e-MANTSHI

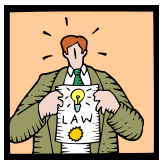
A KZNJETCOM Newsletter

January 2022: Issue 181

Welcome to the hundredth and eighty 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 Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), and with the approval of the Minister of Justice and Correctional Services, amended the rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa. The notice to this effect was published in Government Gazette no 45645 dated 17 December 2021. The rules amended are the following: 1, 16, 22 -26, 29, 31, 32, 38, 39, 41, 42, 54, 55, 60 and Annexure 1 to the Rules. The amended rules come into operation on 1 February 2022.

2. Certain sections of the Cybercrimes Act, 2020 has come into operation on the 1st of December 2021. The notice to this effect was published in Government Gazette no 45562 dated 30 November 2021. The notice to this effect can be accessed here:

https://www.justice.gov.za/legislation/notices/2021/20211130-gg45562re11363proc42-CyberCrimes.pdf

3. The date of commencement of s. 2 of Act 37 of 2013 to the extent that it inserts s. 36D (1) in the *Criminal Procedure Act 51 of 1977* was proclaimed in Government Gazette no 45739 of 13 January 2022. The date will be 31 January 2022.
According to section 36D (1) An authorised person or a registered medical practitioner or registered nurse is obligated to take either buccal swabs or intimate samples from certain designated persons. An authorised person is obligated to take samples from the following persons: (a) Those arrested but before appearance in court to be formally charged for a Schedule 8 offence; Those granted bail in respect of a Schedule 8 offence and if the buccal sample or bodily sample had not been taken during the arrest phase; (b) Those upon whom a summons in respect of any Schedule 8 offence has been served; (c) Those whose names appear on the National Register of Sex Offenders, or (d) Those who are charged or convicted by a court in respect of any offence which the Minister by notice in the Government Gazette has declared as an offence for the purposes of this subsection. The notice can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202201/45739pr48.pdf

.

Recent Court Cases

1. **S v Mangena (A81/2019) [2021] ZALMPPHC 1; 2022 (1) SACR 102 (LP) (20 January 2021)**

A Magistrate irregularly changed an accused's plea of guilty to not guilty and fabricated a version that a trial had taken place in which the accused was acquitted whilst the record showed that no trial had taken place.

Kganyago J.

[1] This matter was brought on special review by the Head of Court Lenyenye Magistrate court.

[2] On 3rd September 2019 the accused appeared before magistrate Ms R Govender on a charge of alleged contravention of a protection order. He pleaded guilty to the charge. After pleading guilty and as the trial court was about to explain to

him the provisions of section 112 (1) (b) of the Criminal Procedure Act[1] (CPA), the accused informed the trial court that he was seeking a legal representative from Legal Aid South Africa to represent him in that matter. On hearing that, the presiding magistrate informed the prosecution that the accused has decided to change his guilty plea and therefore she was recording a plea of not guilty in terms of section 113 of the CPA. The prosecution tried to bring it to the attention of the presiding magistrate that the accused was seeking legal representation and not changing his plea. However, the presiding magistrate responded by telling the prosecution that since the accused was seeking legal representation, she still had to change his plea, as the accused has to consult with his attorney, and they will decide. The guilty plea was accordingly recorded as that of not guilty. The matter was postponed to the 9th September 2019 for the accused to go and apply for a Legal Aid attorney.

[3] On 9th September 2019 the accused appeared in court represented by a Legal Aid attorney. The matter was postponed to the 23rd September 2019 for confirmation of the accused Legal Aid representation. On 23rd September 2019 the records were not yet transcribed, and the matter was postponed to the 14th October 2019 for transcription of the record. On 14th October 2019 Ms Govender was not in court and the matter was postponed the 22nd October 2019 for the presiding magistrate and also for the case docket. The transcribed record does not show what transpired on the 22nd October 2019, but shows that on the 11th November 2019 the matter was postponed to the 2nd December 2019 for the presiding magistrate. Again on the 2nd December 2019 the matter was postponed to the 10th February 2020 for the presiding magistrate. On the 10th February 2020 the matter was postponed to the 24th February 2020 for trial.

[4] On 24th February 2020 the accused did not attend court and a warrant for his arrest was authorized. The accused bail money was provisionally forfeited to the State and the return date was the 9th March 2020. On 9th March 2020 the accused appeared in court in person, and the warrant for his arrest was cancelled and his bail was reinstated. The matter was postponed to the 16th March 2020 for the accused Legal Aid attorney. On 16th March 2020 the matter was postponed to the 4th May 2020 for State witnesses and trial. On 4th May 2020 the matter was postponed to the 8th June 2020 for the presiding magistrate who was not in court that on that day.

