e-MANTSHI

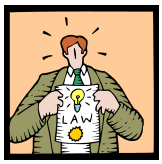
A KZNJETCOM Newsletter

February 2021: Issue 171

Welcome to the hundredth and seventy 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. The South African Law Reform Commission has announced the availability for general information and comment of its project 144 Discussion Paper 152 which deals with the possible adoption of a single marriage statute. Two draft Bills were developed as two alternative options. The first option is the 'Protected Relationships Bill'. The second option is the 'Recognition and Registration of Marriages and Life Partnerships Bill'. Unified requirements for all protected relationships, marriages and life partnerships are proposed in option one, the Protected Relationships Bill and in option two, the Recognition and Registration of Marriages and Life Partnerships Bill. The Bills seek to provide for the recognition of protected relationships or of marriages and life partnerships, entered into by parties regardless of the religious, cultural or any other beliefs of the parties, or the manner in which the relationship was entered into; to provide for the requirements for entering into a protected relationship or a marriage or a life partnership; to provide for registration of protected relationships or marriages and life partnerships; to provide for the legal consequences of entering into

protected relationships or marriages and life partnerships; and to provide for matters incidental thereto.
Any respondents are requested to submit written comment, representations or submissions to the Commission by 31 March 2021 for the attention of Pierre van Wyk to the following address: The Secretary South African Law Reform Commission Private Bag X668 Pretoria 0001 E-mail: pvanwyk@justice.gov.za 30.

Discussion Paper 152 is available on the Internet at the following site: https://www.justice.gov.za/salrc/dpapers.htm

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Recent Court Cases

1. S v White (CA&R 08/2021) [2021] ZAECGHC 4 (20 January 2021)

Although an accused was under the age of 18 when he committed an offence, he is not a person in respect of whom the DPP has invoked the discretionary power that he be dealt with in terms of section 5(2) to (4) of the Child Justice Act, Act 32 of 2007(a preliminary enquiry).

Rugunanan J

[1] On special review at the instance of the regional magistrate ("the magistrate") in East London, this court must consider whether the accused's conviction for contravening the Criminal Law (Sexual and Related Matters) Amendment Act[1] against a 5 year old victim on 3 June 2016 is to be reviewed and set aside.

[2] Before writing this judgment the record of proceedings in the court *a quo* was forwarded to the Director of Public Prosecutions ("DPP") for comment. A note of appreciation is conveyed to the DPP for providing an opinion that included additional detail on the conduct of the matter as well as her recommendations on which I have placed significant store in arriving at my conclusion.[2] Only those

[1] Criminal Law (Sexual and Related Matters) Amendment Act, 2007 (Act 32 of 2007)
[2] The opinion incorporating recommendations is dated 11 January 2021

portions considered relevant for purposes of this judgment are mentioned as succinctly as possible.

[3] What follows are the circumstances that prompted this application.

[4] The accused first appeared in the regional court on 21 November 2019. After several postponements occasioned by the Covid-19 pandemic and the unavailability of forensic DNA results, the matter proceeded to trial a year later on 23 November 2020. The accused was legally represented and following a plea of guilty it became known during argument on sentence that his date of birth is 9 December 1999. No birth certificate was produced to the court. At the time of his conviction on the aforesaid date the accused was 20 years old and about two weeks away from turning 21.

[5] The facts in the guilty plea disclose that the accused did not sexually penetrate the victim and that there was indirect contact between his penis and the victim's vagina. He did not remove her underwear but ejaculated thereon at or near the front of her vagina.[3] Although the facts indicate that the accused was the donor of the genetic material on the victim's underwear, the DNA report was not produced in court - nor was the report of the victim's medical examination produced as confirmation of that examination despite the fact that she had not suffered any physical injury.[4]

[6] When the accused first appeared in the regional court on 21 November 2019 his legal representative informed the court that the accused intended to plead not guilty, that no plea explanation would be tendered and no formal admissions would be made.[5] Had the accused immediately admitted what is now contained in his guilty plea there would have been no reason for the State to have waited for the DNA results. The accused's own conduct appears to be a contributory factor in the substantial delay in finalising his trial.

[7] I digress to deal briefly with the charge against the accused and the offence to which he pleaded guilty. He was charged with attempted rape in contravention of section 55(a) read with section 3 of the Criminal Law (Sexual and Related Matters) Amendment Act. On facts accepted by the State, he pleaded guilty to a lesser charge of sexual assault in contravention of section 5(1) of the latter Act. Despite the fact that a contravention of section 5(1) is not a competent verdict for a contravention of section 55(a) the magistrate found, and correctly in my view, that the conviction on the lesser charge is sustainable under section 270 of the Criminal Procedure Act.[6]

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[3] Record 8:20
[4] Record 14:6
[5] This additional information is contained in the opinion rendered by the DPP
[6] Criminal Procedure Act, 1977 (Act 51 of 1977).

