e-MANTSHI

A KZNJETCOM Newsletter

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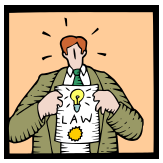
Welcome to the hundredth and sixth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now 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.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The *Legal Aid South Africa Act, 2014 (Act No. 39 of 2014*) has come into operation on 1 March 2015. The notice in this regard was published in Government Gazette no 38512 dated 27 February 2015. Section 22 is of importance to magistrates and reads as follows:

"22. (1) A court in criminal proceedings may only direct that a person be provided with legal representation at state expense, if the court has-

(a) taken into account-

(i) the personal circumstances of the person concerned;

(ii) the nature and gravity of the charge on which the person is to be tried or of which he or she has been convicted, as the case may be;

(iii) whether any other legal representation at state expense is available or has been provided; and

(iv) any other factor which in the opinion of the court should be taken into account; and

(b) subject to subsection (3), referred the matter, together with any report the court may consider necessary, for the attention of Legal Aid South Africa, for evaluation and report by Legal Aid South Africa and Legal Aid South Africa has made a recommendation whether or not the person concerned qualifies for legal representation, as provided for in subsection (2)(c)(i).

(2) (a) If a court refers a matter in terms of subsection (1)(b), Legal Aid South Africa must, in accordance with the regulations made under section 23(1) and the Legal Aid Manual, evaluate and report on the matter.

(b) The report in question must be in writing and be submitted to the registrar or the clerk of the court, as the case may be, who must make a copy thereof available to the court and the person concerned.

(c) The report must include-

(i) a recommendation whether or not the person concerned qualifies for legal representation;

(ii) particulars relating to the factors referred to in subsection (1)(a)(i) and (iii); and

(iii) any other factor which, in the opinion of Legal Aid South Africa, should be taken into account.

(3) A court may only refer a matter in terms of subsection (1)(b) if the person concerned-

(a) (i) has applied to Legal Aid South Africa for legal representation at state expense;

(ii) has been refused legal representation at state expense by Legal Aid South Africa; and

(iii) has exhausted his or her internal right to appeal within the structures of Legal Aid South Africa against the refusal;

(b) has applied for legal representation and has not received any response to the application within a reasonable time; or

(c) has been refused legal representation at state expense by Legal Aid South Africa and the court is of the opinion that there are particular circumstances that need to be brought to the attention of Legal Aid South Africa by the court in a report referred to in subsection (1)(a)(ii).

(4) (a) Any decision by Legal Aid South Africa in any criminal proceedings relating to-

(i) the particular legal practitioner to be assigned to any person;

(ii) the fee to be paid by Legal Aid South Africa to a particular practitioner;

(iii) the number of legal practitioners to be assigned to a particular person or group of persons; or

(iv) the contribution, if any, to be paid to Legal Aid South Africa by the persons in question and when and the manner in which the fee is to be paid, is subject to review by the High Court at the instance of the person affected thereby.

(b) Legal Aid South Africa may, in any review proceedings referred to in paragraph (a)(ii), not be required to pay more than the maximum amounts determined in the Legal Aid Manual in terms of section 24(1)(c).

(5) Only a court in review proceedings may make an order relating to the matters referred to in subsection (4).

(6) In determining whether any person is entitled to legal representation at state expense and before any court orders the provision of legal representation at state expense, the legal aid applicant bears the onus of showing, on a balance of probabilities, that he or she-

(a) is unable to afford the cost of his or her own legal representation;

(b) has made a full disclosure of all relevant facts and documents pertaining to his or her inability to pay for his or her own legal representation;

(c) has a lifestyle that is consistent with his or her alleged inability to afford the cost of his or her own legal representation; and

(d) has cooperated fully with any investigation conducted by Legal Aid South Africa.

(7) No accused person may receive legal representation at state expense if that person has applied for the release of an amount for reasonable legal expenses in terms of section 44(1) (b) of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998), and where the court has turned down the application due to a lack of a full disclosure as required in terms of section 44(2)(b) of that Act."

Recent Court Cases

1. MINISTER OF SAFETY AND SECURITY v KITASE 2015 (1) SACR 181 (SCA)

Section 3 of the Domestic Violence Act, on its plain meaning, did not require an arrest at the scene of the domestic violence only after investigation and analysis.