[5] On the 26th May 2020 the matter was in court before the presiding magistrate Ms Govender. From the transcribed record it seems that the presiding magistrate had requested the prosecution to secure the attendance of the accused for the 26th May 2020, but the prosecution could not succeed in doing that. After that the presiding magistrate proceeded to deliver her judgment in the absentia of the accused, and the accused was found not guilty and discharged.

[1] 51 of 1977

[6] When the Head of Court picked up this acquittal during his routine office inspection, he requested some comments from the presiding magistrate and the prosecution. In her reply the presiding magistrate informed the Head of Court that from the charge sheet that was handed to her, her judicial inscriptions of the 9th September 2019 appears to have been taken out of the charge sheet, and that she reserves her comments until she had listened to the full record of the 9th September 2019 on the recording machine.

[7] The prosecution in its comments has stated that the matter was postponed to the 8th June 2020. However, on the 26th May 2020 the presiding magistrate called the matter without the accused or complainant being present. The court proceeded to dispose the matter by acquitting the accused, and that the State was not afforded an opportunity to address the court on a postponement of the matter.

[8] When this matter was laid before me on special review, I requested some comments from the presiding magistrate and she commented as follows:

"[1] The Honourable Judge Kganyago's directives dated the 27th August 2020 received on 28th August 2020, the contents thereof being noted.

[2] The handwritten record of 09/09/2019 seems to be mislaid, for reasons unknown but part of the transcribed record of the same date has been transcribed.

[3] This case was indeed mechanically recorded however that part of the record after the tea break cannot be retrieved from the recording system.

[4] This matter stands out as a sore thumb in the Judicial Officer's mind as the Legal Aid attorney that handled this case attended court after a long bereavement of her nascituris fiction.

[4.1] Subject to further directives by the Honourable Judge I wish to place on record that the Judicial Officer applied careful introspection of the matter at hand and notes the following procedure was used to take the matter to finality.

[4.2] On 3rd September 2019, the Accused initially pleaded guilty, and section 112 (1) (b) procedure was used as he was in person, but alluded to a defense, thereafter a section 113 change of a plea was inscribed on the J15. Rights to Legal Representation was reiterated and the Accused favoured legal aid.

[4.3] The matter was postponed for legal aid to take instructions and continue with the trial.

[4.4] The Judicial Officer was at all times extremely vigilant of the norms and standard set in Limpopo.

[4.5] The matter proceeded on 9th September 2020 before and after tea break with the state calling the complainant (victim) to adduce evidence under the watchful eye of the Judicial Officer overseeing that Justice is done.

[4.6] The defence attorney (legal aid) took the court by surprise with excellent cross examination of the complainant who failed dismally in her version of events that led to the accused appearing before the court.

[4.7] The state did nothing extraordinary to rebut the cross examination and closed its case.

[4.8] The defense attorney closed her case without calling the accused.

[4.9] Arguments by both parties were adduced and due to the lateness of the hour approximately 16h05 on 9th September 2020, the matter was postponed for judgment.

[4.10] The court gave judgment after due consideration of the evidence adduced and acquitted the accused.

It is the humble submission by the Judicial Officer of record that the decision regarding the Acquittal (accused found not guilty) of the accused to be confirmed as proper procedure has been followed with due diligence, after consideration of the Norms and Standard set in Limpopo Province"

[9] The presiding magistrate received the review query from the reviewing Judge on the 28th August 2020 and she signed her comments on the 7th September 2020. Therefore, the 9th September 2020 referred in her comments is incorrect. Even in her reply dated 6th July 2020 to the Head of Court she refers to the inscriptions made on the charge sheet for the proceedings of the 9th September 2019. Therefore, the correct date is the 9th September 2019 as captured on the transcribed record, her reply to the Head of Court, and that the 9th September 2020 is just a typing error.

[10] I have also requested the opinion of the Deputy Director of Public Prosecutions (DDPP). The DDPP have furnished me with a helpful opinion and I am indebted to them. The DDPP is of the opinion that the proceedings were not in accordance with justice and should be set aside.

[11] The first issue to be dealt with is the manner in which the presiding magistrate has recorded the accused's plea of not guilty. When the trial started, the accused pleaded guilty to the charge as laid against him. As the presiding magistrate was about to explain the provisions of section 112 (1) (b) of the CPA, the accused informed the trial court that he was seeking to be represented by a Legal Aid attorney. Without entertaining the accused's request, the trial court took that as a change of the guilty plea by the accused, and it recorded a plea of not guilty in terms of section 113 of the CPA.

[12] Section 113 of the CPA read as follows:

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

court of such allegation.

(2) If the court records a plea of guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecution explicitly indicates otherwise."