[8] The accused was 16 years of age at the time of the commission of the offence and aged 19 when he was initially served with a summons to appear in the district court on 12 August 2019. As will be seen from what follows herein the Child Justice Act[7] ("the Act") places the accused in a specified category of persons in respect of whom the DPP may exercise a discretion as to whether they ought to be dealt with in accordance with the Act.

[9] Considering that the accused was under the age of 18 when the offence was committed the magistrate raised the issue about whether he ought to have been dealt with in accordance with the provisions of the Act. In doing so the magistrate was prompted by the findings in the matter of *The State v Eugene Dominic Polman*[8]*.* Having established that no preliminary enquiry for the accused was held in terms of the Act, the magistrate refrained from sentencing the accused and referred the matter to this court for review under section 304(A) of the Criminal Procedure Act[9]. According to the prosecutor the accused was "too old for child justice procedures".[10]

[10] To begin with, a *"child"* is defined in section 1 of the Act as *"any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2)."*

[11] The age ambit in respect of persons to whom the Act is applicable is set out in section 4(1) which reads:

"4 Application of Act
(1) Subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and-
(a) was under the age of 10 years at the time of the commission of the alleged offence; or
(b) was 10 years or older but under the age of 18 years when he or she was-
(i) handed a written notice in terms of section 18 or 22;
(ii) served with a summons in terms of section 19; or
(iii) arrested in terms of section 20,
for that offence."

Section 270 reads:
"Offences not specified in this Chapter - If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved."
[7] Child Justice Act, 2008 (Act 75 of 2008)
[8] Unreported NCPD Case No CA&R 06/2014, delivered 11 September 2014
[9] Criminal Procedure Act, 1977 (Act 51 of 1977)
[10] Magistrate's covering letter of referral for special review dated 23 November 2020

[12] A juxtaposing position is indicated in section 4(2) which provides that:

"The Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions in terms of section 97(4)*(a)*(i)*(aa)*, in the case of a person who-

> *(a)* is alleged to have committed an offence when he or she was under the age of 18 years; and
> *(b)* is 18 years or older but under the age of 21 years, at the time referred to in subsection (1) *(b)*,

direct that the matter be dealt with in terms of section 5(2) to (4).

(the emphasis in bold is mine)

[13] Section 5(2) to (4)[11] deals with preliminary inquiries. In summary, it is stipulated that every child who is 10 years or older (but under the age of 18) who is alleged to have committed an offence, must be assessed by a probation officer, must appear before a preliminary enquiry and may be diverted either by the prosecutor (i.e. in terms of section 41 for minor offences detailed in Schedule 1), or at the preliminary enquiry.

[14] Section 4(2) expressly confers upon the DPP a discretionary power to invoke the provisions of section 5(2) to (4) of the Act. This power is not conferred on a magistrate's court nor on a regional court. It is a power that may only be exercised by the DPP in respect of a person who committed an offence while under the age

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[11] Section 5(2): Every child who is 10 years or older, who is alleged to have committed an offence and who is required to appear at a preliminary inquiry in respect of that offence must, before his or her first appearance at the preliminary inquiry, be assessed by a probation officer, unless assessment is dispensed with in terms of section 41 (3) or 47 (5).

Section 5(3) A preliminary inquiry must be held in respect of every child referred to in subsection (2) after he or she has been assessed, except where the matter-
(a) has been diverted in accordance with Chapter 6;
(b) involves a child who is 10 years or older but under the age of 14 years where criminal capacity is not likely to be proved, as provided for in section 10 (2) *(b)*; or
(c) has been withdrawn.

Section 5(4) *(a)* A matter in respect of a child referred to in subsection (2) may be considered for diversion-
(i) by a prosecutor in accordance with Chapter 6; or
(ii) at a preliminary inquiry in accordance with Chapter 7.
(b) A matter which is for any reason not diverted in terms of paragraph *(a)* must, unless the matter has been withdrawn or referred to a children's court, be referred to a child justice court for plea and trial in terms of Chapter 9.
(c) A matter in respect of a child referred to in paragraph *(b)* may, before the conclusion of the case for the prosecution, be considered for diversion by a child justice court in terms of Chapter 9.

of 18 years but who was handed a written notice, or served with a summons,[12] or arrested while s/he is 18 years or older but under the age of 21. The DPP exercises this power in accordance with national directives issued by the National Director of Public Prosecutions in terms of section 97(4)(a)(i)(aa) of the Act.

