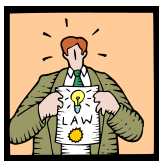
e-MANTSHI

A KZNJETCOM Newsletter

February 2023: Issue 193

Welcome to the hundredth and ninety third 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 The Rules Board for Courts of Law has repealed the Rules Regulating Matters in respect of the Small Claims Court published under Government Notice No. R1893 on 30 August 1985 and fixed 1 April 2023 as the date of commencement of the Rules Regulating Matters in respect of the Small Claims Court published under Government Notice No. R2573 on 7 October 2022. The notice in this regard was published in Government Gazette no 48067 dated 17 February 2023. The notice can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202302/48067rg11543gon3058.pdf

2. The Criminal Law (Forensic Procedures) Amendment Act 8 of 2022 is coming into operation on 3 March 2023. The notice to this effect was published in Government Gazette no 48107 dated 24 February 2023. The amendment Act amends section 7 of the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013.
The notice can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202302/48107pro116.pdf

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Recent Court Cases

1. S v Muridzo; S v Ramafikeng (325/2022;324/2022) [2023] ZAWCHC 32 (20 February 2023)

A court is not empowered ***only*, to impose a fine in terms of section 17(e) of the Drugs and Drug Trafficking Act, 140 of 1992 which payment is enforced by section 287(1) of the Criminal Procedure Act 51 of 1977 where a period of imprisonment is imposed as an alternative to such a fine, without an additional period of direct imprisonment.

Henney, J (Le Grange, J concurring)

Introduction

[1] This is a special review in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977 ("the CPA") transmitted to this court by the senior magistrate of Worcester ("the senior magistrate"), after it was discovered, in an oversight of cases that was conducted at the Laingsburg Magistrate's Court that in two cases, the trial magistrate committed an error during the sentencing proceedings of the accused, in those cases. The two cases were dealt with by the same magistrate. The two cases are *S v Ramafikeng*, ("the first case") and the case of *S v Trymore Muridzo* ("the second case").

[2] The first case was finalized on 8 December 2021 and the second case was finalised on 25 August 2021 and it seems that the error committed by the magistrate in these that caused these cases to be transmitted for special review was only discovered prior to 8 September 2022, when the senior magistrate's transmitted these two for review, to the high court.

[3] According to the senior magistrate, the sentences imposed on both accused in their respective matters were not in accordance with justice, after being convicted of contravening section 5 (b)[1] of the Drugs and Drug Trafficking Act, 140 of 1992 ("the DDTA") in the two cases.

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[1] **5. Dealing in drugs.**—No person shall deal in—
(*a*) any dependence producing substance; or
(*b*) any dangerous dependence producing substance or any undesirable dependence producing substance…

The first case

[4] In this case the accused was charged with contravening section 5 (b) of the DDTA as well, as a charge relating to the Contravention of Immigration Act, 13 of 2002. This review is not concerned with the proceedings relating to this charge. The accused, a 32-year-old male, a Lesotho national, was arrested on 14 September 2020, at N1 National Road near Laingsburg, after he was stopped by the police, who searched the truck and found 14.2 kg of cannabis, valued at R28,400 that he was transporting.

[5] On 8 December 2021, the accused decided to plead guilty on both charges, after having spent all the time in custody awaiting trial. During the plea proceedings before the magistrate, he was questioned in terms of the provisions section 112(1)(b) of the CPA. The accused admitted that he transported the dagga. He also stated that he was going to use some of it and to sell it. On this charge, he was sentenced to a fine R3000 or 12 months imprisonment and paid the fine immediately on the same day.

The second case

[6] In this case, the accused, a 34-year-old, Zimbabwean National, was arrested with another gentleman. They were arrested on 8 August 2021 and remained in custody awaiting trial until 25 August 2021. Both were charged with contravening section 5(b) of the DDTA as well as contravening the Immigration Act, 13 of 2002. The drug dealing charge was withdrawn against his co –accused. In this case the accused was legally represented. The Immigration Act contravention also does not have any bearing on this review.

[7] On 25 August 2021, he pleaded guilty and a statement in terms of the provisions of section 112 (2) of the CPA was presented to the accused, wherein he admitted his guilt. He was convicted subsequent to the court being satisfied on the basis of this plea that he committed the offence. On this charge, he was sentenced to a fine of R10,000 or three (3) years imprisonment. He also immediately on the same day after having been sentenced paid the fine.

The issue to be considered in this Special Review

[8] The senior magistrate is of the view that the sentence imposed by the presiding magistrate in both cases are not competent sentences and not in compliance with the sentencing provisions of the DDTA. The sentencing provisions for offences committed in terms of the DDTA and in particular section 5(b) thereof are set out in section 17 (e) read with section 13 (f) of the DDTA.

Section 13 of the DDTA states:

13. Offences relating to scheduled substances and drugs—Any person who—

(a) …;

(b) …;

(c) …;

(d) …;

(e) ; or

(f*)* contravenes a provision of section 5 (b), shall be guilty of an offence.
The penalty provision for a contravention of section 13(f) are as follows and is set out in section (17) (e) of the DDTA.

Section 17 states that;—Any person who is convicted of an offence under this Act shall be liable—

(*a*)…;

(*b*)…;

(*c*)…;

(*d*) ; and

(*e*) in the case of an offence referred to in section 13 (f), to imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the court may deem fit to impose.

[9] In both cases, the senior magistrate submits that a person who has been convicted for dealing drugs must be sentenced to a term of direct imprisonment, or at least direct imprisonment which may be suspended on certain conditions. He further submits that in this matter, a fine was imposed with an alternative period of imprisonment, is an incompetent sentence and not in accordance with section 17 (e) of the DDTA.
This in my view, with respect, reflects the correct position in our law for the past three decades, and has been pronounced on in judgments not only of this court but also in a number of other divisions.