The respondent was arrested after a domestic violence incident at his home. A witness to the incident called the police after she had seen the respondent stab his wife with a sharp object (referred to as a 'sword' by the various witnesses). When a constable arrived on the scene he saw the respondent chasing his wife, shouting and carrying a spade. The sword at that stage was hidden. He intervened and on discovering that both husband and wife were injured he took them to hospital, and

after they had been attended to he took them to the police station where the respondent's wife informed the sergeant on duty that an interim protection order had been issued under the Domestic Violence Act 116 of 1998 against the respondent. The sergeant confirmed this by referring to a file and after doing so he arrested the respondent. The interim protection order had, however, never been made final and based on that omission the respondent sought and obtained damages in a high court for wrongful arrest and detention. On appeal,

Held, that the information before the arresting officer, that the respondent was drunk and had a sword and had chased his wife carrying a spade, together with the reports of the respondent's wife and another witness, clearly amounted to domestic violence of which violence was an element and this justified an arrest under s 40(1)*(q)* of the Criminal Procedure Act 51 of 1977. (Paragraph [9] at 184*i*.)

Held, further, that s 3 of the Domestic Violence Act, on its plain meaning, did not require an arrest at the scene of the domestic violence only after investigation and analysis. The evidence clearly indicated that the respondent was guilty of committing acts of domestic violence. That was enough to make the arrest without warrant lawful under s 40(1)*(q)*, and there was no reason why it would also not be lawful under s 40(1)*(b)* which gave a peace officer the power to arrest without warrant where he reasonably suspected that a person had committed an offence listed in schedule 1 to the Act, which included assault when a dangerous wound was inflicted. (Paragraphs [14] at 185*h* and [15] at 185*j*–186*b*.)

Held, further, that the Domestic Violence Act added to the protection offered to a victim of an offence such as assault by the common law and the Criminal Procedure Act, and did not detract from it, which would be the effect of not permitting an arrest without warrant where the complainant had once sought protection under the Domestic Violence Act. The existence or otherwise of the interim protection order could not mean that, in a clear case of violent abuse of a complainant, the police could not arrest the perpetrator in order to protect him or her. (Paragraph [16] at 186*c*–*d*.)

Held, accordingly, that the arrest and detention was lawful and the appeal had to be upheld. (Paragraph [18] at 186*g*.)

2. S v MOTLOUNG 2015 (1) SACR 310 (GJ)

The Firearms Control Act, Act 60 of 2000 impliedly repealed the minimum sentence regime in respect of semi-automatic firearms.

The respondent was convicted of murder (the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 being applicable) and the unlawful possession of

firearms and ammunition. He was sentenced in respect of the murder count to 14 years' imprisonment of which six years were suspended for a period of five years, and, in respect of the arms and ammunition offences, to six years' imprisonment, half of which was suspended for a period of five years. The court ordered the sentences to run concurrently and also to run concurrently with a sentence of eight years' imprisonment that the respondent was already serving and in respect of which he had been released on parole at the time the current offences were committed. The Director of Public Prosecutions (DPP) applied under s 316B of the Criminal Procedure Act 51 of 1977 for leave to appeal against the sentence. The DPP submitted, inter alia, that the sentence was inappropriately lenient; that the court had interfered with the discretionary power of the DPP in finding that the provisions of s 51 of Act 105 of 1997 could not be invoked when an accused was charged with the unlawful possession of a firearm; and that the court took into account the activation of the unexpired eight year period of imprisonment in respect of the previous conviction when ordering that the sentences imposed for the present crimes should run concurrently with it.

Held, as regards the alleged leniency of the sentence, that, in the circumstances where the deceased had humiliated and degraded the respondent while trying to make a pass at his girlfriend; where the respondent was placed in a unique situation where he was provoked and intimidated and did not, at least initially, carry a firearm; where the situation was unlikely to occur again and required the presence of an unrelenting bully in the form of the deceased who was determined to pick a brawl with the respondent, a convicted felon who had come out of prison, in order to demonstrate his masculinity, and launched an unprovoked, malevolent attack on the respondent in an attempt to take his girlfriend away from him and assert some influence over her, there were substantial mitigating circumstances present. (Paragraphs [9]–[11] at 313*i*–314*d*.)