[15] The current policy directives provides that a DPP may issue a direction under section 4(2) of the Act in the following prescribed circumstances: [13]

"(a) in the event of a Schedule 1 offence;

(b) if the co-accused is a child;

(c) if the person was used by an adult to commit the crime;

(d) where there is doubt regards *(sic)* the age of the person;

(e) where the person appears to be intellectually or developmentally challenged; or

(f) where other pertinent and relevant circumstances so demand … ."

[16] Quoting directly from the opinion provided by the DPP, the following is stated:[14]

"The accused in this matter was charged with a serious offence (Schedule 3), he having taken advantage of a sleeping 5 year old child, thereby abusing a position of trust, and committed, on his plea, a sexual assault in contravention of section 5(1) of Act 32 of 2007. None of the circumstances that may persuade a Director of Public Prosecutions to issue a direction in terms of section 4(2) … were present and the prosecutor was accordingly not required to refer the matter to the Director of Public Prosecutions for a direction."

[17] Attempted rape in contravention of section 55(a) of the Act for which the accused has been charged is an offence in Schedule 3 of the Act whereas sexual assault in contravention of section 5(1) to which he pleaded guilty is a Schedule 2 offence. Attempted rape is not an offence under Schedule 1 to which the directives specifically refer, nor do any of the other circumstances specified in the directives find favour for the accused. In terms of section 52(3)(a) of the Act, where an offence is listed in Schedule 3, a matter may only be considered for diversion if exceptional circumstances exist and the DPP having jurisdiction has

[12] As was the accused in this case
[13] See Part 48M of the *"Directives in respect of persons who were children at the time of the commission of a crime but are 18 years and older, but under 21 years"* dated 1 June 2015
[14] Paragraph [9]

indicated in writing that the matter may be diverted. In the present matter such circumstances are not extant.

[18] In summing up, section 4(2) read in conjunction with the directives is clear regarding the specific category of persons and offences (i.e. Schedule 1) in respect of whom the DPP may direct that such persons be dealt with in accordance with the Act. Although the accused was under the age of 18 when he committed the offence, he is not a person in respect of whom the DPP has invoked the discretionary power that he be dealt with in terms of section 5(2) to (4) of the Act.

[19] I readily acknowledge that the magistrate's standpoint on the *Polman* judgment signified caution in referring this matter to this court. Respectfully, the *Polman* case does not apply to the present accused and is factually distinguishable. In that matter the accused was two days short of his 18th birthday when he allegedly committed murder. He was arrested and appeared in court before turning 18. Since he was unaffected by the provisions of section 4(2), the high court found that the provisions of the Act were peremptory and a preliminary inquiry should have been held.

[20] In all the circumstances, I am of the view that the proceedings in this matter have thus far been in accordance with justice. This is despite the delay occasioned by circumstances or events subsequent to the accused's first appearance in the regional court.

[21] The accused is yet to be sentenced. I am in agreement with the DPP that his age when the offence was committed is a relevant factor and that, despite his present age, he is entitled to receive the benefit of the sentencing procedure in Chapter 10 of the Act. Moreover, the magistrate must, prior to the imposition of sentence, have the benefit of a pre-sentencing report concerning the accused's personal circumstances.[15] Information relating to the impact of the commission of the offence on the child victim and her family should also be placed before the magistrate together with the accused's birth certificate, the victim's medical report and the DNA report. This will enable the magistrate to have regard to information for fully evaluating all the factors relevant to the imposition of a just sentence.[16]

[22] Wherefore the following order is made:

(i) The proceedings before the regional magistrate in the court *a quo* are declared to be in accordance with justice.

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[15] See generally *S v B* 2006 (1) SACR 311 (SCA) at paragraph [15]; *S v IO* 2010 (1) SACR 342 (CPD) at paragraph [17]; *S v BF* 2012 (1) SACR 298 (SCA) at paragraph [11]

[16] As *per* recommendations by the DPP

(ii) The accused's conviction is confirmed.

(iii) The matter is remitted to the court *a quo* for continuation of the proceedings on sentence.

(iv) At the conclusion of the evidence the regional magistrate must impose a sentence which she deems to be just.

From The Legal Journals

Van As, H & Erasmus, D

"Admission of guilt fine: A legal shortcut with delayed shock?"