[13] The prerequisite for a presiding officer to record a plea of not guilty in terms of section 113 are that (i) there must be doubt whether the accused is in law guilty of the offence which he or she had pleaded guilty; (ii) or it must appears to the court that the accused does not admit an allegation in the charge; (iii) or that the accused has incorrectly admitted any such allegation; (iv) or that the accused has a valid defence to the charge; (v) or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand. It does not mean that all the five prerequisites should be present at the same time for the presiding officer to record a plea of not guilty in terms of section 113 of the CPA. Usually whether either of the five prerequisite is present, will be determined during the questioning of the accused after pleading guilty in establishing whether the accused is admitting all the elements of the offence, or when the accused is testifying in mitigation of sentence. That is the reason the section state that at any stage of the proceedings but before sentence is passed.

[14] In *Shiburi v S*[2] Makgoka AJA as he was then said:

"When questioning the accused in terms of s 112 (1) (b) the court's duty is to determine whether an accused factual statements and answers in his or her plea of guilty adequately support the conviction on the charge. It is not the courts' function to evaluate the plausibility of the answers, or to determine their truthfulness at this stage of the proceedings. Instead, for the purposes of the section, the accused explanation must be accepted as true. On that premise, the court should consider whether the explanation discloses a possible defence in law to the charge he or she pleaded guilty to. As is plain from the text of the section, the presence of doubt is a jurisdictional factor to trigger the application of the procedure laid down is s 113. Thus, once a basis exists, objectively considered, the court has no residual discretion but to apply the procedure set out in s 113"

[15] There must be the basis for the presiding officer to record a plea of not guilty in terms of section 113. The presiding officer will be guided by what the accused tells the court during questioning by the court or when the accused testify during mitigation of sentence, and not what the presiding officer thinks will transpire. Judicial officers should guard against preconceived views. (See *Bula and Others v Minister of Home Affairs and Others*[3]**)**

[16] In the case at hand, the presiding magistrate was about to explain the

[2] [2018] ZASCA 101; 2018 (2) SACR 485 (SCA) (29 August 2018) at para 19
[3] 2012 (4) SA 560 (SCA) at para 56

provisions of section 112 (1) (b) to the accused, when the accused, informed the court that he was seeking to be represented by a Legal Aid attorney. On that basis the presiding magistrate invoked the provisions of section 113 of the CPA. Her reasoning for that was that when the accused seeks legal representation, she had to change the plea as the accused had to consult with his attorney, and thereafter they will decide. This in my view, is a wrong test that was followed by the presiding magistrate. She was pre-empting what might transpire after the accused had consulted with his legal practitioner, and that was based on pure speculation. She invoked the provisions of section 113 based on her own speculation and not on what the accused had placed before court. In my view, the presiding magistrate had misdirected herself in the manner in which she had invoked the provisions of section 113. The application before her was that of legal representation, and that is what she should have dealt with. Whether the accused at a future date would have changed his plea or not, that was not an issue that should have concerned her at that stage.

[17] The second issue to be dealt with pertains to the record of the proceedings. According to the presiding magistrate, her hand written notes of the 9th September 2019 seems to have been misplaced for reasons unknown to her. The presiding magistrate has further stated that despite her hand written notes being misplaced, part of the proceedings for that date have been transcribed. She had also stated that part of the record cannot be retrieved from the recording system. On her foot note in reply to the reviewing Judge, she has stated that a possibility exist that the case was recorded on DCRS which was no longer in use as they have migrated to CRT, and that is the reason why the record cannot be transcribed as it no longer appears on the ICMS. What the presiding magistrate is highlighting is that the record that is placed before the reviewing Judge is incomplete and that the incomplete record cannot be reconstructed since her hand written notes were missing and also that since they have migrated from DCRS to CRT, the records could no longer be retrieved.

[18] The presiding magistrate went on to state that the matter proceeded on 9th September 2019 before and after tea break with the State calling the complainant to adduce evidence under oath under the watchful eye of the judicial officer overseeing that justice was done. She had further stated that the defence attorney took her by surprise with her excellent cross examination of the complainant who had failed dismally in her version of the events. According to her, the defence attorney thereafter closed the accused case without calling the accused to testify. Thereafter both parties submitted their closing address and the matter was postponed for judgment.

[19] The proceedings of the 9th September 2019 wherein the complainant allegedly testified and the parties submitted their closing address does not form part of the transcribed record. The alleged missing part constitute the whole trial which is vital to this court to determine whether the proceedings appears to be in accordance with

justice. In the absence of that missing part of the record it will be difficult for this court to determine whether the proceedings were in accordance with justice or not.

[20] In *S v Phakane*[4] Zondo J said:

"[39] As to when it can be said that an incomplete record will result in the infringement of an accused's right to a fair appeal, in S v Chabedi the Supreme Court of Appeal said:

'(T)he requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial…The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in abstract. It depends inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal'.

This passage was quoted with approval by this court in Schoombee.

[40] In the present case the full court did not have before it a record on the basis of which it could fairly assess whether the trial court's conviction of the applicant was correct. The trial record available to the full court was simply not adequate for a proper consideration of the applicant's appeal. Therefore, the applicant's right of appeal was frustrated by the fact that material evidence was missing from the record."