Held, further, that there was no factual underpinning to support even a prima facie case that the sentence was inappropriately lenient. The circumstances were exceptional and could not be construed as setting a precedent of leniency. It was case-specific and could not conceivably be understood to send a message to the public or criminals that the courts had gone soft on crime. This was not a case where the offender could legitimately be made an example of. (Paragraph [15] at 315*c*.)

Held, further, as regards the argument by the National Director of Public Prosecutions relating to the effect of the minimum sentencing legislation, that s 51(2) of Act 105 of 1997 imposed a minimum sentence of 15 years' imprisonment on the facts of the present case for the possession of a semi-automatic firearm, whereas the subsequently enacted s 121 and s 151 of the Firearms Control Act 60 of 2000 provided for a maximum sentence of 15 years' imprisonment. The subsequent Firearms Control Act impliedly repealed the minimum sentence regime in respect of semi-automatic firearms because, if it did not, there would be two pieces of legislation dealing with the identical subject matter but imposing a different

sentencing regime, one more onerous on the accused than the other, which could not have been the intention of the legislature, more particularly, as it would result in impermissible arbitrariness and discrimination in its application, if regard were had to the ordinary rules of interpretation and the equality provisions of the Constitution. (Paragraphs [16] at 315*f* and [18] at 315*i*.)

Held, further, as regards the order made that the sentences should run concurrently with the previously imposed sentence that the respondent was already serving, that the power to direct the concurrent running of a sentence with one which was subject to parole was expressly conferred on the court by s 280 of the CPA. It came down to the court which sentenced for the subsequent offence having the power and responsibility to take into account, where parole had been granted, the overall impact of the reimposition of the unexpired portion of the earlier sentence on the overall sentence. The court considered a total of 16 years' imprisonment disproportionate to the crime, eight years of which would not have been imposed if the present crime had not triggered its implementation. The relative age of the respondent and the effect of an otherwise very lengthy prison sentence for a relatively young man were also considered. The parole board's power to decide when it would consider parole in respect of the concurrent sentences remained unaffected and the present case was no H different. (Paragraphs [29]–[31] at 317*i*–318*e*.) The application for leave to appeal was accordingly dismissed with costs.

3. MAGISTRATE PANGARKER v BOTHA AND ANOTHER 2015 (1) SA 503 (SCA)

A magistrate who considers refusing an application for a postponement in divorce proceedings must consider what is fair to both parties.

The first respondent (AB) instituted divorce proceedings before a magistrate, the appellant, in a divorce court. The magistrate postponed the trial three times to enable AB to appoint new legal representatives. The second respondent (CB, the defendant in the divorce proceedings) was, however, anxious for the matter to be finalised. Aware of this, the presiding magistrate granted a final postponement and warned that the matter would proceed when it next came before court, whether AB had legal representation or not. But, the attorney AB eventually found to represent him was unavailable for trial on the postponed date and asked the magistrate to grant another postponement. The magistrate referred the request to CB's legal representatives, but she was not amenable and indicated that she would oppose any such application. On the trial date AB appeared in court without legal representation and applied for the recusal of the magistrate. He left the court after the magistrate explained to him the potential consequences of doing so and without making any formal application for a further postponement. The magistrate considered the recusal application, dismissed it, and granted a decree of divorce, together with an order for the partial forfeiture of the benefits of the marriage.

Aggrieved, AB launched a high court application for the setting-aside of the H divorce proceedings. He argued that the magistrate had, by continuing and finalising the proceedings in his absence, violated his rights to be heard and to legal representation. The high court upheld the application on the basis that the magistrate should have mero motu postponed the matter to enable AB to obtain legal representation. The high court also held that it was grossly irregular for the magistrate to have proceeded with the matter without I considering the issue of the postponement, and that it had been unreasonable to deny AB's attorney an opportunity to facilitate a postponement of the matter. Save for the decree of divorce, the high court set aside the proceedings before the magistrate and ordered the magistrate and AB to pay CB's costs. In an appeal by the magistrate —
Held: The magistrate's approach was appropriate under the circumstances. She was faced with a trial that had already been postponed three times to accommodate AB, and CB clearly wished to achieve finality. The magistrate considered what was fair to both parties, including the possibility of a postponement, and decided that the matter should proceed. The record showed that she deliberated anxiously before reaching that decision. Her conduct could not be faulted. The high court's criticism of the magistrate was unjustified: it was clear that AB had engineered an application for a postponement under the guise of a recusal application and this application was a transparent and dishonest strategy to obtain a postponement. The high court failed to appreciate or consider the principles applicable to postponements and recusal applications or to consider CB's competing right to have the matter settled swiftly, which, in view of the history of the matter, trumped AB's right to legal representation. In the circumstances it could not be said that the magistrate had committed a gross irregularity or that the costs order against her was justified. Appeal upheld. (Paragraphs [29] – [33] at 511C – 512C.)