SA CRIME QUARTERLY NO. 69 • 2020

Abstract

A popular perception shared by peace officers and the public alike is that the payment of an admission of guilt fine finalises the judicial process and no criminal record will result. However, paying an admission of guilt fine in terms of section 56 of the Criminal Procedure Act means that the person is deemed to have been convicted and sentenced in a court of law. People who pay admission of guilt fines later discover with shock that they in fact have a criminal record, with severe consequences. Often costly High Court applications will have to be instituted to set aside the conviction and sentence. Peace officers have a duty to inform a person of the consequences of paying an admission of guilt fine, but often do not do so and even abuse the admission of guilt system to finalise matters speedily. This article examines the consequences for a person who pays an admission of guilt fine. It further investigates whether there is a duty on Legal Aid South Africa to provide legal assistance in these matters and whether an administrative infringement process should be investigated.

Swemmer, S

"Justice Denied? Prosecutors and presiding officers' reliance on evidence of previous sexual history in South African rape trials."

SA CRIME QUARTERLY NO. 69 • 2020

Abstract

This article presents data from a study conducted by the Medical Research Council of South Africa, focusing on rape attrition in South Africa at different stages in the processes (from reporting at a police station to potential conviction). The study found that of the 3 952 reported cases of rape analysed 65% were referred to prosecution, and trials commenced in 18,5% of cases. Of the total 3 952 cases reported, 8,6% resulted in a guilty verdict. Using qualitative data from a subset of trial transcripts, the article focuses specifically on the problematic views of both presiding officers and prosecutors based on rape myths and gender-stereotyping at trial, and suggests that these are a factor affecting the attrition rate between cases referred to trial and those that result in a not guilty verdict.

Nortje, W

"Warrantless Search and Seizures by the South African Police Service: Weighing up the Right to Privacy versus the Prevention of Crime."

***PER / PELJ* 2021(24)**

Abstract

The constitutional right to privacy is enshrined in section 14 of the Constitution of the Republic of South Africa, 1996. It is premised on the notion that all persons should be protected from intrusions on their privacy by any person or institution. The Constitutional Court has also, on numerous occasions, held that the right to privacy is bolstered by its connection with the right to human dignity. It is undeniable that every person's right to privacy should be protected. However, a person's right to privacy is violated when police officials conduct warrantless search and seizure operations. Generally section 22 of the Criminal Procedure Act provides for warrantless search and seizure operations when a police official has a reasonable suspicion that a search warrant will be issued to him and that a delay in obtaining such a warrant would defeat the object of the search. Warrantless searches are important for the prevention of crime, but recent case law has suggested that there has been a progressive shift towards protecting the right to privacy of the individual subjected to

warrantless searches, since there are a number of laws besides section 22 that regulate warrantless searches and which have been declared to be constitutionally invalid. This article seeks to demonstrate that the current regulatory framework for warrantless searches should be reviewed in order to protect the legitimacy of the police as well as the dignity and privacy of the citizens of South Africa.

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

Contributions from the Law School

Amnesia and criminal responsibility

The defence of amnesia arises frequently in our courts (for a detailed analysis of this issue, see Hoctor 'Amnesia and criminal responsibility' in Kidd & Hoctor (eds) *Stella Iuris – Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 349). Accused persons have often claimed to be amnesic in attempting to show their incompetency to stand trial and to reduce legal responsibility for crimes. Such claims are particularly prevalent in cases involving violent crime, and are usually raised as being indicative of automatism or lack of capacity (Van Rensburg and Verschoor 'Medies-geregtelike aspekte van amnesie' (1989) 14(2) *Tydskrif vir Regswetenskap* 40 at 41). It is widely acknowledged that amnesia is easily faked and very difficult to disprove, and that many accused persons may submit claims of amnesia simply to avoid punishment (see *R v Botha* 1959 (1) SA 547 (O) at 549D-E). As a result, the courts tend to be sceptical about claims of amnesia, and have decided on a number of occasions that the mere inability to remember cannot be regarded as a valid defence (Van Rensburg and Verschoor op cit 41; see *S v Piccione* 1967 (2) SA 334 (N); *R v Johnson* 1970 (2) SA 405 (R); *R v H* 1962 (1) SA 197 (A)). Further, courts have been cautious in accepting even expert evidence regarding amnesia, since such evidence is often based on the assumption that the accused is telling the truth when he claims not to remember the events in question (Van Rensburg and Verschoor op cit 41; *S v Trickett* 1973 (3) SA 526 (T) at 563H).

