In applying the test for recusal, courts recognise a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence. This means that:

The test should be applied on the assumption that a reasonable litigant would take these considerations into account. A presumption in favour of judges' impartiality must therefore be taken into account in deciding whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased.

The Court also held that the reasonable person will not expect that judges will "function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging. It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function."

Moreover, the personal feelings of the applicant will not be decisive, as the test is whether a reasonable person (not the applicant or his supporters) would be apprehensive that the judge is biased. Particularly relevant for the current case is the statement of the Court that:

It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party.

Where the applicant is overly suspicious, has an overdeveloped sense of grievance or victimhood, or has misconstrued the facts or the nature of the proceedings (for example, by wrongly conflating a Commission of Inquiry with a criminal trial), the

application is bound to be rejected. As the Constitutional Court stated:
An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test.

As per Prof Pierre De Vos on his blog ***Constitutionally Speaking*** on 29 September 2020 in **"Zondo recusal application: more a political than a legal move."**