From The Legal Journals

Mollema, N & Van der Bijl, C

“Hate crimes: the ultimate anathematic crimes”

Obiter 2014 672

Knoetze, E

"Value (x 2) + Fine = Damages? Notes on the imposition of sanctions by the Courts of Chiefs (Senior traditional leaders) and Headmen"

Obiter 2014 602

Roos, A & Slabbert, M

"Defamation on Facebook: Isparta v Richter 2013 6 SA 529 (GP)"

Potchefstroom Electronic Law Journal 2014 Volume 17 No 6

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

Contributions from the Law School

The evaluation of a rape complainant's evidence in light of ss 58 and 59 of Act 32 of 2007

This note will consider the evaluation of the rape complainant's testimony in the case of *[Z…][N…][Y…] v The State* (Appeal no 187/2014. Heard in the Free State Division of the High Court, sitting in Bloemfontein. Decided on 11 December 2014.)
In this case, the appellant appealed against his conviction for raping a 22 year old male, homosexual, complainant. He was sentenced to ten years imprisonment by the court a quo, but his appeal was against conviction only.

Facts of the Case
Complainant's version
The complainant testified that he left a tavern in the early hours of the morning, when he was accosted by the appellant who was wielding a knife. This happened at the gate of the tavern, in front of the security guard who was stationed there. The complainant testified that the appellant roughly pulled him to his (the appellant's) shack which was nearby. He did not scream until he reached the door of the appellant's shack (para 2). The complainant was ordered inside, and told to undress. Both the appellant and the complainant then got into bed, under the blankets. The complainant testified that he was then raped. Under cross examination, the

complainant agreed that the appellant's brother was in the shack at the time (para 24). The appellant testified that the intercourse was extremely painful (para 3). He testified that after the rape the appellant showed him a tattoo on his chest and asked him what it represented. When the complainant could not answer, the appellant slapped him. The complainant testified that he started to cry and wanted to leave the shack but the appellant then hit him on his head with a knife repeatedly. The complainant testified that he then went to the toilet, and managed to escape to the front door of the shack belonging to the second state witness. The appellant followed him, and the complainant cried out for help. The second state witness responded to his cry for help and told the complainant that he could enter her shack via the backdoor since the front door was locked. The complainant was scared to enter the second state witnesses shack; because he feared that the appellant would then know where he was. Instead he ran to his parent's shack, which was approximately opposite the appellant's shack. He was wearing only his trousers, having left his shoes and T shirt at the appellant's shack. The complainant's mother asked him where his clothes were and he replied only that he had met a violent person. He testified that he was too confused to tell his mother anything more. He went to bed without reporting anything further. The second state witness went to the complainant's parental home the next morning to find out what had happened the previous night. The complainant was advised to go to the police station 'so that the police could reprimand the appellant' (para 7). It is not clear exactly when the complainant first reported the rape from the court's judgement. In para 5 it is recorded that 'the second state witness arrived later that morning and it was only then that he reported that he had been raped by the appellant.' In para 7 it is stated that the complainant's aunt 'enquired from him about the incident that unfolded earlier that morning and he related the incident to her.' Later in para 7, it is stated that it was only when the complainant was on his way to the police station that the complainant reported that he had been raped by the appellant. The complainant laid a charge of rape against the appellant, and he was taken to the hospital for a medical examination. The complainant testified that he screamed and cried during the medical examination. He testified that he told the doctor that his head was throbbing from having been bashed repeatedly by a knife (para 7). None of this detail was in the medical report. The report simply noted that there were no external physical or anal injuries except for tenderness of the anus. The doctor concluded that rape could not be excluded on clinical grounds (para 8).