Any attempt to discuss a concept such as amnesia must overcome the notorious doctrinal divide between the legal and mental health professions. To the neuropsychologist, amnesia extends beyond mere poor memory. Generally, memory

can be conceptualised as involving three stages of information processing (Smith 'Memory' in Atkinson, Atkinson & Hilgard *Introduction to Psychology* 8ed (1983) 221): encoding (transforming a sensory output into a form that can be processed by the memory system), storage (i.e. maintaining information in memory), and retrieval (locating information in memory). Amnesia involves a profound defect in one or more of these stages, and has consequently been described as 'a behavioural syndrome marked by a severe inability to acquire and retain new permanent memories (anterograde amnesia), often coupled with some degree of impairment in the retrieval of previously acquired memories (retrograde amnesia)'(Rubinsky and Brandt 'Amnesia and the criminal law: a clinical overview' (1986) 4(1) *Behavioral Sciences and the Law* 27 at 32).

While there are a number of types of amnesia, the focus for the purposes of this comment will be on the most frequently encountered type, limited amnesia, which is 'a pathological inability to remember a specific episode, or small number of episodes, from the recent past'. Memory loss is restricted to a specific critical event in this condition, which may be produced by intoxication (see, eg, *S v Ramdass* 2017 (1) SACR 30 (KZD)), head injury (see *S v Cunningham* 1996 (1) SACR 631 (A) at 639*b-c*, where evidence of amnesia caused by head injuries provided the basis of a successful defence), epileptic seizure, or emotional shock (associated with psychogenic amnesia, the sudden inability to recall important information already stored in memory as a result of an emotionally disturbing event – see Rubinsky and Brandt op cit 41).

Unless an allegedly amnesic person confesses, it is difficult to make a definitive determination which subjects are simulating amnesia and which are genuinely amnesic (Schacter 'On the relation between genuine and simulated amnesia' (1986) 4(1) *Behavioural Sciences and the Law* 47 at 49; in *S v Kali* [2000] 2 All SA 181 (Ck) at 197*g-h* it was testified that there is no medical method of ascertaining genuine amnesia). This results in a natural reluctance on the part of the judiciary to accept claims of amnesia. However, it seems that simulators tend to overplay their role and perform more poorly on some memory tests than do patients with documented memory problems (Schacter op cit 55), allowing for the possibility of using tasks that exploit lay-people's inaccurate beliefs about amnesia to detect malingering. In *S v Lizamore* 2012 JDR 0306 (GNP) at par [31]-[32] the court explained its dismissal of the appellant's claim of amnesia as follows:

'…[H]e knew where he was, why he was there, what he was doing, why he was looking for an object and how he wanted to use it. During this period, he had the ability to direct his attentions to his intention…He could thereafter vividly remember what had happened…In deciding whether a person had genuinely lost memory a court is entitled to have regard to the manner in which he relates the events up to the stage where he claims that he had lost memory; the manner in which he continued with his narration after the stage where he had lost memory; the circumstances that prevailed before he lost memory; the length of such loss of memory and evidence by other witnesses.'

Amnesia does not in itself affect competence to stand trial, unless it is associated with a mental disorder (see s 77 of the Criminal Procedure Act 51 of 1977). The question of whether amnesia could be regarded as a defence first arose with regard to (both civil and criminal) cases arising out of motor car collisions. The courts, whilst acknowledging the feasibility of a claim of amnesia, have demonstrated a marked scepticism regarding this defence. It has been held that such a defence should be closely scrutinized (*Buckman v SAR&H* 1941 EDL 239 at 241; *S v Trickett supra* 536G-H), that mere reliance on the accused's *ipse dixit* was obviously insufficient (*S v Ramdass supra* par [14]), and where any doubts existed as to the truthfulness of the party claiming amnesia, the defence was rejected (*Buckman v SAR&H supra* 243, 250; *Horn v R* 1944 NPD 176 at 180; *R v Botha supra* 551F; *R v H* supra 208C-G; *S v Van Zyl* 1964 (2) SA 113 (A) at 120F; *S v Lizamore supra* at pars [31]-[33]). It is still incumbent upon a court to scrutinize the amnesia defence carefully, even if it is supported by medical evidence, since medical evidence is often based upon the hypothesis that the accused has given a truthful account of the events in question (*S v Moses* 1996 (1) SACR 701 (C) at 713*a*-*c*; *S v Gesualdo* 1997 (2) SACR 68 (W) at 74*g*-*h*).

Moreover, it has been repeatedly stressed that the court is the ultimate arbiter of the true nature of the alleged criminal conduct (*S v Henry* 1999 (1) SACR 13 (SCA) at 20*i*). This is particularly significant where the court has to deal with psychiatric or psychological evidence, all the more so when there is conflicting psychiatric testimony.

