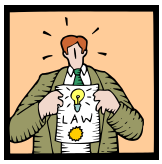
e-MANTSHI

A KZNJETCOM Newsletter

March 2021: Issue 172

Welcome to the hundredth and seventy second 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 Department of Justice and Constitutional Development invites interested parties to submit written comments on the proposed amendments to the Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (the Act). The proposed amendments to the Act, the invitation and a note explaining the background of the proposed amendments, are available on the website of the Department at the following address: https://www.justice.gov.za/legislation/invitations/invites.htm. The notice to this effect was published in Government Gazette no 44402 dated 26 March 2021. The purpose of the Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill, 2021 ("the Bill") is to address certain problems that have been identified with the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (the Act), following a review process of the Act.
The first part of the Act, which deals with, among others, **the prevention of equality** through the equality courts in which complaints about discrimination are adjudicated.

These sections are in operation and a few amendments are proposed in the Bill to improve the protection of complainants.
The second part of the Act, which deals with **the promotion of equality** by Organs of State and public and private bodies, is not yet in operation. This is due, in part, to the regulatory burden on placed on all sectors of society, both public and private. This was identified in a Regulatory Impact Assessment conducted by the National Treasury. The Bill intends to address these challenges.

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Recent Court Cases

1. Venter v S (779/2018) [2021] ZASCA 21 (18 March 2021)

The case discusses whether contradictions in the evidence of the complainant as a single witness and that of other witnesses in sexual offences were material and whether the evidence was properly assessed and whether despite contradictions the appellant was appropriately convicted.

Mabindla-Boqwana AJA (Mocumie and Molemela JJA and Poyo-Dlwati AJA concurring):

Introduction

[1] Rape is one of the most invasive and horrendous criminal acts. Added to that is the trauma that goes with a victim having to recount the ordeal in evidence. Refuting a view that it is easy to bring a charge of rape, in *S v Jackson,* Olivier JA[1] observed:

'Few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn its back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed *ad nauseam*; she (but not the accused)

[1] *S v Jackson* 1998 (4) BCLR 424 (A); [1998] 2 All SA 267 (A) at 272-273.

may be required to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turn their backs on a "soiled" wife.'

[2] Olivier JA criticised the cautionary rule in relation to the evidence of complainants who are single witnesses in sexual offences as being premised on an outdated notion that unjustly stereotypes complainants (overwhelmingly women) as particularly unreliable. He, however, endorsed the view that evidence may call for a cautionary approach where, inter alia, a witness has been shown to have been unreliable, is shown to have lied, had previously made false complaints or bears some grudge against the accused. In those cases, some supporting material may be required.[2]

[3] More often than not, in sexual offences the State places reliance on the evidence of a single witness. Although there is no general requirement for corroboration, in the criminal context our courts have taken the approach that the evidence of a single witness should only be relied upon where it is clear and satisfactory in all material respects.[3] This position is supported by s 208 of the Criminal Procedure Act 51 of 1977 (the CPA), which provides that the conviction of an accused may follow from the single evidence of any competent witness. Even so, the overarching consideration in a criminal matter is whether the State has proven its case against the accused beyond a reasonable doubt.[4]

[4] 'It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true'.[5] The approach to the evaluation of evidence in a criminal trial was articulated by this Court in *S v Chabalala*[6] as follows:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.'

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[2] *S v Jackson* fn 1 at 274.
[3] *Zulu v The State* [2019] ZASCA 189 para 21.
[4] *Y v S* [2020] ZASCA 42 paras 71-72.
[5] *S v V* 2000 (1) SACR 453 (SCA) para 3.
[6] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

[5] As was stated by Malan JA in *R v Mlambo*[7] 'there is no obligation upon the [State] to close every avenue of escape which may be said to be open to an accused. It is sufficient for the [State] to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused'.

[6] In this case the appellant, Mr Johannes Jacobus Venter, was convicted in the regional court, Pretoria on four counts of rape and seven counts of indecent assault committed during the period of August 1998 and June 2002. He was sentenced to an effective term of 10 years' imprisonment. He appealed against his conviction to the Gauteng Division of the High Court, Pretoria (high court) which appeal was unsuccessful (Potterill and Maumela JJ (concurring) and Van Niekerk AJ (dissenting)). The appeal against his conviction is before us with special leave having been granted by this Court.

[7] The nub of the appellant's case is that the trial court did not properly assess the complainant's evidence intrinsically and as against the evidence of the other witnesses. Had it done so, so it was contended, it would have found material discrepancies which affected the credibility and reliability of her evidence. The evidence was lengthy, involving a total of 12 counts and 17 witnesses. The attacks on the evidence are numerous, it is accordingly important to outline the evidence in some detail before proceeding to consider whether there is merit in the appellant's contentions.