[10] In order to address the concern of the senior magistrate and his colleagues that regularly asses the work of newly appointed and less experienced magistrates, regarding sentencing in cases like this it perhaps necessary to restate the law in this regard.

[11] One of the first cases that dealt with the interpretation of a similar provision like this under the previous Act, the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 came this court in the matter of *S v Van Zyl and others 1992 (2) SACR 101 (C)*. In that matter, Selikowitz, J also in a special review dealt with the amended sentencing provision of section 2*(d)*(i) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 that was amended by section 1*(a)* of the Abuse of Dependence-producing Substances and Rehabilitation Centres Amendment Act 78 of 1990.

[12] This amendment changed the penalty provisions for dealing in a dependence producing substance to a maximum period of 25 years imprisonment or such imprisonment, as well as any fine, the court might find fit to impose. In *Van Zyl*, the court found that the proper interpretation of that section, which is similar to the current provision as set of section 17 (e) of the DDTA, was that a court is obliged to impose a term of imprisonment (not exceeding 25 years). And furthermore, has the option to impose an additional fine (with an alternative term of imprisonment enforcing such payment in terms of the provisions of section 287 (1)[2] of the CPA.

The court in that case, also made reference to *S v Baliso (1991)(2) SACR 366(T)*, where the court in a previous decision also interpreted the amended sentencing provision of the previous act in a similar manner.

[13] In *S v Mqikela 2005 (2) 397(E)* which is one of the first cases that dealt with the similar provisions under the provisions of the current DDTA as set out section 13(f), Jones J (Leach J, concurring) also in a special review held the following at page 399 A -C:

"*The magistrate has interpreted and applied this section over the years to oblige him to impose a sentence of imprisonment without the option of a fine (which may be fully or partially suspended). He has considered that in addition to this sentence of direct imprisonment, the section allows him to impose a fine, to which he may add an alternative of imprisonment in default of payment in terms of s 287(1) of the Criminal Procedure Act 51 of 1977. This interpretation is correct. The section provides that the court must impose a term of imprisonment, but it does not preclude the total or partial suspension thereof. See S v Van Zyl and Others 1992 (2) SACR 101 (C); S v*

[2] **287 Imprisonment in default of payment of fine**(1) Whenever a court convicts a person of any offence punishable by a fine (whether with or without any other direct or alternative punishment), it may, in imposing a fine upon such person, impose, as a punishment alternative to such fine, a sentence of imprisonment of any period within the limits of its jurisdiction:
Provided that, subject to the provisions of subsection (3), the period of such alternative sentence of imprisonment shall not, either alone or together with any period of imprisonment imposed as a direct punishment, exceed the longest period of imprisonment prescribed by any law as a punishment (whether direct or alternative) for such offence.

Mazibuko 1992 (2) SACR 320 (W) at 322j - 323b; S v Mohome 1993 (1) SACR 504 (T); S v Mosolotsane 1993 (1) SACR 502 (O); S v Baliso 1991 (2) SACR 366 (T) at 369h - 370b; S v Zwane 2004 (2) SACR 291 (N); and S v Sivuyile (unreported ECD case No CA&R 141/05, 19/05/05). The plain wording of the section makes provision for a fine in addition to, but not in substitution of, the sentence of imprisonment."

The same interpretation was followed in S v Mlambo 2007 (2) SACR 664(T) Marais J (Borchers, J concurring) at 666 G- J and 667 A said:

"…[T]he wording of the section leaves me in no doubt that the opposite is intended and that the court is obliged to impose a sentence of direct imprisonment and, only when it has done so, may it couple a sentence of a fine with an alternative of imprisonment to the sentence of direct imprisonment.
The first part of the sentencing provision provides only for direct imprisonment ('imprisonment for a period not exceeding 25 years'). The court is then authorised to impose an alternative form of punishment which is 'or to both such imprisonment and such fine as the court may deem fit .'. To interpret this section as authorising the imposition of any of the bouquet of punishments is to ignore the effect of the words 'both' and 'and'. The Legislature is stating clearly that the only alternative to a sentence of direct imprisonment is the imposition of 'both such imprisonment' and a fine.

My conclusion is underlined by the significantly different penalties provided in s 17(a), (b), (c) and (d), where the wording differs materially from that of s 17(e). In each previous section the court is authorised to sentence the accused to a 'fine or to imprisonment, or to both such fine and such imprisonment'.

In each case therefore the first sentence option is a fine, and imprisonment is thereafter authorised as an alternative sentence to the imposition of a fine. This difference makes the intention of the Legislature in s 17(e) even clearer, as the preceding sections authorise a fine as the first of three options. Section 17(e) singly does not, and only authorises a fine in conjunction with imprisonment ('or to both such imprisonment and such fine as the court may deem fit'). (In each case above where there is emphasis, it is my own.)

The change in wording was clearly not accidental, but the change appears to have eluded numerous courts, including those hearing the matters of Mahlangu (and various cases there cited) and Sokweliti. What is apparent from the change in wording is that the Legislature intended that dealing in dagga should be dealt with much more severely than lesser offences such as possession thereof."

[14] In the last reported judgment, S v *Madikane 2014(2) SACR 88 (GP)* the court also confirmed the interpretation of this provision as set out in the cases I referred to.

The trial magistrate should either have imposed a sentence of direct imprisonment (wholly or partially suspended), without the option of a fine or to both such sentence of imprisonment coupled with a fine with an alternative of imprisonment enforced in terms of the provisions of section 287(1) of the CPA. It could not ***only*** impose a fine. A court is not empowered ***only***, to impose a fine in terms of section 17(e) of the DDTA which payment is enforced by section 287(1) of the CPA where a period of imprisonment is imposed as an alternative to such a fine, without an additional period of direct imprisonment.