Amnesia is not in itself a valid defence to a criminal charge, and thus, in principle, it will not affect liability unless it is associated with automatism or lack of capacity (See *S v Piccione* supra 335C-D; *R v Johnson* supra 405; SA Strauss 'Geestesongesteldheid en die strafreg' (1974) 37 *THRHR* 219 at 232; *S v Humphreys* 2012 JDR 0277 (WCC) par [56]; *S v Humphreys* 2013 (2) SACR 1 (SCA) par [10]; *S v Mthethwa* 2017 JDR 0551 (WCC) par [63]). In relation to a defence of automatism, '"when a person acts in a state of automatism, there must be an amnesia", but the opposite does not necessarily hold' (*S v Potgieter* 1994 (1) SACR 61 (A) at 83*a*-*h*). Similarly, where the accused pleads lack of capacity, the presence of amnesia is not decisive (see *S v Ingram* 1995 (1) SACR 1 (A) at 4*c*-*d*; *S v Chretien* 1981 (1) SA 1097 (A) at 1108C-D).

The concepts of automatism and amnesia have been so closely identified with each other, but although amnesia is typically present in the case of automatism (*S v Cunningham supra* 637*c*-*d*), proof of amnesia does not amount to proof of automatism (*Potgieter supra* 83*a*-*h*; *S v Cunningham supra* 638*d*-*e*; *S v Henry supra* 20*h*-*i*). Nevertheless, absence of memory has been held to be a strong indication that the accused had acted involuntarily (*S v Pederson* 1998 (2) SACR 383 (N) at 390*g*). Conversely, in evaluating the presence of automatism, retention of memory has been regarded as a refutation of involuntariness (*S v Ngema* 1992 (2) SACR 651 (D) at 655*a*).

It appears that the first criminal case in which automatism, along with amnesia, was acknowledged as successfully being associated with a defence was *R v Du Plessis* 1950 (1) SA 297 (O). Given the course of development of the concept of amnesia through the courts it is perhaps appropriate that the accused was prosecuted for road traffic offences, including negligent driving. It was held that as a result of low blood pressure the accused had experienced a 'blackout', with accompanying amnesia, and consequently the convictions were quashed on appeal. In *R v Ahmed* 1959 (3) SA 776 (W), a defence of automatism with concomitant amnesia was successful where the accused was charged with assault with intent to murder. However, in a number of succeeding cases, the courts simply did not accept the evidence of amnesia as *per se* conclusive proof of automatism (see, e.g. *R v Rossouw* 1960 (3) SA 326 (T) at 329H; *R v H supra* 209D-E; *S v Bezuidenhout* 1964 (2) SA 651 (A); *S v Piccione supra* 337B-C).

A notable exception to this trend occurred in *S v Stellmacher* 1983 (2) SA 181 (SWA). Whilst it was unclear whether the condition was caused by hypoglycaemia or a partial epileptic seizure, the court accepted the unanimous conclusion of the expert witnesses that the accused acted automatically, with concomitant amnesia. Subsequent attempts to rely on the amnesia/automatism defence have, however, not met with success.

In each of these recent cases, in evaluating whether the accused's conduct was involuntary, the courts sought to draw a vital distinction between 'true absence of memory' and 'retrograde loss of memory after the event' (*S v Pederson supra* 390*f-h*, 397*f-h*). In each case the accused's actions were found to be sufficiently goal-directed to show a conscious mind directing his actions (*S v Pederson supra* 399*g-h*). The presence of retrograde amnesia was not found to support the defence of automatism in these cases. Courts will look beyond amnesia to find some evidence of a 'trigger mechanism' in order to found a basis for automatism (*S v Cunningham supra* 637*f*; *S v Henry supra* 21*b-d, 22f-h*).

That the accused suffered from amnesia is not determinative as regards the subjective elements that constitute the *mens rea* component of criminal liability, and at best can be regarded as indicative of the absence of such elements. While proof of amnesia does not necessarily establish a defence excluding *mens rea*, it may, however, avail an accused. It has been held that an accused lacked capacity due to mental illness partly based on a finding of amnesia (*R v F* 1960 (4) SA 27 (W)). Moreover, evidence of amnesia can provide a basis for a finding of diminished responsibility, and thus can be regarded as a mitigating factor if at the time of the offence the amnesia affected the accused's ability to understand the nature and meaning of the conduct giving rise to the criminal charge (see *S v Marx* 2009 (2) SACR 562 (ECG)).