[34] As explained by J Hopper and D Lisack:[8]

'It is not reasonable to expect a trauma survivor – whether a rape victim, a police officer or a soldier – to recall traumatic events the way they would recall their wedding day. They will remember some aspects of the experience in exquisitely painful detail. Indeed, they may spend decades trying to forget them. They will remember other aspects not at all, or only in jumbled and confused fragments. Such is the nature of terrifying experiences, and it is a nature that we cannot ignore.'

[53] In Van Zijl v Hoogenhout, Heher JA made the following remarks:

'Many sexual abuse victims experience considerable guilt and shame as a result of their abuse. The guilt and shame seem logically associated with the dynamic of

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[7] *R v Mlambo* [1957] 4 All SA 326 (A); 1957 (4) SA 727 (A) at 738A-C. See also *S v Sauls and Others* [1981] 4 All SA 182 (A); 1981 (3) SA 172 (A) at 182G-H.

[8] J Hopper and D Lisak *Why Rape and Trauma Survivors have Fragmented and Incomplete Memories* Time Magazine (2014), which was cited with approval in the minority judgment of *Y v S* fn 4 para 90.

stigmatisation, since they are a response to being blamed and encountering negative reactions from others regarding the abuse. Low self-esteem is another part of the pattern, as the victim concludes from the negative attitudes toward abuse victims that they are "spoiled merchandise". Stigmatisation also results in a sense of being different based on the (incorrect) belief that no one else has had such an experience and that others would reject a person who had.'
Although these views were made in relation to child victims, they are equally relevant in this case, given the power dynamics between the appellant and the complainant. There is accordingly no merit in this criticism, in my view.

Conclusion
[93] Having assessed the totality of the evidence, I am of the view that the appellant was correctly convicted on all the charges. I am satisfied that the evidence accounts for all the charges. The appellant's grounds of appeal and argument did not reveal any incongruities that ought to have been considered by this Court in respect of each count. Whilst the magistrate can be criticised for not having given sufficient reasons in respect of each charge, the conclusions that he arrived at, as borne out by the record, were correct.

[94] The issue of the vagueness of the charges and their lack of particularity that my colleague raises in the minority judgment was not raised by the appellant as a ground of appeal nor did it enjoy any prominence during oral argument before us. It was neither brought up as an issue in the trial court nor was it raised in the high court. At the commencement of the trial, the appellant who was represented by the same counsel who appeared before us showed no difficulty in pleading. In fact, his counsel proceeded as follows:
'Your [Worship], I can only say I have worked through all these charges with my client, he is completely informed about the contents of all these charges. I don't even think it will be necessary to read them aloud to him. We can in the case of each charge simply ask him how he pleads against it.' (Translated.)

[95] During the course of the trial the appellant proceeded to give a version in respect of one count and offered a bare denial in respect of others. Nevertheless, the charges referred against the appellant were clear and unambiguous in my view. Given the nature of the offences, reference to months and years in the charge sheets as the periods in which the alleged incidents occurred as opposed to precise times and dates did not prejudice the appellant.

[96] Similarly, the issue of the trial court's failure to deal with the evidence on each count, was also not raised as a ground of appeal. The appellant did not complain, as appears in the notices of appeal both before the high court and this Court, that his constitutional right to a fair trial was violated for this reason. Nor did he protest that his trial was not conducted in accordance with the basic notions of fairness and justice. I accordingly do not share my colleague's view in the minority judgment

regarding these issues.

[97] While the charges are couched in broad terms as regards the period in which the offences were alleged to have been committed, they specified what the appellant was accused of having committed during the relevant periods. In any event, he never complained of any inability to plead for lack of understanding of the charges, at any stage in the proceedings. He knew what charges he had to answer to and pleaded without any difficulty by denying all the allegations against him in terms of s 84 of the CPA read with s 35(3)(a) of the Constitution.

[98] For those reasons the appeal is dismissed.

(The above is an extremely shortened edited version of the above majority judgment. The full judgment including the dissenting judgment is available here: http://www.saflii.org/za/cases/ZASCA/2021/21.html)

2. Mntambo v S (478/2020) [2021] ZASCA 17 (11 March 2021)

On a charge of murder the appointment of assessors in terms of the proviso to s 93*ter* (1) of the Magistrates' Courts Act 32 of 1944 was not complied with – the appellant was not afforded the opportunity to elect whether the magistrate should sit with or without assessors therefore the court was not properly constituted and it was a fatal misdirection which vitiated the proceedings.