[21] In the case at hand, the transcribed record is not adequate and the defects are so serious as the entire evidence upon which the conviction has been based is missing. The transcribed record is not adequate for a proper consideration of the review. The proper remedy will be to set aside the proceedings in its entirety.

[22] The third area of concern in this matter and probably the most disturbing, is the response of the presiding magistrate after being requested by the reviewing Judge to give her comments in this matter. The impression created in her response is that on the 9th September 2019 there was a full blown trial, but that the proceedings for that date have not being transcribed in full. Further that for reasons unknown to her, her hand written notes for the 9th September 2019 has been removed from the charge sheet. This is a serious accusation which had some elements of gross misconduct by whoever might have removed her hand written notes from the charge sheet.

[23] It will be helpful to quote directly from the record in relation to the proceedings of the 9th September 2019 to illustrate the serious discrepancy in the presiding magistrate's response and the transcribed record:

"PROCEEDINGS ON 9TH SEPTEMBER 2019

PROSECUTOR: The state calls case number B81/2019 the state v Victor Mangena. The matter is on the roll today for accused to apply for Legal Aid your

[4] 2018 (1) SACR 300 (CC) at paras 39 and 40

worship.

COURT: Is it B court? Is it a B court matter?

PROSECUTOR: It is A, your worship. I mixed it. The matter is on the roll for accused to apply for Legal Aid. I see it is already [indistinct]

COURT: Legal Aid, are you on record?

PROSECUTOR: Thank you, your worship.

COURT: The date again?

PROSECUTOR: May be postponed for further hearing, your worship. For state witnesses and further hearing. Counsel's [indistinct] diary. Counsel, 7 October your worship, will be suitable for further hearing.

COURT: Ms Legal Aid you are still to confirm your instructions, confirmation of Legal Aid.

DEFENCE ATTORNEY: Your worship, may I place on record for the accused. I also confirm the date of the 7th October your worship for further hearing.

COURT: For consideration of Legal Aid only

DEFENCE ATTORNEY: Correct, your worship. I was not there when [indistinct]

COURT: So how can we place it for hearing.

DEFENCE ATTORNEY: Your worship, we have to postpone maybe for transcribed record but the best thing was for to receive the record, that will be the fastest way. But I will follow the transcribed record, I do not know how long does it take, maybe two weeks for transcribed record.

DEFENCE ATTORNEY: Transcribed record, your worship, for two weeks.

PROSECUTOR: Can we place it on the 23 September, your worship.

COURT: 23rd day of?

PROSECUTOR: Your worship, is it, the clerk of court is saying something, I cannot hear him.

COURT: Could we have order please. Mr Mangena, Ms Prosecution?

PROSECUTOR: Your worship, the accused person pleaded but I was not there but I do not have a problem, your worship to listen to the record in the morning of that day when the trial will be proceeding to hear what did he say. But however for Legal Aid, your worship, I think maybe she might need a transcribed record. But however I am not sure if she does need the transcribed record because the accused person has already pleaded guilty, said something that might incriminate him if she advise him otherwise. So she needs to prepare herself for that. I do not know whether she needs a transcribed record or rather she will also do the same that I am going to do on the date of the trial, your worship. It is up to her. If she says she wants transcribed record it is the accused person right. If she says she will listen to the record like I do, I am not sure whether she will choose the listening or transcribed record your worship.

COURT: Legal Aid, are you confirming your appearance today that you have also accepted that this particular person, Mr Mangoma, Mangena, you will continue with the matter because I know that Legal Aid normally has to do the means test before [indistinct] is accepted on Legal Aid.

DEFENCE ATTORNEY: Your worship, I am confirming the instruction for today, your worship. Further that his application will be processed and then if he qualifies to be represented by Legal Aid, your worship, that is when I will be able to continue and confirm his plea, your worship, that has been changed. And also the transcribed records, your worship.

COURT: What is your full names? Full names?

ACCUSED: [Indistinct]

COURT: The matter is postponed to the 23 October 2019 for confirmation of Legal Aid and transcript, the transcribed record, your bail is extended, you are warned for 8:30.

INTERPRETER: 23?

COURT: October

DEFENCE ATTORNEY: September your worship, two weeks, I am not sure because I was waiting for her to confirm if it is two weeks. I do not know how long does it take, your worship. It is only her that can assist us…[intervenes]

COURT: With what things

PROSECUTOR: The transcribed record, how long does it take, I do not know, your worship. But we may postpone it for two weeks, the 23rd then for her confirmation with Legal Aid and we will see what are the results on that day, your worship. 23 September, not October, two weeks. 14 days your worship.

COURT: Sir this matter is postponed to the 23rd September 2019 for confirmation of Legal Aid only. Your bail is extended, you are warned for 8:30.