Courts approach the defence of amnesia with caution. This is an eminently sensible *modus operandi*, given the fact that amnesia is indeed easy to raise and hard to disprove, and further, given that bad memory is not necessarily related to lack of capacity or involuntary conduct. Yet, the frequency with which amnesia arises in the

context of denial of criminal responsibility requires that the concept of amnesia be carefully evaluated and circumscribed by the courts.
Rubinsky and Brandt (op cit 43) point out that as in many areas in which law and psychology share a common interest, there are glaring gaps between psychological knowledge about amnesia, especially of the psychogenic variety, and knowledge needed by the courts in determining the effect of alleged memory disorders on legal responsibility. Therefore it is essential that cooperation between legal professionals and psychologists be fostered. Psychologists who testify as experts should ensure that they make every effort to present the most recent and most relevant scientific knowledge as lucidly as possible, whilst legal professionals should 'attempt to understand and to apply correctly neuropsychological research findings to amnesia cases' (*ibid*). The complex issues inherent in the use of amnesia as a legal defence, and the grave consequences of relying on misconceptions in this regard, are compelling justifications for giving due consideration to this ubiquitous notion.

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Matters of Interest to Magistrates

Jacob Zuma and the State Capture Commission: we need to talk about his lawyers (1 February 2021)

Last week the Constitutional Court held that former President Jacob Zuma acted in a "reprehensible" manner in his dealings with the Commission of Inquiry into State Capture, and handed down a cost order against him. Mr Zuma's reprehensible conduct was partly facilitated by his legal team, headed by Adv Muzi Sikhakhane. This raises questions about the ethical and legal obligations of lawyers representing powerful clients whose legal strategy depends on disobeying the law in direct breach of the rule of law.

Last week, advocate Kemp J Kemp, who famously represented Jacob Zuma in his rape trial and executed Zuma's "Stalingrad strategy" to help him avoid accountability for his alleged involvement in corruption, passed away. Kemp has been widely (and rightly) praised for his brilliant legal mind, but his dubious ethical treatment of Fezekile Kuzwayo, the survivor and complainant in the Zuma rape trial, was generally glossed over. As Redi Tlhabi previously remarked, Kemp J Kemp was "masterful – and I don't mean that as a compliment – in slut-shaming Fezekile Kuzwayo."

It has long been a strategy of defence counsel in rape trials to exploit deeply entrenched sexism in society by putting the victim on trial, turning the prosecution of the rapist into the prosecution of the survivor. Kemp followed the same strategy. Given permission by the court to interrogate Kuzwayo on her sexual history, including consensual encounters with other men, Kemp repeatedly sought to imply that Kuzwayo had sex with men she did not know well. The implication was that Kuzwayo was, essentially, a slut – and therefore "unrape-able". This strategy – aided and abetted by the presiding judge Willem van der Merwe – worked in the sense that Zuma was acquitted of raping Kuzwayo despite the significant evidence pointing in the other direction.

What Kemp did was not unlawful. Arguably, his conduct also did not contravene the General Bar Council's Code of Professional Conduct or its Uniform Rules of Professional Ethics. But his conduct does raise serious questions about what type of conduct we have a right to expect from lawyers, and whether it could ever be professionally and personally acceptable for lawyers to aid and abet the reprehensible conduct of their clients. How, for example, would we judge a senior advocate who exploits deeply entrenched racial prejudice in defence of his or her client?

Asking question about the ethical behaviour of lawyers who defend their clients, must not be confused with unwarranted criticism of lawyers for taking on any client. Every person, no matter how dishonest or reprehensible, has a right to legal representation. It is therefore not appropriate to criticise a lawyer merely on the basis of the clients he or she represents. In fact, in terms of section 80 of the Bar Council's Code of Professional Conduct, read with section 2.1 of the Uniform Rules of Professional Conduct, advocates have a duty to take on a brief regardless of who the client is.

This is often referred to as the "taxi cab rule", and although there are always ways of getting around this rule, advocates often represent clients whom they have little in common with and may even profoundly disagree with or dislike. This is why the same advocate could represent Busisiwe Mkhwebane today and Pravin Gordhan tomorrow, Afriforum today and the EFF tomorrow.

Moreover, in terms of section 3.1 of the Uniform Rules of Professional Conduct and advocate has a duty – while acting with all due courtesy to the tribunal before which he is appearing – to "fearlessly uphold the interests of his (*sic*) client without regard to any unpleasant consequences either to himself or to any other person".