Weiner AJA: (Mocumie, Dlodlo and Mbatha JJA and Poyo-Dlwati AJJA concurring)

[1] The appellant was convicted of murder by the Regional Court, sitting at Verulam, KwaZulu-Natal on 27 September 2012. He was sentenced to fifteen (15) years' imprisonment. The Regional Court and the KwaZulu-Natal Division of the High Court, Pietermaritzburg refused leave to appeal on 27 September 2012 and 14 May 2013 respectively. He petitioned this Court on 25 October 2016 and was granted special leave to appeal against both the conviction and sentence on 19 December 2016. The appellant has been incarcerated for over eight years.

Condonation

[2] The appellant failed to comply with rules 7(1), 8 (1) and 10 (1) of this Court's rules in that he filed his notice of appeal, copies of the record and his heads of argument out of time. He has filed an application for condonation and for the appeal to be re-instated.

[3] In dealing with this issue, it is useful to refer to the judgment in this Court in

Mulaudzi v Old Mutual Life Assurance company (SA) Limited,[9] where Ponnan JA stated that:

'Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.[10]

In applications of this sort the prospects of success are in general an important, although not decisive, consideration. As was stated in *Rennie v Kamby Farms (Pty) Ltd*, it is advisable, where application for condonation is made, that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success.'[11]

[4] The reasons for the appellant's non-compliance with the abovementioned rules are set out in detail by the appellant. For purposes of this enquiry, it is unnecessary to give a detailed account. Suffice it to state that the inordinate delay of over five years was apparently caused by his erstwhile attorney providing inadequate service and his inability to raise funds to pursue the appeal after the Legal Aid Board refused his application for legal assistance, which resulted in the notice of appeal, copies of the record and his heads of argument being filed out of time. He was saved by his current attorney in ensuring that the appeal be reinstated. The attorney filed an affidavit confirming this explanation. For that reason, although the delay of over five years is inordinate and would ordinarily not be countenanced, his explanation is accepted as reasonable for the purposes of assessing whether good cause has been made out for condonation. On the prospects of success, a necessary requirement for condonation to be granted, I will deal briefly with the facts leading to the appellant's conviction.

[5] The appellant contended that he was convicted on the basis of the evidence of the deceased's mother and her grandson. Both alleged that on the fateful night two men entered their home while they were sleeping and shot the deceased. The deceased died later in hospital. The deceased's mother said that she identified the appellant as the assailant that pulled the trigger. She insisted that she identified him through a light from the screen of a cell phone. However, in her statement to the police she stated that she could not identify him. She saw him again the following day and told her grandson that the appellant was the perpetrator. The magistrate dealt with the grandson's evidence as that of a single witness.

[6] The State's evidence suffered from the typical shortcomings of evidence of a

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[9] Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi *[2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA).*

[10] Ibid para 26.

[11] Ibid para 34.

single identifying witness. In the absence of any *aliunde* evidence which could pin the appellant to the commission of the murder, he ought to have been discharged upon an application brought under s 174 of the Criminal Procedure Act 51 of 1977. The evidence of the State was simply not satisfactory. For these reasons, I have serious doubts about the correctness of the accused's conviction on the count of murder, but in the view I take of the matter, it is not necessary to say more in that regard.

[7] Having regard to the explanation the appellant has provided and the applicable legal principles, the appellant has established good grounds for condonation and the re-instatement of the appeal. The State does not oppose the application for condonation for non-compliance with the rules of this Court and the re-instatement of the appeal. Condonation is accordingly granted and the appeal is re-instated.

Section 93*ter* (1) of the Magistrates' Courts Act No 32 of 1944 (the Act)

[8] The appellant has raised the challenge that there was non-compliance with the provisions of the proviso to s 93*ter* (1) of the Act, which provides that, when facing a murder charge, assessors must be appointed by the magistrate unless the accused waives such right. The section reads:

'93*ter* Magistrate may be assisted by assessors

1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-

(a) before any evidence has been led; or

(b) in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: *Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him*.' [Emphasis added]

[9] Until the judgment in *S v Gayiya*[12] there were conflicting judgments in relation to the interpretation of s 93*ter*(1). This Court in *Gayiya* referred to *Chala and Others v Director Of Public Prosecutions, KwaZulu-Natal and Another,*[13] stating that the conflicting authorities had been succinctly dealt with in that case. In *Gayiya*, it was held that the appointment of assessors was peremptory, unless the accused requests, prior to him pleading to a charge of murder, that the trial should proceed without assessors. Mpati P stated:

'In my view the issue in the appeal is the proper constitution of the court before which

[12] S v Gayiya *[2016] ZASCA 65; 2016 (2) SACR 165 (SCA).*

[13] *Chala and Others v Director of Public Prosecutions, Kwazulu-Natal and Another* 2015 (2) SACR 283 (KZP).

the accused stood trial. The section is peremptory. It ordains that the judicial officer presiding in a regional court before which an accused is charged with murder (as in this case) *shall* be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors. It is only where the accused makes such a request that the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor. The starting point, therefore, is for the regional magistrate to inform the accused, before the commencement of the trial, that it is a requirement of the law that he or she must be assisted by two assessors, unless he (the accused) requests that the trial proceed without assessors.