MATTER POSTPONED TO 23RD SEPTEMBER 2019 [09:40]

COURT ADJOURNS

[24] From this quote, it is clear that on the 9th September 2019, the matter was not trial ready and State witnesses were not even before the court. The 9th September 2019 was for the accused to apply for Legal Aid attorney. Even though the Legal Aid attorney has attended court on that date, she was still to confirm instructions to represent the accused. On the 9th September 2019 there was also the issue of the transcribed record of date on which the accused had pleaded. On the 9th September 2019 the trial court had postponed the matter to the 23rd September 2019 "for confirmation of Legal Aid only" and the court adjourned at 9:40. It is clear that on 9th September 2019 this matter did not proceed beyond tea time.

[25] It is mind boggling as to which proceedings is the presiding magistrate referring wherein a full blown trial took place. The presiding magistrate's reply to the query letter of the reviewing Judge is not in line with the transcribed record, specifically the proceeding of the 9th September 2019. In my view, this is a deliberate attempt by the presiding magistrate to mislead this court in trying to cover herself for the irregularity committed by her in the manner in which she had acquitted the accused. She had created imaginary proceedings of the 9th September 2019 despite the transcribed record speaking for itself. Even if her hand written notes might have been misplaced as she claims, the record of the 9th September 2019 gives a full picture of what

transpired on that date, and that record does not appear to be incomplete.

[26] With regard to the proceedings of the 3rd September 2019, the presiding magistrate has stated that the accused had initially pleaded guilty, and section 112 (1) (b) procedure was followed but the accused alluded a defense, thereafter a section 113 change of plea was inscribed on the J15. The record of the 3rd September 2019 shows that as the trial court was about to explain the section 112 (1) (b) procedure, the accused requested Legal Aid representation, and that is what triggered the presiding magistrate to act in terms of section 113 of the CPA. The record does not show which defence had the accused alluded which prompted the presiding magistrate to act in terms of section 113 of the CPA. What the record shows is that the accused was at no stage questioned in terms of section 112 (1) (b) of the CPA. It seems that the presiding magistrate is trying to manufacture evidence which does not exists.

[27] The reviewing query letter was specific as to what the presiding magistrate should comment on. It read as follows:

"[1]…On reading the memo requesting automatic review, there are serious allegations made against you in the manner in which you have acquitted the accused on 24th May 2020.

[2] As per your letter dated 6th July 2020 addressed to S Phakula Head of Court, you have also made serious allegations that your hand written notes have been taken out from the charge sheet. In conclusion you have stated that you reserve your comments after you have listened to the full record of 09/09/2019 on the recording machine. Unfortunately, we don't have your comments after listening on the recording machine.

[3] In order to enable us to have a full picture of this matter, kindly let us have your comments within seven (7) days of receipt of this letter."

[28] The presiding magistrate has failed to address the circumstances that led her to bringing the trial forward to the 26th May 2020 despite the matter having been properly postponed to the 8th June 2020 in an open court. The presiding magistrate has failed to address the allegations raised by the prosecution that on the 26th May 2020 when she delivered her judgment, she did not give them an opportunity of addressing the court regarding the postponement of the matter. In her reply, the presiding magistrate has given a picture that shows that on the 9th September 2019 there was a full blown trial for the whole day, and thereafter the matter was postponed for judgment, but did not specify to which date was the matter postponed. If indeed the matter on merits was finalized on the 9th September 2019 and what was outstanding was for the presiding magistrate to deliver her judgment, logic dictates that for such a short trial it would not have been postponed to the 8th June 2020 for judgment. Something does not add up here. There are more questions than answers.

[29] The presiding magistrate in replying the Head of Court has stated that she will

make her comments after listening on the recording machine. In replying to the review query letter, she did not state whether she had listened to the recordings or not. However, what she had stated in her reply is that part of the record after tea break cannot be retrieved from the recording system. The transcribed record of the 9th September 2019 shows that the accused's matter was adjourned at 9h40 after it was postponed to the 23rd September 2019, and there were no further proceedings in relation to that matter on that date after tea break. Again this shows that the presiding magistrate is trying to mislead this court by creating imaginary proceedings which did not exists. This court views that in a serious light since it comes from a judicial officer who had taken an oath to uphold the Constitution and dispense justice without fear, favour or prejudice. A judicial officer is obliged to display the uttermost honesty, intergrity and honourable conduct at all material times when executing his/her duties. The reply by the presiding magistrate in relation to the proceedings of the 9th September 2019 leaves much to be desired. It will therefore be proper if copy of this judgment is brought to the attention of the Magistrates Commission.

[30] In conclusion, the manner in which the presiding magistrate has recorded the accused plea of not guilty in terms of section 113 of the CPA, the manner in which the accused was acquitted in his absentia, and also misleading this court that the complainant was called to testify whilst no evidence was ever led, amounts to serious gross irregularities which taint the whole proceedings. The proceedings were therefore not in accordance with justice and stand to be reviewed and set aside.