[15] In general, where a penalty provision in a statute make provision for the imposition of a sentence of a fine or imprisonment, a court has a discretion to either impose the fine (with a term of imprisonment as an alternative to such a fine in terms of section 287(1) of the CPA) or a term of imprisonment as prescribed by such a statute. Unless the penalty provision states that a court is empowered to "*impose a fine or imprisonment or both*". The application of statutory provisions that states that the court can impose a fine or imprisonment are usually misunderstood, where a court would use the penal provisions in a statutory offence that grants a court the power to impose a period of imprisonment as alternative to such a fine.

[16] The enforcement of the payment of that fine is not granted by the statutory provision of a specific act, but by the provisions of section 287(1) of the CPA which gives the court the general power to enforce the payment of a fine by imposing a period of imprisonment as an alternative. In this regard, the cases of *S v Mathabela 1986 (4) SA 693 (T)* at *694F* that referred and relied on *S v Nkwane, S v Takwana 1982 (1) SA 230 (Tk)* at *232C-E* and *S v Arends 1988 (4) SA 792 (E)* at *794C* is still good authority on this point. This, it seems happened in this case, where the Magistrate was under the impression that he could only impose a fine and enforce the period of imprisonment as stated in the statutory provisions as an alternative to enforce a fine. The sentencing provisions under section 17(e) of the DDTA does not allow for such an interpretation.

[17] The alternative imprisonment is not a sentence of imprisonment and can never standalone separate from the fine. It is not a substantive sentence. It only becomes so in future if the fine is not paid. See *S v Jeffries 2011(2) SACR 350 (FB)* at 355 h. In this case, the fact that only a fine was imposed without an additional term of imprisonment and not a term of imprisonment renders the sentence either incomplete and incompetent. If only a period of imprisonment (direct or suspended) were imposed, it would have been a competent sentence. It therefore follows that the sentence imposed in both cases were incompetent and there not in accordance with justice and falls to be set aside.

An appropriate order

[18] The procedure and powers of a review court is set out in section 304(2)(c) of the CPA. With regards to sentence in terms of section 304(2) (c) (ii) of the CPA, a

review court can confirm, reduce, alter or set aside the sentence or any order of the magistrate's court. In terms of section 304(2) (c) (iv), the review court *may generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case*.(own emphasis)

[19] In terms of section 304(2) (c) (v) of the CPA a review court can also remit the case to the magistrate's court with instructions to deal with any matter such as the provincial or local division may think fit. In cases like this, where a sentence has to be reconsidered after it was referred on review, the usual order of the review court, would be to remit the matter back to the magistrate's court for a reconsideration of the sentence.

[20] This case, however, poses some practical difficulties with regards to what an appropriate order should be in terms of the provisions of section 304 (2) (c) of the CPA, especially with regards to whether it should be remitted back to the magistrate's court. It seems that both the accused were undocumented foreign nationals, that entered the country by illegal means. They have since left the jurisdiction of that court or may even have left the country.

[21] In respect of the first accused Mr. Ramafikeng, the accused in the first case, it seems that his address is unknown to the authorities. It was recorded during the proceedings before the magistrate, the court was told that he is a flight risk and that his wife and children stays in Malawi. During the proceedings before the trial magistrate, he also abandoned his bail application and remained in custody until the finalization of the case. It seems at this stage, that this accused's whereabouts is unknown.

[22] In respect of the accused in the second case Mr. Muridzo, the address he gave to the authorities, is in Brakpan in the Gauteng province. And although he had given an address, it seems that in an affidavit given by an official of the Department of Home Affairs that there is no record of the accused in the Republic and no record of any address of the accused. A further problem that the court under review has, is that these cases were sent on review almost a year after it was finalized by the magistrate. Should the court exercise its powers in terms of section 304(2) (c) (iv) of the CPA by imposing such a sentence or make such order as the magistrate's court ought to have given or have imposed, there is a real risk that it may increase sentence, or that such a sentence would be more onerous than the one imposed by the trial court. It seems, however, that the court does not have any option but to follow this route, given the exceptional circumstances of this case.

[23] In the light of these difficulties, I communicated with the senior magistrate to ascertain whether it would be at all possible to have the accused brought before the magistrate court, should the review court be minded to remit both these matters to

the magistrate's court for sentence to be reconsidered. In reply to my query he said that it would not be possible. The only remaining option for this court therefore would be to exercise its powers in terms of section 304 (2) (c) (iv) of the CPA and make an order as stated in this subsection. This however, as will be shown below, is not an easy route to follow.

[24] The trial court should either have imposed a sentence of direct imprisonment (direct or wholly or partially suspended) ***alone or in addition to that a fine***. This would mean for all practical purposes if the court on review imposes a sentence that would be in compliance with the provisions of section 17 (e) of the DDTA, it can either be that the court should impose a period of direct imprisonment on the accused, in their absence, which would be detrimental to such an accused. Such a course of action should be avoided and would be impossible and impractical to implement because of the difficulties in securing the attendance of the accused' before court. On the other hand, the court can impose a period of direct imprisonment that is wholly suspended. In such a case, the sentence would be more onerous, because of the conditions of suspension.

[25] Although the review court can reduce a sentence, it is well established that in terms of section 304 (2) (c) of the CPA, that this provision ordinarily does not allow for an increase in the sentence of an accused. In *Attorney – General, Venda v Maraga 1992 (2) SACR 594(V) 596 a-b* the following was said in this regard … "*It has been held frequently that a competent, but inadequate or too lenient, sentence cannot be increased on review in South Africa. Where a sentence falls squarely within the penal provisions and is therefore regular, the review Court is powerless to interfere, even where it was inadequate". (emphasis added)* In the ordinary course, a very light or lenient sentence can only be increased on appeal[3].