Appellant's version

The appellant denied that he had raped the complainant. He testified that the complainant has asked to sleep in his shack because he was locked out of his parental home. He gave the complainant a place to sleep on the couch. During the night he was woken up by the complainant slipping into bed with him, wearing only his underpants. The appellant testified that he got angry because he knew that the complainant was a homosexual, and slapped him. He ordered the complainant to leave the shack and eventually had to get the assistance of his brother to get the complainant to leave (para 9).

The Court a quo

The court a quo found that the evidence of the complainant was consistent and clear, and that he exhibited fear in the witness box which was consistent with his testimony (para 10). The court a quo noted further that the medical examination did not exclude the possibility of rape, and observed that the tenderness to the anus displayed by the complainant corroborated the complainant's version. The court a quo found that the second state witness corroborated the complainant's evidence insofar as his calling out for help in the middle of the night was concerned. The court a quo found that the appellant's version of events was improbable, and therefore convicted the appellant (para 10).

Appeal

The state's legal representative conceded that the appellant's conviction could not stand after hearing the submissions of the appellant's representative (para 11).

The appeal court noted that the complainant was a single witness, and that caution should therefore be exercised before relying on his testimony to support a conviction (para 12). It also noted that the prosecution had handed the medical report in, and that this signified that the prosecution accepted that the content of the report was correct (para 12). This turned out to be important since the medical report did not mention the complainant screaming at his medical examination, nor that he had complained about his throbbing head. The appeal court found that this raised concerns about the reliability of the complainant's testimony (para 13, 14). The appeal court's evaluation of this evidence stands in stark contrast to the court a quo's finding that the medical report corroborated the complainant's version. It should be noted that the medical report could only have corroborated the evidence that the complainant had been raped, not the identity of the rapist. In any event, the medical report did not make a finding that the complainant had been raped, just that the possibility of rape could not be excluded.

The appeal court criticised the court a quo for finding that the complainant's version was corroborated by the testimony of the second state witness that he was crying when he sought refuge at her shack. The appeal court noted that the complainant had confirmed that he was crying at that time because he had been slapped by the appellant (para 15). The appeal court held that "it was a neutral fact that the complainant was slapped by the appellant moments before he had left the [appellant's] shack' (para 15). Presumably what the appeal court meant was that this fact was consistent with the testimony of both the appellant and the complainant.

The appeal court found that the evidence that the complainant was crying strengthened the appellant's version that he had slapped the complainant, and not the version of the complainant that he had been raped (para 16). The complainant had however also testified that he had been slapped, so while it is true that this fact could not corroborate the allegation of rape it was consistent with both the appellant and the complainant's versions, and thus could be said to strengthen both sides. To use the appeal court's term, it should have been regarded as a neutral fact.

In the same vein, the appeal court noted that the fact that the complainant arrived at his parent's shack dressed only in his trousers was consistent with both his version