[31] In the results I make the following order:

31.1 The acquittal of the accused stand to be reviewed and is set aside.

31.2 The matter is remitted to the trial court for a trial *de novo* before a different magistrate should the State still wish to pursue this matter.

31.3 Copy of this judgment be sent to the Magistrates Commission for their attention.

From The Legal Journals

Hoctor, S

Mistaken identity of the victim in criminal law

OBITER 2021 676

The article can be accessed here:

https://obiter.mandela.ac.za/article/view/12908/17926

Mukheibir, A

Barking up the wrong tree – The *Actio de Pauperie* revisited. Van Meyeren v Cloete (636/2019) [2020] ZASCA 100 (11 September 2020)

OBITER 2021 703

The article can be accessed here:

https://obiter.mandela.ac.za/article/view/12911/17829

Delano Cole van der Linde

Warrantless searches and awards for damages in light of the judgment in Shashape v The Minister of Police Case No.: 1566/2018

OBITER 2021 720

The article can be accessed here:

https://obiter.mandela.ac.za/article/view/12913/17773

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

Contributions from the Law School

The element of 'taking' in the crime of abduction

The crime of abduction in South African law may be defined as:
'unlawfully taking a minor out of the control of his or her custodian with the intention of enabling someone to marry or have sexual intercourse with that minor…' (Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 554).
Kidnapping and abduction may share similar features in respect of the unlawful conduct upon which these crimes are based, but they protect different legal interests. While kidnapping protects the liberty of the individual (underpinned by the right to freedom and security of the person contained in s 12 of the Constitution), abduction seeks to protect parental authority over a minor child. This has led to the continued utility of the crime of abduction being questioned, given that the crime of kidnapping is available to punish any non-consensual taking of a minor (Milton 555). Indeed, even in the case law, what is referred to as 'abduction', often associated with subsequent rape, is in fact kidnapping, rather than the common-law crime of abduction (see, e.g., *S v Khumalo* 2009 (1) SACR 503 (T)). It is the criminalization of the abductor's conduct, notwithstanding the fact that the abductee has often consented to it, that makes the question of how a 'taking' should be defined for the purposes of the crime of abduction an interesting one.
It has been consistently held, in several decisions, that there may be a 'taking' even where the abductee fully consents (see, *inter alia*, *R v Schut* (1881) 1 Buch AC 37; *S v Marais* (1889) 6 Cape LJ 110 (O); *S v Tobie* (1899) 16 Cape LJ 45 (O); *R v Armitstead* (1905) 26 NLR 505; *R v Adams and Ibrahim* 1911 CPD 863; *R v Clark* 1914 TPD 50; *R v Van der Merwe* (1927) 48 NLR 446; *R v Kahn* 1928 CPD 328; *R v Weinstein* 1930 CPD 357; *R v Jorgenson* 1935 EDL 219; *R v Churchill* 1959 (2) SA 575 (A); and see Milton 559). This rule operates even where the abductee persuades or induces the abductor to act (*R v Van der Merwe supra*; *R v Kahn supra*; and *R v Hanna* 1937 TPD 236). The rationale for this approach is that 'otherwise it would mean that girls would be entitled to leave the home of their parents and go away with any man who was willing to take them in his charge…' (per Bale CJ in *R v Armitstead supra* 512). This quote is not reflective of the fact that in terms of the present law abductees can include boys, and that the custody rights of guardians would be protected (see the above definition, and Burchell *Principles of Criminal Law* 5ed (2016) 666).

The ‘taking’ element was defined in *R v Ismail* (1943 CPD 418 at 420) as either ‘a physical taking, as, for instance, in a vehicle, or…a taking by means of suggestion, inducement, persuasion’.

Whilst the first form of taking is self-explanatory, it is clear that the courts interpret the latter form, constructive taking (dubbed a ‘moral taking’ by Davis J in *R v Ismail supra* 421), broadly. In *R v Van Breda* 1931 GWL 11, for example, the appellant’s conviction for abduction was upheld despite the court indicating that the appellant had neither persuaded nor induced the complainant to go with him. Although the complainant initiated the entire process, the conviction was based on the fact that the appellant agreed to take her away. Similar reasoning was adopted in confirming the conviction in *R v Nel* 1923 EDL 82. It follows that the accused need not accompany the minor when she leaves the parental home. Whilst it is evident that the moral guilt of abduction ‘may vary infinitely’ (‘where the girl not only consents, but actually urges the man to take her away, it becomes very small’ (*Barnard v R* 1907 TS 270 271)), criminal liability for abduction is widely construed.