[26] This decision was followed in *S v Greyling 2008(1) SACR 537 (E)*, where the court held that where a sentence might be absurd or illogical, it was neither incompetent or incapable of being understood for it to be implemented. The court held that it is trite that a review court would be reluctant to increase a sentence on review under such circumstances. In *S v Morris 1992 (2) SACR 365 (C)* at *366 H- I* this court held:

"*It is established by now that the powers of this Court on automatic review, which powers are conferred by s 304(2)(a) of Act 51 of 1977, do not include the power to increase a sentence or to make an order more onerous for the accused, where the sentence or order was a competent sentence or order of the magistrate's court, nor can this Court on such a review set aside the sentence or order and remit the matter to the magistrate's court for that purpose. R v Froneman and Froneman 1941 TPD*

[3] In terms of the provisions of section 309(3) a provisional division or local division of the High Court have the power to increase any sentence on appeal subject to the conditions as set out in this section.

74; R v Fletcher 1941 EDL 255; R v Bornman 1960 (3) SA 87 (E); S v Haasbroek 1969 (1) SA 356 (E); and S v Msindo 1980 (4) SA 263 (B).” (own underlining)

[27] It seems, however that there is an exception to this general principle. It does not find application in cases where the magistrate’s court imposed an irregular or incompetent sentence which obliges the review court to replace that sentence with the correct one. Even if this results in a heavier or more severe sentence, than the initial sentence. In *S v Msindo 1980(4) SA 263 SA (B)* at 266A the court held in a case a where a magistrate imposed an incompetent sentence, a reviewing judge is obliged to impose the correct sentence, even if it should result in an increase in sentence.

[28] This usually happens where the law prescribes a minimum sentence, which the magistrate court did not impose. In such a case the sentence imposed by the magistrate, should be replaced with the minimum prescribed sentence. A sentence can also be increased in a case where the conviction of the magistrate based on the facts results in a more serious conviction. In such a case, the sentence should be altered to bring it in line with the more serious conviction. In that case the court referred to *S v Mbayi 1976 (4) SA 638 (TK)*. This case, given the authorities I referred to, falls within this category of cases.

[29] It seems only in exceptional cases a review court by altering a sentence imposed by a magistrate’s court and replacing it with a competent sentence as required by law, would merely be doing what the magistrate’s court was required to do by law and ought to have done. And it is in cases where the law obliges it to impose a specific or mandated sentence. The imposition of a competent sentence by the review court takes place by the operation of law and it is not a direct interference by the review court such as increasing a light or lenient sentence, and by altering it to a more severe sentence. As stated earlier, only a court of appeal can do so in terms of the provisions of section 309(3) of the CPA. The court will therefore not be exercising its powers in terms of that section.

[30] The alteration of the sentence is therefore not based on the fact that it is too light or severe, but because by operation of law, it is altered to a competent sentence, which obliges the review court to impose a competent sentence. I am therefore of the view, that given the circumstances of this particular case, it would be appropriate for the court to alter this sentence imposed in both cases to comply with the peremptory sentencing provisions as set out in section 17(e) of the DDTA 140 of 1992.

[31] I would therefore, make the following order:

"*1. That the sentence of accused, Mahlomola Ramafikeng is hereby set aside and replaced with the following; Six (6) months imprisonment which is suspended for five (5) years on condition that the accused is not convicted of contravening section 4(b) or 5(b) of Act 140 of 1992 and which he committed during the period of suspension, in addition he is sentenced to a fine of R3000 or Twelve (12) months imprisonment.*

2. That the sentence of accused, Trymore Muridzo is hereby set aside and replaced with the following: Twelve (12) months imprisonment which is suspended for five (5) years on condition that the accused is not convicted of contravening section 4(b) or 5(b) of Act 140 of 1992 and which committed during the period of suspension in addition he is sentenced to a fine of R10 000 or Three (3) years imprisonment.

3. The Clerk of the Court, Laingsburg and the South African Police Services, should circulate the outcome of this review order in respect of both these accused under their respective fingerprint and CAS numbers and make an attempt by means thereof to secure the presence of the accused before the magistrate's court, in order for them to be informed about the decision of the review court."

From The Legal Journals

Coetzee, S A

Sexual Grooming of Children in Teaching as a Trust Profession in South Africa

PER / PELJ 2023(26)

Abstract

The aim with this article is to put the sexual grooming of children in teaching as a trust profession in perspective. Because sexual grooming frequently precedes other sexual offences, targeting it can help prevent such offences. However, the author contends it should not be targeted as a preparatory offence but as an independent offence and form of sexual misconduct. This argument is supported by the fact that the institutional context and distinguishing features of schools make them unique hunting grounds for sexual groomers looking to sexually groom children. This risk is heightened by instances in which a school's institutional values, culture, traditions and practices facilitate sexual grooming. Furthermore, sexual grooming causes severe harm to a child, especially when

it occurs within a trust relationship. Following a brief conceptual analysis of the offence of sexual grooming of children as set out in section 18 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and some reflection on dilemmas in this regard, the author deliberates on the harmfulness of sexual grooming, focusing on teaching as a trust profession. The author then addresses schools as breeding grounds for sexual grooming before discussing the institutional facilitation of sexual grooming. The author concludes with recommendations on how sexual grooming in schools could be approached.

This article can be accessed here:
https://perjournal.co.za/article/view/14192/19710

Du Toit, P G

The search warrant provisions of the Cybercrimes Act and their relationship with the Criminal Procedure Act.