and that of the appellant (para 17). This fact was therefore also 'neutral' and was not corroborative of the allegations of rape. The appeal court noted that the complainant did not report the alleged rape when he arrived at his parental home, not even when his mother asked him why he was undressed. Neither did he report it to his aunt the following morning, nor immediately to the second state witness (para 18). The appeal court also noted the testimony of the second state witness who said that she told the complainant to approach the police so that they could 'reprimand' the appellant. The appeal court found that the unassailable conclusion from this was that the complainant had complained of something 'that was not so serious', and only later raised the allegation of rape (para 19). The appeal court found that the appellant's version was 'validated' by two further pieces of evidence. First, the evidence that the complainant had told the second state witness that he was being threatened with being stabbed at the time he called out for help, and did not mention that he had been raped. Second the evidence that the complainant had also failed to mention the rape to his mother when he arrived at her shack in his trousers. Instead he just told her that he had met a violent person (para 16, 20). From this, the appeal court was 'satisfied that [the complainant's] delay in reporting the alleged rape adversely affected his credibility', holding that the complainant's allegation of rape was 'an afterthought and fabrication' (para 23). The appeal court reasoned that the complainant had been faced with a dilemma: the second state witness was demanding to know what had happened the previous evening, and the complainant had to explain to his parents why he had arrived at their home wearing only his trousers. The appeal court concluded that the allegation of rape was 'the obvious answer' to his dilemma, since if he had not cried rape, it would later have come to light that he had gotten into bed half naked with the appellant (para 22). I am not entirely convinced by the court's reasoning on this point. It is well established that rape victims often feel shame and are thus reluctant to disclose their plight. This shame may be even greater where a male homosexual has been raped by another man, particularly since homosexuality is particularly stigmatised. This may be the explanation for why the complainant did not disclose the alleged rape initially. The empirical evidence showing that rape victims may be reluctant to disclose rape immediately, for myriad valid reasons, was considered by the South African Law Reform Commission, which found that it was a common practice for courts to draw a negative inference against the complainant when a report of rape was not made at the first reasonable opportunity. The SALRC accepted that 'this reflects an assumption about the psychological effects of rape…and the conduct expected of a "reasonable" complainant which are not borne out by …empirical studies in this area.' (SALR Discussion paper 102 Project 107 "Sexual Offences: Process and Procedure (2002); see also K J Singh 'Evaluating the 'First Report': The Persistent Problem of Evidence and Distrust of the Complainant in the Adjudication of Sexual Offences' 2006 1 *SACJ* 37; D Naude 'Investigating the Applicability of the "Hue and Cry" Requirement Within the Framework of Psychological Testimony Regarding Criminal Sexual Behaviour 2003 16(1) *Acta Criminologica* 45).

The SALRC's work resulted in the enactment of ss 58 and 59 of the (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Section 58 of the Act provides that 'evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: provided that the court may not draw any inference only from the absence of such previous statements.'

Section 59 of the Act provides that no adverse inference may be drawn against a rape complainant merely because of the delay between the alleged rape and the first report of it.

The sections have been criticised for usurping the court's power to evaluate evidence, and it has been suggested that it may undermine the fair trial rights of the accused (PJ Schwikkard et al *Principles of Evidence* 3ed Juta at 118, Paizes in Du Toit et al *Commentary on the Criminal Procedure Act* Juta at 24-8B).

The appeal court explained why it took into account the fact that the complainant had not complained of rape at the first opportunity, despite the provisions of ss 58 and 59 of Act 32 of 2007, saying that the sections 'should … be interpreted so as not to usurp the court's discretion to draw any reasonable and justified inferences from the facts presented as evidence' and that 'any contrary interpretation would…affect the fair trial rights of an accused' (para 21). The appeal court held that 'what the court should do is to have regard to the totality of the evidential material to decide whether a negative inference may be drawn from the complainant's failure to report the offence at the first reasonable opportunity' (para 21). It is trite that a court should evaluate the evidence holistically, and I am leery of legislation which curtails the court's ability to evaluate the evidence and to draw the appropriate inferences from it. I therefore support the appeal court's interpretation of the legislation. The appeal court's interpretation is also consistent with Schwikkard's view to the effect that while a delay in report the rape cannot alone justify an adverse inference against the complainant, it remains a factor to be taken into account in evaluating the evidence in its totality. She opines that to draw an inference only from the delay is not only contrary to s 59 of the Act, but it is also inconsistent with 'the general principle that inferences may not be drawn from selected facts considered in isolation' (Schwikkard et al op cit 119).

To my knowledge, the case under discussion is the first case where the court has made an explicit finding regarding the proper interpretation of ss 58 and 59 of Act 32 of 2007. My understanding of the ratio decidendi of the case is that while a court may not draw an adverse inference against a rape complainant merely because of the delay between the alleged rape and the report; the court may draw an adverse inference from the delay considered in conjunction with factors surrounding the delay and the eventual report as well as any other relevant evidence. In casu, what led the appeal court to be sceptical about the complainant's case included the evidence that the complainant had made reports to third parties regarding what had happened to him which were inconsistent with his later allegations of rape, and which were consistent with the appellant's version.