Van Oosten points out that the ‘taking’ can, following the decision of the court in *S v Killian* 1977 (2) SA 31 (C), even be committed by omission, where, for example, an accused takes a girl out for the evening, without the intention to have intercourse with her, but later changes his mind (irrespective of the role of the girl in this regard), and does not return her to the control of her parents (Van Oosten ‘Vonnisse: Abduksie: *S v Killian* 1977 2 SA 31 (K)’ 1977 *THRHR* 399 at 400. See also *Brand v R* 1943 (2) PH H173 (O)).

However, whilst the courts have interpreted the notion of a ‘taking’ broadly, it is clear that there must be an abduction, and not merely a seduction (*R v Adams and Ibrahim supra* 870; *R v Hanna supra* 239; and *S v Sashi* 1976 (2) SA 446 (N) 447F-G). The distinction between these concepts is customarily drawn on the basis that abduction requires the intention to remove the minor at least for ‘a substantial period’ (Burchell 670). Further, mere passivity or acquiescence on the part of the accused is not enough to found liability (*R v Pearston* 1940 OPD 153 at 156); *R v Marseti* (unreported, cited in *R v Ismail supra* 420-421); *Cornick v R* 1957 (2) PH K140 (C); *S v Katelane* 1973 (2) SA 230 (N) 231G). Therefore abduction is not committed where, having provided neither the physical means of leaving control nor inducement to do so, the accused takes a girl in or lives with her after she has removed herself from control (Milton 559).

Although a number of directive principles have arisen out of the case law, it appears that a measure of uncertainty remains with regard to the evaluation of whether a ‘taking’ has occurred, not least because ‘it may be difficult sometimes to distinguish between an abduction and an assignment for the purpose only of carnal connection amounting merely to a seduction’ (*Brand v R supra* 158). Moreover, where the minor has played a leading role in the leaving, it is often unclear whether there has actually been a ‘taking’ by the accused.

Snyman has suggested that the word ‘take’ be replaced by the word ‘remove’ in the definition of the crime (Snyman *A Draft Criminal Code for South Africa* (1995) 32), on the basis that the word ‘remove’ is wide enough to give a court freedom to interpret it

widely (108). However, it is submitted that the term 'taking' can be retained, if it is understood that the conduct of the accused must be an effective cause of the minor accompanying him. This approach was adopted in *R v Pearston supra* 156, where the appellant's conviction was overturned on the basis that there was 'no causal connection between [the appellant's] assistance and [the complainant's] absconding'. Reliance on this approach, in terms of which the courts seek to establish a sufficient objective causal link between the accused's acts and the loss of control of the parents or custodians of the minor, should enable the courts to draw the often tricky distinction between abduction and seduction, or between a taking away and a mere facilitation of the complainant's absconding from parental control. It further allows the courts to apply an objective test in assessing conduct, rather than the intention of the accused being determinative of whether the requisite 'taking' has occurred. If the accused's conduct is indeed the effective cause of the minor's removal from the control of her or his parents or guardians, then whether or not the removal is physical or constructive in nature, or whether or not it arises out of an act of commission or an omission, it should be regarded as a 'taking' for the purposes of the crime of abduction.

Shannon Hoctor
Stellenbosch University

Matters of Interest to Magistrates

UGANDAN COURT PUTS WIDOW'S RIGHTS AHEAD OF CULTURAL PRACTICES

By Carmel Rickard

In a judgment that strikes a blow for women's equality in the face of strong cultural practices, the Ugandan high court has ordered that a widow may decide where her deceased husband may be buried. This despite the wishes of the man's family, who wanted him laid in an ancestral burial ground and who wanted the woman to be barred from in any way 'interfering' with the burial. Before making its decision, the court asked for expert witnesses to provide evidence about the burial traditions of the Ndiga clan. And, in its conclusion, the court urged that ordinary members of the public should be encouraged to adopt a culture of writing wills indicating their preferences about property distribution and burial preferences. The judge said this would reduce the number of cases handling burial dispute matters, and would promote peaceful relations between families.

At the centre of this court dispute is a family divided over where Christopher Kyobe, who died of Covid in Switzerland during October, should be buried.
His wife of 28 years – they married in Uganda in 1993 – brought his body back from Switzerland where they had lived, because she said he had told her that he wished to be buried at his matrimonial home in Mukono.
But his birth family disagreed with her decision. In a court application, his siblings and half-siblings (their father had 20 children) insisted that he should be buried at the family's ancestral burial grounds where his own father was buried.

Graveyard

One of the siblings, the first applicant, said it was necessary for his half-brother to be buried in the ancestral burial grounds. However, in cross examination it turned out that even his own father and grandfather were not buried in the same burial grounds, but lay in two different graveyards, about seven miles apart.
In her evidence, the widow said that her husband had told her he wanted to buried in Mukono where they had built their house during 1997, and that he wanted to be buried at the church there. He specifically said he did not want to be buried where his family is 'because he was not treated well when he was young'.
According to the siblings, burial was a cultural affair, based on traditions, norms and customs that are protected and promoted by law including the constitution.