Obiter Volume 43 no 4 (2022) 764

Abstract
The recently enacted Cybercrimes Act 19 of 2020 regulates the powers of the police and investigators to investigate cybercrimes. Chapter 4 of the Act provides for the powers of the police and others in respect of search, access or seizure in the investigation of cybercrimes and other offences committed by means of cybertechnology. The provisions of the Criminal Procedure Act 51 of 1977 will continue to operate in addition to the provisions of the Cybercrimes Act, to the extent that the Criminal Procedure Act is not inconsistent with the Cybercrimes Act. The search and seizure provisions of the Criminal Procedure Act are object-based, as they do not deal explicitly with the specialised procedures that are required to investigate cybercrimes or other offences that involve the use of digital devices. The Cybercrimes Act attempts to address this shortcoming. The coexistence of the search and seizure provisions in these two Acts may cause difficulties in the fight against crime. In addition to the validity requirements of search warrants, as set out in the Acts ,additional intelligibility requirements for the validity of search warrants have been developed by the courts.
This article can be accessed here:
https://obiter.mandela.ac.za/article/view/13191/19609

Goliath, A
A short critique of minimum sentences

Obiter Volume 43 no 4 (2022) 779

Abstract
The state has a constitutional duty to respect, promote and protect the rights of citizens. To this end, every citizen has the right to dignity, the right to equality, and the right to freedom and security of the person. Allied thereto is that they will not be subjected to punishment that is cruel, inhuman, and degrading, among others. With the advent of democracy, South Africa inherited a host of challenges and one of these challenges was the explosion of violent crime. Mandatory minimum sentences were introduced by the Criminal Law Amendment Act 105 of 1997 to serve as a temporary, emergency crime-control measure based on the commonly-held belief that harsh punishment would reduce crime. Since minimum sentencing legislation has been in full operation for more than two decades, one would expect crime in South Africa to be relatively under control. However, violent crimes like murder and rape in our society have not abated. It is argued that minimum sentences do not serve as a deterrent to violent crime, instead, they exacerbate prison overcrowding. Lengthy prison terms and high imprisonment rates fuel the conditions for higher crime rates as it impedes the objectives of rehabilitation and promotes recidivism. The state's continued support for these increased sentences infringes on the constitutional rights of citizens. In this article, the author concludes that if we feel outraged by the high rate of violent crime, we need to find a sentencing regime that leads to the reduction rather than the exacerbation of crime in line with constitutional provisions.

The article can be accessed here:
https://obiter.mandela.ac.za/article/view/15411/19610

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

Contributions from the Law School

The curious offence of housebreaking with intent to commit a crime to the prosecutor unknown

A controversial offence
Whereas at common law if an accused was charged with housebreaking with intent to commit one offence, and the evidence established intent to commit another

offence, an acquittal had to follow, since 1917 it has been a competent verdict (and is currently so in terms of s262 of the Criminal Procedure Act of 1977) to convict the accused of housebreaking with intent to commit that other offence, or even 'some offence unknown' (Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 806). (The formulation used in s262 (2) & (3), and in s95(12) of the Criminal Procedure Act (which provides for a charge in these terms) – 'an offence to the prosecutor unknown' is clearly preferable to that used in s262(1) – 'an offence unknown' – since the issue is whether the offence intended can be proven rather than whether it exists.) Over the years this statutory extension to the housebreaking crime has been subjected to stringent criticism by commentators. De Wet regards this notion as an 'onding' (*Strafreg* 4ed (1985) 370), Snyman states that it has 'no right of existence' in our law (*Criminal Law* 6ed (2014) 549), and Milton opines that any such charge is potentially prejudicial to the accused and smacks very much of a fishing expedition (807). The nub of the criticism of the offence by these writers may be briefly set out, as follows:

Snyman asks: how can a court find as a fact that the perpetrator intended to commit *an* offence if it is impossible for that court to determine *what* this intended offence was (1993 *SACJ* 43; *Criminal Law* 549)? Moreover Snyman points out that housebreaking per se is not a crime (as does De Wet 369), and neither is the mere intention to commit a crime, thus 'to charge somebody with such an offence is therefore tantamount to charging him with something which conceptually cannot constitute a crime' (1993 *SACJ* 43; see also De Wet 369). In other words, two non-wrongs don't make a right (and proper) conviction.

Milton is equally scathing in his dismissal of the notion of being convicted with the intent to commit an unknown crime (806):

'It would seem that if X is charged with housebreaking with intent to commit an offence to the prosecutor unknown, he cannot be convicted unless the evidence shows that he intended to commit some offence known to our law. But if the evidence does reveal such an intent, then it is logically contradictory and farcical to convict of housebreaking with intent to commit an offence unknown, because the offence is known.'

However, as has been argued in more detail elsewhere (Hoctor 'Some constitutional and evidential aspects of the offence of housebreaking with intent to commit a crime' 1996 *Obiter* 160 162ff), it seems that this provision does not unjustifiably limit either the accused's right to be presumed innocent or the accused's right to be informed of the details of a charge with sufficient details to answer it (s35(3)(h) and (a) of the 1996 Constitution respectively). This view has been accepted by the South African Law Commission (now the South African Law Reform Commission) in its Report on *Project 101: The Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing* (May 2001) 86-91, which has therefore recommended that ss95(12) and 262 of the Criminal Procedure Act be retained in their present form.