. . .

In the present matter, the quorum prescribed by the proviso to ss (1) of s 93*ter* of the Magistrates' Courts Act was three members, namely the regional magistrate and two assessors, unless the accused had requested that the trial proceed without assessors, in which event in his discretion the regional magistrate could, sitting alone, have constituted a quorum. No such request was made by the accused.'[14]

[10] The court held that the failure to comply with the proviso resulted in the court not being properly constituted and it set aside the conviction and sentence. In *Shange v S,*[15] Lewis JA referred to and endorsed *Gayiya.* She stated:

'In *S v Gayiya* 2016 (2) SACR 165 (SCA) this court, referring to *Chala v DPP, KwaZulu-Natal* 2015 (2) SACR 283 (KZP) and the authorities discussed there, considered that where the regional magistrate had not sat with assessors, and the accused had not requested that the trial not proceed with assessors, the court was not properly constituted and that the convictions and sentences had to be set aside.'

[11] In the present matter, it is clear from the record of the proceedings that the appellant was not afforded an opportunity by the magistrate to decide whether to request that the trial proceed with or without assessors before he was asked to plead. It is common cause that there was non-compliance with the proviso to s 93*ter* (1) of the Act in that no assessors were appointed in terms of the proviso to the section and the appellant did not waive his right to such appointment. This is a fatal misdirection which vitiates the proceedings. The State properly conceded the point and accepted that the conviction and sentence should be set aside and the appellant immediately released from prison. The appeal must therefore succeed.

[12] Accordingly:

1 The appeal is upheld and the conviction and sentence are set aside.

2 The appellant is to be released from custody with immediate effect.

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[14] *Gayiya* fn 4 paras 8 and 11.

[15] *Shange v S* [2017] ZASCA 51.

From The Legal Journals

Goosen, S & Whitear-Nel, N

"Revising spousal testimonial privilege and marital communications privilege in South African Criminal procedure: is abolition or extension the answer? (Part 1)"

***SACJ* (2020) 2 446**

Abstract
Spousal testimonial privilege and marital communications privilege are distinct concepts, but both are underpinned by the same policy rationale: The desire to protect the sanctity of the marriage relationship, encourage communication between spouses, and to prevent a spouse from being faced with the moral dilemma of either telling the truth and risking the relationship or committing perjury to avoid incriminating the other spouse. Collectively, spousal testimonial privilege and marital communications privilege are referred to as the marital privileges in this article. The law indicates a clear policy choice in favour of protecting the marriage relationship as opposed to the public interest in ensuring that the maximum relevant evidence is placed before the court, by virtue of the existence of the marital privileges. In part one of this two-part article, the authors discuss the marital privileges and the rationales underpinning them. Then the article considers the problems with the marital privileges and whether the law needs reform. The authors discuss whether the marital privileges should be extended to include cohabitant life partners. It is argued that the law on marital privileges is arbitrary and incoherent and does not adequately reflect or take into account the types of relationships that exist in multicultural South African society. In part two, the authors discuss the position as regards the marital privileges in a constitutionally comparable democracy – that of Canada. Also considered is the position adopted by the European Court of Human Rights in respect of the marital communications privilege in the Netherlands.

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

Contributions from the Law School

Attempt at the impossible

The attempt and not the deed confounds us. (*Macbeth* II ii).

I Introduction

As the American writer Hall has stated, '[o]f all the various problems in the law of criminal attempt that concerning "impossibility" presents the major difficulties' (Hall *General Principles of Criminal Law* 2ed (1960) 586. This note assesses the South African position in this regard.