But an advocate does not only have a duty to her client. She also has a duty to the court and to the justice system as a whole. Thus, in terms of section 3.2 of the Uniform Rules of Professional Conduct an advocate has a duty not to mislead the

Court. In essence this means that an advocate is not permitted to make submissions to the Court which she knows to be false. This does not mean the advocate has a duty to share information confided to her by her client, but it does mean she cannot tell the Court something her client told her was false.

Moreover, section 3 of the Bar Council's Code of Professional Conduct prohibits an advocate from engaging in conduct which is: "3.1.1 dishonest or otherwise discreditable to an advocate; 3.1.2 prejudicial to the administration of justice, or 3.1.3 likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute."

Given these obligations, the judgment of the Constitutional Court handed down late last year in the case of *Public Protector v Commissioner for the South African Revenue Service and Others* must raise eyebrows. The High Court had handed down a personal cost order against Public Protector Busisiwe Mkhwebane, partly because she had falsely claimed that she had not received notice that a personal costs order would be sought against her. The Constitutional Court overturned the personal cost order, pointing out that in oral argument her counsel, Dali Mpofu, had owned up to the fact that:

it was his idea that the Public Protector must adopt this stance, an idea he wisely abandoned and did not pursue in oral argument as it was legally indefensible. So, outlandish though the Public Protector's assertion appears to be, it would be ignoring all this reality if we were to take it at face value. What is crucial here is that the assertion was counsel's, not the Public Protector's, idea. We may criticise the Public Protector for failing to realise that the legal point she was obviously advised to advance was a non-starter. But can we really go far with that criticism? I think not. She got that advice from *senior counsel*.

The Constitutional Court pointed out that the assertion that the Public Protector did not receive notice that a personal cost order would be sought against her "is astounding and warrants censure and perhaps more", raising the question of whether it would not appropriate to censure Adv Mpofu who advised her to embark on this "astounding" course of action that "warrants censure". I would argue that in this case, the senior counsel went further than merely fearlessly upholding the interests of his client and strayed into the impermissible terrain of misleading the court.

Which brings us to the most recent Constitutional Court judgment in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* in which the court censured Zuma for flouting his legal obligations to co-operate with and testify before the State Capture Commission. The Court censured Zuma's conduct in the most emphatic terms, stating that:

It is remarkable that the respondent would flout regulations made by him whilst he was still President of the Republic. The respondent's conduct in defying the process lawfully issued under the authority of the law is antithetical to our constitutional order. We must remember that this is a Republic of laws where the Constitution is supreme. Disobeying its laws amounts to a direct breach of the rule of law, one of the values underlying the Constitution and which forms part of the supreme law. In our

system, no one is above the law. Even those who had the privilege of making laws are bound to respect and comply with those laws. For as long as they are in force, laws must be obeyed.

The Court proceeded to describe this conduct by Zuma as “reprehensible”, and noted that by “ignoring process from the Commission, he did not only contravene the Commissions Act but he also breached regulations made by him for the effective operation of the Commission. His conduct seriously undermined the Commission’s investigation”.

In fact, from the conduct of Zuma and his legal team it is clear that the strategy had always been to try to delegitimise the Commission and its Chairperson in a high stakes game, and if that did not work, to try to delegitimise the evidence leaders of the Commission. Zuma’s legal team executed this strategy quite efficiently, consistently but falsely advancing the argument that Zuma was being unfairly treated by the Commission.

This raises the question whether Zuma’s legal team did not set out to diminish public confidence in the legal profession and the administration of justice in breach of their professional obligations. Is it really acceptable for an advocate to assist your client to disobey the law and act in direct breach of the rule of law? Does one not have a professional duty to steer your client away from such unlawful and reprehensible” conduct?

There is a thin but relatively clear line between fearlessly representing your client’s interest, on the one hand, and misleading the court and undermining the administration of justice, on the other. I would argue that ethical lawyers will always err on the side of caution to ensure that they stay on the right side of this line. But, as the examples above illustrate, unfortunately not all lawyers do.

(The above contribution was published on the *Constitutionally Speaking* blog by Prof Pierre de Vos on 1 February 2021).

A Last Thought

"An 'important purpose of section 34 [of the Constitution] is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law' and that the right of access to court is 'foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance'. The right guaranteed s34 would be rendered meaningless if court orders could be ignored with impunity: the underlying purposes of the right — and particularly that of avoidance of self-help — would be undermined if litigants could decide which orders they wished to obey and which they wished to ignore."

Plasket A J in
Victoria Park Ratepayers' Association v Greyvenouw cc and others (511/03) [2003] ZAECHC 19 (11 April 2003)