The need for this offence – policy considerations

The offence has been defended in *S v Slabb* 2007 (1) SACR 77 (C) where the significance of the housebreaking crime in protecting life and property was emphasized (par [12]). The role of the housebreaking crime in this regard should not be underestimated. It is well-recognized that the housebreaking crime is a serious offence, involving the invasion of the personal right of security and safety of the individual in his or her home or property (*S v Madlala* 1962 (1) PH H9 (N)). As Le Grange AJ notes in *Slabb*, the crime 'constitutes a major invasion of the private lives and dwellings of ordinary citizens' (par [12]). This is particularly the case where the invasion takes place in the home, in the 'place of security for [the complainant's] family, as well as his most cherished possessions' (American Law Institute *Model Penal Code and Commentaries* (1980) art 221.1 67 (hereafter cited as *MPC*)), with the inevitable consequence of terror or fear being inflicted on the victim (Haddan 'Burglary: The Law' in Wright and Miller (eds) *Encyclopedia of Criminology* 129 130). It follows that burglary (the Common Law version of the housebreaking crime) has been described as one of the 'most damaging crimes to society' (House Report No. 98-1073 (1984) 3 cited in *Taylor v United States* (1990) 495 US 575 581), and that in the British Crime Survey burglary was found to be the most feared crime among all respondents (cited in McSherry & Naylor *Australian Criminal Laws* (2004) 319). Accordingly, the existence of this crime 'reflects a considered judgment that especially severe sanctions are appropriate for criminal invasion of premises under circumstances likely to terrorize occupants' (*MPC* 59).

Burglary inflicts significant costs upon its victims and society in general. Research indicates that victims of residential burglary suffer considerable psychological and emotional consequences (Newburn 'The long-term impact of criminal victimisation' *Home Office Research and Statistics Department Research Bulletin* No.33 (1993) 32). (On psychological trauma and sense of violation associated with a housebreaking as the rationale for the housebreaking crime, see Hoctor 'The underlying rationale of the crime of housebreaking' (1998) 19(1) *Obiter* 96.) Apart from loss of property, victims may potentially struggle with physical trauma, post-traumatic stress disorder, immobility, and stages or phases of grief, anger, shock, disbelief, fear and sadness (Robinson 'Extents and Correlates' in Wright and Miller (eds) *Encyclopedia of Criminology* 126). Where the perpetrator is not apprehended, this can result in additional trauma for the victim, who may fear a further intrusion (Haddan 131). Furthermore, fear of being a victim of burglary is a pervasive concern amongst even those who have not experienced such trauma first-hand (Robinson 126). As Haddan points out, '[s]ince burglary is frequent, costly, upsetting, and difficult to control, it makes great demands on the criminal justice system'(131).

Moreover, the gravity of the crime of housebreaking is invariably considerably enhanced by the possibility of violent confrontation:

'[A]n intrusion for any criminal purpose creates elements of alarm and danger to persons who may be present in a place where they should be entitled to freedom from intrusion. Their perception of alarm and danger, moreover, will not depend on the particular purpose of the intruder. The fact that he may be contemplating a minor

offence will be no solace to those who may reasonably fear the worst and who may react with measures that may well escalate the criminal purposes of the intruder' (*MPC* 75).

Whilst sometimes viewed as a non-violent crime, the character of the crime can change rapidly, 'depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is still on the premises' (*Taylor v United States* supra 581). The offender's own awareness of the possibility of violent confrontation may meant that he is prepared to use violence if necessary to carry out his plans or to escape (*Taylor v United States* supra 588).

Given that the statutory variant of the housebreaking crime functions as an adjunct to the common-law crime, these policy considerations apply equally to it. Although the criticisms leveled at the statutory version of the crime are indubitably theoretically sound, for all that it seems to have a useful and even important role in practice (see, eg, *S v Keenan* 1973 (1) PH H17 (T), where the accused broke and entered the premises only to emerge empty-handed, probably because he realized he had been seen, and where the court duly handed down a conviction of housebreaking with intent to commit a crime to the prosecutor unknown). There have been several convictions on this basis, although it seems that where possible (quite properly, it is submitted) the court attempts to substitute a conviction of housebreaking with intent to commit some known crime for a charge under s 95(12) of the Criminal Procedure Act 51 of 1977 (see, eg, *R v Coetzee* 1958 (2) SA 8 (T); *S v Wilson* 1968 (4) SA 477 (A)).

Concluding remarks

If we are to reject this version of the crime, and scrap the legislative provisions which underlie it, we need to ask whether this will leave a lacuna, and whether other, more ideologically acceptable, methods can be employed to remedy whatever defect exists. The fact remains that the notion of being convicted with intent to commit a crime to the prosecutor unknown remains a valuable source of assistance to prosecutors who may be called upon to convince the court of the criminal intent of the accused, armed only with the flimsiest evidence of the real state of mind of the accused. In this regard, Nanoo argues that a distinction must be drawn between *no* intent and an *unknown* intent, and that such a charge will be valid 'if an inference of criminal intent is the only reasonable explanation of suspicious behaviour' ('In defence of housebreaking with intent to commit a crime unknown' (1997) *SACJ* 254 255-6).

Housebreaking with intent to commit a crime is a serious crime, which impacts not only on property rights, but also on the psychological well-being of its victims. As the court in *Slabb* stressed, the purpose of the housebreaking crime is 'to protect and preserve the sanctity of people's homes and property', as well as to punish intruders 'who unlawfully gain entry into a home or other premises with the intention of committing a crime on the premises' (par [12]). Thus the crime protects the rights to property and security of the person (see Haddan 133), and does so for all members of society, not just the wealthy (see Kgomo J's comments in *S v Madini* [2000] 4 All

SA 20 (NC) 25c, where the need for the crime to protect even shanties in informal settlements is stressed). Moreover the crime functions, in the words of Justice Holmes (*The Common Law* (1881) 74), as 'an index to the probability of certain future acts which the law seeks to prevent'. Thus there are compelling policy arguments for not merely charging an intruder apprehended shortly after entry with trespass, but with the housebreaking crime, recognizing that the breaking and entry often constitutes the first steps towards 'wrongs of a greater magnitude' (Holmes 74). It is these considerations which form the foundation of the statutory housebreaking crime.

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Matters of Interest to Magistrates

Lawyer held in Contempt of Court: when legal practitioners behave badly, they undermine the legitimacy and effectiveness of the profession

By Prof Pierre De Vos

A judgment that holds a lawyer in contempt of court has arrived at a time when one has to ask whether the legal profession is facing a crisis of legitimacy, aggravated by the unethical behaviour of a small number of members of the profession.