After some pragmatically decided early cases, the Appellate Division finally addressed the issue directly in the case of *Davies* 1956 (3) SA 52 (A). The court had to decide whether a conviction for attempting to procure an abortion was possible if the aborted foetus was already dead. Schreiner JA, for the majority of the court, held that the conviction for attempted abortion was sound. In the course of his judgment, Schreiner JA stated that in considering the distinction between an objective approach, concerned with danger to community interests, and a subjective approach, focusing on the liability of the individual accused ('moral guilt'), the latter should be followed (61D-F). It was held that the focus is on 'the only essential fact: that he thought that he could achieve his purpose, but was mistaken' (62H). The crux of the judgment of Schreiner JA is found at 64A-B:

'To sum up, then, it seems that on principle the fact that an accused's criminal purpose cannot be achieved, whether because the means are, in the existing or in all conceivable circumstances, inadequate, or because the object is, in the existing or in all conceivable circumstances, unattainable, does not prevent his endeavour from amounting to an attempt'.

It is significant that in relation to 'widely irrelevant' endeavours – such as trying to kill someone by incantation or prayers – and faced with the temptation to introduce objective considerations to exclude these instances from liability, Schreiner JA grasped the nettle, and insisted that a subjective approach should apply (63E-64A). While intention alone does not suffice, the effect of the entirely subjective approach in *Davies* is that conduct can be objectively innocent and still lead to liability for attempt.

The principle that factual impossibility does not negate liability for attempt was held to be subject to two 'cautionary observations' by Schreiner JA: that if what the accused was aiming to achieve was not a crime, an endeavour to achieve it could not, because by a mistake of law he thought that his act was criminal, constitute an attempt to commit a crime; and that the language of the statute may preclude attempt liability (64B-D). The latter qualification has been applied, apparently without difficulty, in the case law (see *Kantor* 1969 (1) SA 457 (RA) 458H-461A; *Frames (Cape Town) (Pty) Ltd* 1995 (8) BCLR 981 (C) 993G-I), and thus, for the balance of this note, the focus of the discussion will be on the content of the first qualification.

II Attempt at the legally impossible

Before addressing the content of the first qualification, it may be noted that the clarity which the *Davies* case brought to this area of the law was generally welcomed by the writers, and that it has been the leading case in South African criminal law as regards attempt at the impossible ever since (the approach in *Davies* was explicitly followed in cases like *Pachai* 1962 (4) SA 246 (T); *Shongwe* 1966 (1) SA 390 (SR, AD); *Ndlovu* 1982 (2) SA 202 (T); *Madikela* 1993 (2) SACR 403 (B)). This is not to say that the courts have always applied the rules set out in *Davies* consistently, but the Appellate Division has confirmed its authority, at least in relation to attempt at the factually impossible, in the cases of *W* 1976 (1) SA 1 (A) (attempted rape of a corpse), and *Ndlovu* 1984 (3) SA 23 (A) (attempted murder of a corpse). At the very least, it appears that the effect of the first qualification set out in the *Davies* case is that an attempt at a non-existent or *putative* crime (such as adultery or sodomy) would be regarded as falling within this exception, would be regarded as 'legally impossible', and would not incur liability.

One case which has however given rise to some difficulty proceeded from the Appellate Division itself: the case of *Palmos* (1979 (2) SA 82 (A)). In this case the accused, a pharmacist, obtained large quantities of medicine from representatives of pharmaceutical companies, for which he paid the representatives. Although the representatives were authorised to give away small quantities of product to pharmacists as samples, to give large quantities to a single pharmacist in return for cash or goods was distinctly irregular. The accused was found guilty of attempted theft in the trial court. The verdict was not theft, because it could not be established that the representatives had actually stolen the goods from their respective companies, but because the court found that the accused believed that the goods were stolen, it held that he had intention to steal, and applying the legal reasoning in *Davies*, based on a subjective test, the accused was convicted of attempted theft.

On further appeal to the Appellate Division, it was held that intent to steal could not be established beyond reasonable doubt (94G-H), and thus the conviction was set aside. It is unfortunate that the court did not stop at this point. However, the court

went on to state that even if it was held that the appellant had intent to steal, he would still be acquitted, as his conduct at most amounted to the commission of a 'putative crime', rather than a mere error as to an essential element of the crime of theft (95E-F). The difficulty with this conclusion is manifest. Surely it is incorrect to hold that the mistaken belief of Palmos that the goods had been stolen constituted a mistake relating to the existence of a crime (see the criticism of the *Palmos* case in Van Oosten 1979 *THRHR* 323 324ff, De Wet *Strafreg* 4ed (1985) 174)? Theft is, after all, a legally recognized crime.

However, the effect of this confusion was to expose the significant differences of opinion regarding the interpretation of the first qualification in *Davies*, holding that attempt at the legally impossible would not give rise to criminal liability. The views of the writers thus fall to be briefly summarised.