Respect

Counsel for the widow, however, said her deceased husband did not 'espouse' the customs of the Ndiga claim. True, when he visited Uganda he would visit the graveyard where his father was buried, but that was out of respect for his father and not because he wanted to be buried there himself.
The widow's legal team also raised the important question of constitutionally-enshrined equal rights between men and women. The applicants were half-siblings of the deceased man and clearly had no close relationship with him.
The widow, however, was the closest person to her husband, and was best placed to know his wishes.

Oppressive custom

Counsel further raised the controversial issue of gender equality, saying the half-siblings did not come with clean hands and were 'hiding under an oppressive custom of the Ndiga clan' which denied widows the right to bury their husbands. He urged the court to find that a widow's rights over the body of her deceased husband should carry more weight than any other rights, and that customs and traditions denying a widow that right were 'oppressive'.
Lawyers for the half-siblings said they wanted the court to acknowledge that burial in Buganda 'follows the patriarchal lineage' and make an order accordingly.
Judge Alice Komuhangi Khaukha, who heard the matter, said she wanted more clarity on these matters, and invited the prime minister of the traditional Buganda

kingdom to identify someone who could come to court and help her understand the burial requirements of the Ndiga clan.

Haunting

This expert witness said that under Ndiga custom, if someone died without a will in which burial arrangements were stipulated, they should be buried where the grandfather is buried. Asked the reason for this practice, the witness said it was to stop ghosts from haunting those who remain. He conceded, however, that if someone were buried away from the ancestral home, this would not amount to 'an abomination'.

The judge also examined the statutory law that applied when someone died without a will. She pointed out that the relevant provisions recognised that a widower or widow was the 'most entitled' to apply for the power to administer the deceased's estate. 'Brothers and sisters will only come in where there is no widower, widow and children'.

The judge said the constitution which spoke of equal rights in and during marriage and at its dissolution, meant that the couple was expected to 'live independently and exclusively of any other person, including their parents and/or brothers and sisters and clan members.'

Widow

In the absence of a will stating where someone should be buried, the next person to determine how the deceased's affairs should be managed, including where he or she should be buried, is 'the widow as opposed to half-brothers and half-sisters.'

Finding that the widow was the correct person in the circumstances of this case to decide about the burial, the judge then looked at the Baganda cultural practices in relation to burial.

The right to culture was not an 'absolute right' or one that allowed no deviation, she said.

Abomination

When people married, they shared their lives more closely with their partners than with even their close family. The expert on Baganda traditions had testified that it was 'not an abomination' for someone to be buried elsewhere than the ancestral grounds, and the judge therefore found that Baganda cultural practices could be deviated from where someone chose to do so, as happened here.

'Traditions, custom and norms that deny a widow [the] right to determine how her deceased husband should be buried' were inconsistent with the equality provisions of the constitution, and were thus oppressive and discriminatory.

The judge thus held that denying the widow the right to bury the deceased 'would not only be contrary to natural justice but would also be discriminatory in nature'. It would subjugate the 'wishes and rights' of the widow to the wishes of her deceased husband's family 'and it would create a marked inequality in the rights afforded to men and those afforded to women upon the death of their spouses'.

Good conscience

If, in this dispute, the wife had died first, 'this suit would not be in court' because it would be accepted that the widower should decide the location of his wife's burial since the woman became a member of her husband's family when she married.

'It would go against justice, equity and good conscience if I denied (the widow) the right to bury the deceased in a situation where even the supreme law of our land provides for equality between men and women in all spheres of life.'

The judge added that there was a pressing need to encourage the culture of writing wills. This would reduce the court's backlog and would promote peaceful relations between family members, she said.

In her order, the judge gave the widow the right to bury her husband's body at their matrimonial home in Mukono. She also stipulated that the siblings could not claim any burial rights or interfere with the burial but that they were allowed to attend the burial if they so wished.

(The above article appeared in 'A Matter of Justice', Legalbrief, on 9 December 2021)

A Last Thought

[A]ll judges make legal errors. Sometimes this is because the applicable legal principles are unclear. Other times the principles are clear, but whether they apply to a particular situation may not be. Whether a judge has made a legal error is frequently a question on which disinterested, legally trained people can reasonably disagree. And whether legal error has been committed is always a question that is determined after the fact, free from the exigencies present when the particular decision in question was made….

[J]udges must be able to rule in accordance with the law which they believe applies to the case before them, free from extraneous considerations of punishment or reward. This is the central value of judicial independence. That value is threatened when a judge confronted with a choice of how to rule-and judges are confronted with scores of such choices every day-must ask not "which is the best choice under the law as I understand it," but "which is the choice least likely to result in judicial discipline?"

In re Curda, 49 P.3d 255, 261 (Alaska 2002)