It is not that unusual to come across a high court judgment in which a judge expresses disappointment about the tardy actions of one of the lawyers or of one of the legal teams in a matter. But it is not often that one comes across a judgment in which a lawyer is held in contempt of court for failing to obey a court order, and "sentenced" to pay punitive costs in his personal capacity. It is, regrettably, also uncommon to encounter a judgment in which a judge takes such a decisive stand against the unethical, contemptuous, or dishonest behaviour of legal practitioners.
It was therefore both depressing and heartening to read the judgment of acting judge Warren Shapiro in the case of *Grundler NO and Another v Zulu and Others* in which the high court held advocate Lee Zulu in contempt of court for refusing to provide the

applicants with copies of the court papers he submitted on behalf of his clients in a previous application — despite a court order to do so.

The trouble started when Mr Zulu, representing certain members of a dysfunctional body corporate, applied for, and was granted, an order to place the body corporate under the administration of a Board of Trustees. Mr Zulu brought this application *ex parte,* inexplicably failing to give notice of the application to Mr Grundler — the court-appointed administrator of the body corporate — and the body corporate, who both obviously had a direct and substantial interest in the matter.

Suspecting that Mr Zulu may have failed to make a full disclosure of all the material facts in his application, the applicants asked Mr Zulu to provide them with copies of the court papers he prepared for the application, which he failed to provide — even after a court ordered him to do so. (Whether he did so because the court papers revealed dishonesty on his part, is impossible to say.) As a result, Mr Grundler and the body corporate approached the court to declare Mr Zulu in contempt of court, and asked the court to sanction him by sending him to prison, alternatively, to order him to pay a fine.

The court took a dim view of the vague and insubstantial "justifications" offered by Mr Zulu, especially his claim that he could not provide copies of the papers as he had a duty to uphold "confidentiality" with the body corporate. The court dismissed the latter argument, calling it "nonsense", and described Mr Zulu's behaviour as "unprofessional, obstructive, and dilatory and certainly […] not the behaviour one would expect from a legal practitioner".

The judgment arrives at a time when one has to ask whether the legal profession is not facing a crisis of legitimacy, made worse by the unethical and even criminal behaviour of a small but not entirely insignificant, number of members of the profession. Here I am not only talking about the political theatrics, bullying, and amateurish bullshitting, we have come to expect from some lawyers representing high-profile political (or politically connected) individuals and other wealthy clients. I am also referring to the slew of recent news reports containing accusations of lawyers and judges behaving badly. Only in the last week, at least four such matters came to public attention.

- Last week it emerged that a newly appointed judge of the Free State high court had been summonsed to appear in the Kroonstad Specialised Commercial Crime Court on charges of theft, money laundering and contempt of court, stemming from the judges conduct while still practicing as an attorney.
- It was also reported over the weekend that the Eastern Cape judge-president Selby Mbenenge is facing an investigation by the Judicial Conduct Committee after claims of sexual harassment levelled against him by a judge's clerk based in the Makhanda high court.
- On Tuesday, the Judicial Conduct Tribunal started its impeachment hearing into judge Tintswalo Makhubele, for taking up an appointment as acting chairperson of Prasa, after the JSC had selected her for appointment as a judge, and for allegedly using this position at Prasa to advance the interests of

a company whose contracts with Prasa have been set aside on the grounds of corruption linked to state capture.

- And on Wednesday *Daily Maverick* reported that evidence has emerged that advocate Dawie Joubert, a senior counsel and member of the Bar's examination board, has been involved in an attempt to frame conservationist Fred Daniel. The report also claimed that a senior public prosecutor, named as Ms Ansie Venter from Middleburg, has also allegedly been implicated in the matter.

It is no wonder, then, that the court complained in the *Grundler* judgment, about "a rising trend in the legal profession of practitioners demonstrating disrespect (if not outright contempt) for courts and the judiciary". It is also heartening to read the judge's timely reminder to all legal practitioners that "Officers of this Court must be held to a higher standard of conduct than lay people", and that legal practitioners "do not own a duty only to their clients, they also owe a duty to the courts and the legal system".

One does not need to look far to find examples of this sort of behaviour, from the ranks of senior counsel to the most junior of candidate attorneys. It manifests not only in how practitioners interact with opponents and judges in and out of court but also in the launching of *prima facie* spurious applications, lacking in factual or legal foundation, that are designed to "snatch bargains", achieve ulterior objectives, delay and/or obstruct. It is a "win at all costs" attitude that does a disservice to the profession and to the country and sets an appalling example to the public at large. It ignores not only the oath that all lawyers take upon their admission but also the distinction between the duty that practitioners owe to their clients and the separate duty that they owe to the Court.

The court further noted that in this case Mr Zulu had "failed in this most basic duty" by not distinguishing "between his clients' interests and his own professional and ethical obligations". He also failed to provide any substantive explanation for his failure to obey a court order, and was thus guilty of contempt of court. Consequently, the judge referred Mr Zulu to the Legal Practice Council "so that his conduct as a legal practitioner can be investigated and, if required, sanctioned".

But because the Legal Practice Council has, in some instances, declined to sanction legal practitioners who flout the code of ethics, and has generally been slow to investigate, and — if required — to act, against legal practitioners implicated in unethical or criminal behaviour, it is also significant that the court endorsed the view that there "must be a serious consequence" for the kind of behaviour Mr Zulu made himself guilty of.