Van Oosten (*op cit* 325) is of the view that the term 'putative crime' refers to a crime that does not exist. In his view, attempt at such a crime does not give rise to any liability, as opposed to attempt at the factually impossible or an attempt which relates to a mistake as to the elements of an existing crime (*op cit* 329). De Wet (*op cit* 173) takes the same approach as Van Oosten, stating that there would only be no liability where there was an attempt at a non-existing crime. However, De Wet presents a confused picture, as in a subsequent discussion of the case law, he states that if one appropriates a *res nullius*, then this would not be an attempt, but a simple case of a putative crime (*op cit* 174). It is evident that theft is not a putative crime.

Visser and Maré on the other hand state that 'putative crime' includes both a non-existent crime and a mistake as to the nature of an existing crime (*Visser & Vorster's General Principles of Criminal Law Through the Cases* 3ed (1990) 651). It follows that a mistaken attempt in either of these contexts is excluded from liability. Labuschagne also classifies mistaken attempt at a putative crime and a mistaken attempt to commit an existing crime together (1980 *De Jure* 119 122).

Snyman further states that the accused's mistake in the *Palmos* case was a mistake as to the nature of the goods, i.e. factual impossibility (*Snyman's Criminal Law* 7ed (2020) 248n55), and that the distinction must be drawn between attempt at the factually impossible, which leads to liability, and attempt at a putative crime, which he defines as a mistake as to the existence of a crime or the legal nature of one of its definitional elements, which would not found liability (*op cit* 248).

Lastly, the views of Professors Exton Burchell and Jonathan Burchell may be examined. In his case note on *Davies* (1956 *SALJ* 364), and in the first edition of *South African Criminal Law and Procedure (Vol I: General Principles)*, published in 1970, Exton Burchell clearly states his position using the following example (388):

‘A, intending to steal, traps an animal *ferae naturae* [a wild animal]. Whether A is guilty of attempted theft depends upon his intention and the type of mistake which he made. If he wrongly thought that an animal *ferae naturae* could be stolen and had this intention his mistake would be one of law and he would not be guilty of attempted theft since the crime intended was legally non-existent. The result would be otherwise, however, if he merely made a mistake of fact in thinking that the animal in question had been domesticated. It follows…that an endeavour can be an attempt even though the accused obtained the result that he desired and that result was not a substantive crime. The argument that if the physical act intended is not a crime the attempt to do it cannot be criminal is valid therefore only when the attempt is legally impossible judged by the act which the accused intended and taking the circumstances as he supposed them to be’ (my emphasis).

This statement appeared in all succeeding editions of this work (latest version fourth edition (2011) by Burchell at 573-574), and can be found in the fifth edition of Jonathan Burchell’s *Principles of Criminal Law* ((2016) 562, as well as in all previous editions of this work. It is a crisp, clear example which shows that a mistake as to one of the elements of a crime amounts to an attempt at the legally impossible, and thus will not give rise to liability. Unfortunately, the need to explain the decision in *Palmos* muddied the water in the second edition of *South African Criminal Law and Procedure*, published in 1982, where we find the following statement (466):

‘It seems now clear from Corbett JA’s reference in *Palmos* to a mistake giving rise to a putative crime and the weight of juristic opinion that for an attempt to be excusable on the ground of legal impossibility the accused must have endeavoured to commit a legally non-existent offence, i.e. he must have been mistaken as to the existence of the offence itself and not merely in respect of some aspect of a legally recognized offence’.

The identical passage may be found in succeeding editions of this work (latest version fourth edition (2011) 574), as well as in all editions of *Principles of Criminal Law* (latest version fifth edition (2016) 563). However, these two statements, found in the course of the same analysis, are obviously irreconcilable. Further, as has been stated above, the difficulties with the second statement are manifest, in the light of the fact that theft is a legally recognized crime.

The above discussion begs the question – in the light of the divergent views of the content of the first qualification in *Davies*, and the lack of further appeal court authority in point after *Palmos* – what is the law?

III Conclusion

First, as regards attempt at the *factually impossible*, the law is clear. It is necessary to assess liability for attempt in terms of the facts or circumstances as the actor believes

them to be at the time of acting. The rationale for this approach is, in line with legal policy and the legal convictions of the community, that if it is proved that the accused acted with intent to commit the offence and that his conduct would constitute the crime if the circumstances had been just as he believed them to be, then he is just as culpable (*Ndlovu* supra 28D-E) and in general just as dangerous as the accused who successfully consummates the offence.

In respect of attempt at the *legally impossible*, in South Africa we no longer have the difficulty of paying lip service to the maxim that ignorance of the law does not excuse. In South Africa, since the Appellate Division decision in *De Blom* (1977 (3) SA 513 (A)), it does. In principle then, if an accused is genuinely mistaken as to the law (and which rational person is going to set out to intentionally commit a crime that is impossible to commit?) he or she ought not to be held liable for attempt of that crime on the basis that *bona fide* mistake of law excludes intention. Thus the first qualification in *Davies* relating to attempt at a putative crime (legal impossibility) should include both mistake as to the existence of a crime and mistake as to the definition of an existing crime.

This is incidentally in line with both the US Model Penal Code (§5.01(1)(a)) and the English Criminal Attempts Act of 1981, both of which adopt a subjective approach to this form of attempt liability. In essence, what these instruments state, and what we need to state in order to be consistent with the leading case of *Davies*, is that there ought not to be liability where the accused's intended acts, even if completed, would not amount to a crime. It is necessary, in the final analysis, to judge accused persons against the *facts* as they believe them to be, but against the *law* as it actually is.

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Matters of Interest to Magistrates

JUDGES TOLD NOT TO MAKE TRADITIONAL RITUALS A CONDITION OF BAIL IN SEXUAL ASSAULT CASES

The supreme court of India has slammed judges who impose ‘wholly inappropriate’ bail conditions in cases of sexual violence, like requiring that the accused visit the woman concerned and give her gifts. The court has also ordered that judges, lawyers and prosecutors must undergo gender sensitivity training to stop language and bail conditions that retraumatise victims. The decision, which comes during international women’s month, is likely to be well received by women’s organisations, professional law bodies and the courts in Africa where rulings from India are often quoted with approval.

It’s hard to believe that a court, considering bail in a sexual harassment case, should stipulate that the accused must visit the woman concerned with ‘a box of sweets’ and request her to complete various traditional rituals with him, that would bind them together as ‘brother and sister’.

But the order gets worse: the court also instructed that the accused offer money to the woman’s son ‘for clothes and sweets’. He was also to photograph the interaction between himself and the woman and her son, and file the photos with the court.

The whole story played out in India, whose jurisprudence is influential in a number of African countries, and the result has been a landmark judgment from India’s supreme court.

Ibsen

The court not only criticised and overturned the bail conditions, it went even further with a wider ruling that seems like a highlight of this year’s international women’s month.

The court began its decision with this quote from the playwright Henrik Ibsen: ‘A woman cannot be herself in the society of the present day, which is an exclusively masculine society, with laws framed by men and with a judicial system that judges feminine conduct from a masculine point of view.’

The appeal was brought by a group of ‘public-spirited individuals’, worried about the precedent that such controversial bail conditions were setting. They asked the supreme court to direct trial courts not to make ‘observations and impose conditions’ in rape and sexual assault cases, that ‘trivialise the trauma’ experienced by survivors of sexual assault and that ‘adversely affect their dignity’.

Paternalistic

The judges said it was a sad fact that even though India was committed to equality for all, ‘many courts’ didn’t seem to realise that there was a problem. They said they were writing their judgment to address what seemed to be ‘entrenched paternalistic and misogynistic attitudes that are regrettably reflected at times in judicial orders and judgments’.

They expressed concerned about judicial decisions in cases involving sexual offences, particularly where children were targets of sexual assault, by judges who ‘granted bail on the plea that an agreement to marry’ had been reached between the parties. They were also alarmed by submissions showing that judges, adjudicating sexual harassment and rape cases, ‘have made shocking remarks on the character’ of the woman concerned.

The applicants wanted to stop judges from imposing inappropriate or peculiar bail conditions in sexual assault matters. By way of example they noted a case where the court told the accused to register ‘as a Covid-19 warrior’, so that he would be assigned work with Covid-19 disaster management.

Ostracised

Nor should bail conditions require the accused to go to the house of the woman concerned or meet the survivor and her family.

They wanted the supreme court to stop judicial ‘mediation’ between parties in sexual assault cases, particularly when mediation was aimed at getting the parties to marry each other.

In response, the judges said that in India violence against women was seen as acceptable in some communities. The culprits were often known to the woman but the social and economic ‘cost’ of reporting the crime was high. Fear of being ostracised by society was a ‘significant disincentive’ to report. ‘This silence needs to be broken.’

Stalking

Sexual violence included stalking and harassment, sometimes dismissed as ‘minor’ problems. But they were not minor, and were ‘regrettably triviliased and normalised, even romanticised and therefore invigorated in popular lore such as cinema’ even though they had a ‘lasting and pernicious effect’ on survivors.

Crime statistics showed certain kinds of offences against women had not declined. Courts had to be a forum where survivors could expect impartiality and neutrality. Using traditional rituals as a condition for bail ‘transforms a molester into a brother, by judicial mandate’. ‘This is wholly unacceptable and has the effect of diluting and eroding the offence of sexual harassment.’