Notably, the court seriously considered imposing a sentence of direct imprisonment without the option of a fine on Mr Zulu as punishment for his contempt of court (as the Constitutional Court did in the contempt of court case of Mr Jacob Zuma). The court approvingly quoted justice Edwin Cameron's Supreme Court of Appeal judgment in *Fakie NO v CCII Systems (Pty) Ltd*, where it was noted that the reason why courts were permitted to commit recalcitrant litigants to prison when they make themselves guilty of contempt of court, was not only to ensure court orders were enforced but

also, and more importantly to protect the “very effectiveness and legitimacy of the legal system”.

That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.

The court in *Grundler* nevertheless decided not to send Mr Zulu to prison, because “justice must be tempered with a modicum of mercy”, and because there was a possibility that, “given the chance”, Mr Zulu might “react quite differently, and would understand where his obligations lie and the seriousness of failing to comply with orders of court” (the latter aspect distinguishes this case from that of Mr Zuma).

The court nevertheless held that it was important to impose a serious sanction on Mr Zulu, and ordered him “in his personal capacity to pay the costs of both the main application and the application for contempt and all reserved costs on the scale as between attorney and client”.

This case was somewhat unique because Mr Zulu ignored a court order directed at him personally, so there was no doubt that he was responsible for the misconduct. But it is not always that clear to what extent the misconduct can exclusively be laid at the door of the legal practitioner, instead of their clients, especially in cases where the legal practitioner becomes too closely identified with their client and their client’s political or other causes.

Moreover, courts are usually reluctant to grant personal cost orders against legal practitioners, because they worry that this may have a chilling effect on the ability or willingness of lawyers to represent the interests of their clients robustly and efficiently. While this worry is real, it may be time — given the scale of the problem — for our courts to use personal cost orders against legal representatives who ignore their professional and ethical obligations and the duty they owe to the courts and the legal system, and shamelessly abuse the legal process, often at great financial benefit to themselves.

(The above contribution appeared on the *Constitutionally Speaking* blog of Prof Pierre De Vos on 23 February 2023)

A Last Thought

“That’s me. That’s who you are talking about. Me. Everything is down to lacerations. A deep cut into the skull behind the ear. The bruising that only appeared four days later. Lacerations, cuts, bruises, swelling, sharp metal object, force. Multiple injuries. Tear, gash, incision. Injury to the arm, the right arm, cut on the right hand. Could it have been caused by a fall? Was it a stick or a plank with a sharp point or a metal object? No evidence of dirt or stones found in the laceration. Exhibit C. Left part of forehead.”

I was listening to my friend Jenny free-fall. She had spent the day back in the Simon’s Town court for the umpteenth time. She was stressed and angry. Her frustration was listening to her doctor being cross-examined about her injuries. She was the subject. There was no emotional consideration. She had been physically brutalised, and she continues to be mentally battered.

Jenny is an environmental researcher. She was busy working on her bee project at the Table Mountain National Park near Cape Point. This kind of work requires intense focus. But she was distracted by a man who was zigzagging towards her, stick in hand. .

Initially she thought he was a researcher. She soon became aware that he was trying to hide something. Without any hesitation he lunged at her with a sharp plank. She was holding back her dogs, and realised this man was not going to leave her.

“I really believe he wanted to kill me. He was taunting and jeering me. I know he had done this before,” she said.

We were sitting on the stoep. The stillness of the night was a relief. It had been a long day. She had waited hours for proceedings to start. The magistrate was late. Then loadshedding. The hearing did start, four hours later, then the hearing was cut short. New date. New venue. She would have to wait a further two months.

The attack happened in July 2021. She cannot move on. She reflects on reliving the attack, dealing with the lies, being unseen. Compounded over and over to feel like a victim. Going over the events continues to make her feel regretful that she had laid charges. She could have just had the necessary medical attention, stitches, and dental surgery.

“Then I would just have to move on. Heal the wounds. Look at the scars. Remember what happened. And move on.”

When she reported the attack, the police did not offer her any support. There was no trauma room offered to her (even though there is one available at Simon’s Town police station). The investigating detective has not yet been to the place where the attack occurred.

Her attacker came to where she lived and threatened her. So she reported it to the court which meant filling in another form. She told a court official, a woman, that she did not understand how to fill out the form. The official’s response was, “I don’t care. I am not a social worker.” The security guards at the station were more helpful.

Jenny says her advice right now is not to do it her way. Just deal with the fact that the system is broken and corrupt. It’s too big. It’s too hard. And nothing will change.

This is a typical South African response. We are stoic in our response to the level of

crime we have. Gender-based violence is acknowledged as an epidemic.
"Fortunately she was only raped, not murdered!" is a common response to our helplessness. This is ridiculous, unhelpful and wrong. We need to understand the absurdity of our responses. The justice system is broken but we do not have to accept this. We must, as civil society, hold our politicians and lawmakers accountable.
Friends started a Back a Buddy campaign for Jenny as the legal fees are mounting. She has a good support network, including a lawyer who cares about the case. She also has a job. Her situation is much better than most women in South Africa. They will not report the abuse as they expect the system to fail them.
Recently, I met an American woman currently doing her PhD on the leadership philosophy of Ubuntu. She told me that her family are very concerned for her safety in South Africa; they insist she contacts them daily. Every time she takes an Uber she has to send them her location pin. They are worried as she is a single woman travelling alone in Johannesburg and Cape Town.
Before she headed our way, she was in West Africa, with no safety concerns. She said it makes her feel deeply uncomfortable and she does not want to become paranoid. Her reality as an African American is conflicted and she has personal experience of police brutality in her own country. But our levels of gender-based violence are front of mind when she moves about. She never allows herself to relax.
This is abnormal and yet we carry on life as if it isn't. Gender-based violence must become the agenda. It is all our jobs to make sure it is."

Opinion by Bobbie Fitchen : *My friend told the police she'd been assaulted. Then the justice system failed her a*s published on the groundup.org.za website on 23 February 2023.