‘Judges can play a significant role in ridding the justice system of harmful stereotypes. They [should not] engage in gender stereotyping.’ Under the Bangalore Principles of Judicial Conduct, judges are not to make ‘any comment that could affect the outcome or fairness of a case and they may not show bias or prejudice towards any person or group on irrelevant grounds.’

Chaste

'This court therefore holds that the use of reasoning or language which diminishes the offence … is to be avoided under all circumstances.' Judges should particularly avoid saying that a woman had behaved promiscuously, or that she had behaved in a way that was 'unbecoming of chaste women'.

Such attitudes should never be found in judicial decisions and could not affect whether to grant bail. It was 'especially forbidden' to impose conditions that exposed the survivor to secondary trauma, like mandatory mediation, requiring that the accused must in any way be in contact with the survivor.

Even a single case involving such conditions 'reflects adversely on the entire judicial system of the country'. The judges therefore directed that from now on, bail conditions should not 'require or permit' contact between the accused the victim but should rather protect the complainant from any further harassment by the accused.

Submissive

Bail conditions were to avoid reflecting stereotypical notions about women and their place in society. 'Discussion about the dress, behaviour or past "conduct" or "morals" of the [survivor]' was not allowed. Nor was any suggestion of a compromise 'marriage' to be made by a court.

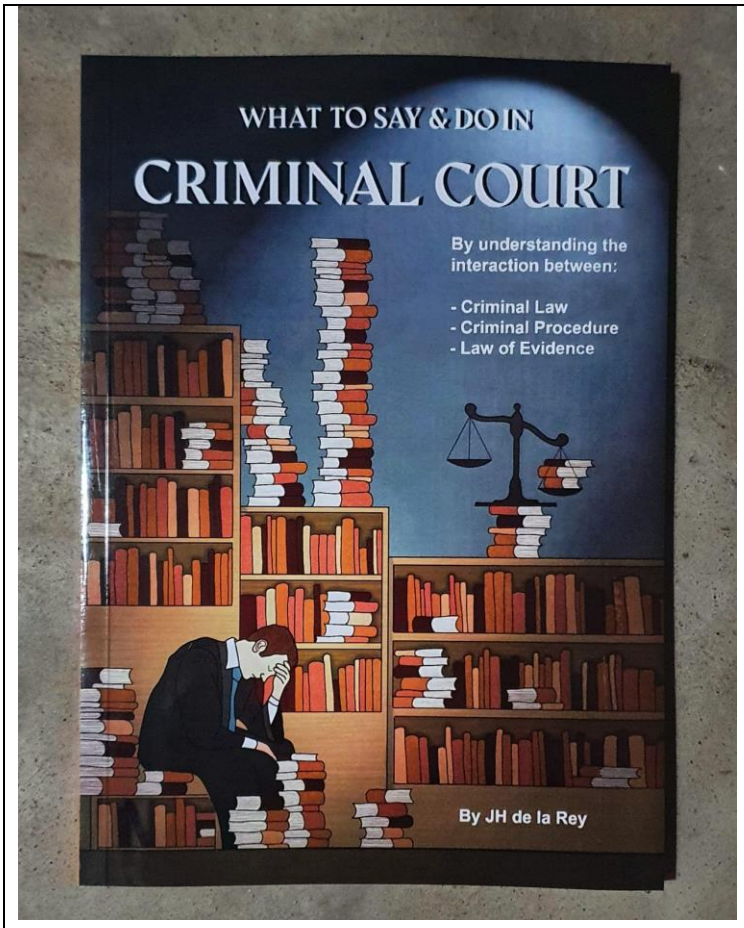
Judges were not to use any words that would shake the confidence of the survivor of the court's fairness. They were also not to express any stereotype opinion such as that women were weak and need protection, that they couldn't take decisions on their own, that men were the 'head' of a household and had to take all family decisions, that women should be 'submissive and obedient', that 'good' women were sexually chaste, that motherhood was the 'duty and role' of all women, that women were emotional and overreacted and so it was necessary to corroborate their evidence and that lack of evidence of physical harm in sexual offences cases should lead to an inference of consent.

The court also stipulated that judges, lawyers and prosecutors should have gender sensitivity training that emphasised the role that judges should play in eliminating misogyny. They requested the national judicial academy to devise suitable training courses for young judges and that the Bar council of India should ensure that similar training was included at law schools.

Carmel Rickard (The article appears on the africanlii.org website on 25 March 2021).

The judgment can be accessed here:
https://africanlii.org/sites/default/files/20318_2020_35_1501_27140_Judgement_18-Mar-2021.pdf

A Last Thought



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