Despite my concern at the adverse inference drawn against the applicant because he failed to make a report of rape at the first opportunity, without taking account of the complainant's vulnerable position as a male homosexual rape victim, I am of the opinion that the final decision of the appeal court to uphold the appeal was correct. The complainant was a single witness who had doubt cast on his reliability in view of the discrepancies between his testimony and the medical report. There were a number of facts which were consistent with both the appellant and the complainant's version. The appellant's version was not inherently improbable. Further, the state failed to call witnesses who may have been able to shed light on the case. It was common cause that the appellant's brother was in the shack at the time of the alleged rape. The prosecutor was aware of this fact but chose not to call him as a witness, seeming to hold the view that it was the appellant's obligation to call him. Likewise the state did not call the security guard to testify even though the complainant's evidence was that he had been dragged into the appellant's shack in view of the security guard (para 24). Of course the appellant is under no duty to call witnesses: it is the duty of the state to prove guilt beyond a reasonable doubt, and the court may draw an adverse inference against the state for failing to call available witnesses without adequate explanation.

In addition, the appeal court found that there was no reason to reject the appellant's version, saying that the reasons advanced by the court a quo in this regard were insufficient. The court a quo had found that the appellant's version was improbable in that it was unlikely that the complainant would have undressed and got into the appellant's bed having been given a place to sleep on the couch, and because the appellant could not give a reason as to why the complainant would have wanted to get into his bed with ulterior motives (para 25).

The appeal court reiterated the well-known rule that for an accused to be convicted, his defence must be shown not to be reasonably possibly true (para 26, 27). It concluded that the appellant's defence had been shown to be reasonably possibly true, and therefore upheld the appeal against conviction (para 28).

Conclusion

The appeal court's decision is welcome for the light it has shed on how ss 58 and 59 of Act 32 of 2007 should be interpreted. However, it is of concern that the court was not sensitive to the vulnerable position of a male homosexual rape complainant and how this may have impacted on the complainant's failure to report the rape at the first available opportunity.

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Matters of Interest to Magistrates

Hate speech is a crime

Equality Court rules in favour of domestic worker

By Peter Williams

The District Court of Cape Town, sitting as an Equality Court, has recently made a landmark ruling in *Nomasomi Gloria Kente v Andre van Deventer* (EqC) (unreported case no EC 9/13, 24-10-2014, Cape Town Magistrates Court) (Magistrate Koeries), by awarding a domestic worker R 50 000 in damages. This was after it found in the domestic worker's favour in a case of hate speech and harassment. Ms Kente, a domestic worker, complained that after her shift had ended, she requested her employer's boyfriend to look after his own child for a brief period of time, while she took a shower. He was upset about this, grabbed her by her pyjamas, spat in her face and told her that she was 'a pathetic Kaffir, that he hated Kaffirs and that he hated her.' He continued by saying that 'Kaffirs had stolen our land'. Ms Kente complained that she had been subjected to racial abuse and harassment over a number of years and that she had previously lodged a case with the police, only to find out that the perpetrator had paid an acknowledgment of guilt fine in the sum of R 150.

Magistrate Jerome Koeries found that the incidents had occurred as described by Ms Kente and indicated that hate speech will not be tolerated by our courts and that violence against women will have dire consequences. The court found that the word 'Kaffir' constitutes hate speech. The judgment implies that where derogatory words, such as 'Kaffir', or even 'Hotnot' or 'coolie' or other derogatory words are used, the court will not hesitate to deal with it harshly. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) provides for victims of hate speech to claim damages for the hurt, humiliation and degradation, which they suffered and in Ms Kente's case, a substantial amount was awarded, relatively speaking.

Hate speech and harassment

In terms of s 10 of the Equality Act, words that are communicated amount to hate speech if:

'i. The words are based on one or more of the prohibited grounds referred to in the Act. Prohibited grounds include race, gender, ethnic or social origin and colour;

ii. Objectively it is considered to be hurtful, harmful, incite harm or propagate hatred. The intention of the person who utters the words is irrelevant; and

iii. It does not fall within the proviso to section 12 (the proviso refers to bona fide engagement in artistic creativity, academic and scientific inquiry and the like.)'

In the case of *Herselman v Geleba* (ECG) (unreported case no 231/2009, 1-9-2011) (Dawood J), the court held that the use of the word 'baboon' amounted to hate speech as defined in s 10 of the Equality Act. The court held that 'the word "baboon" has racial undertones and a derogatory meaning and would be construed as such by a reasonable African person.' Similarly, in the case of *Strydom v Chiloane* 2008 (2) SA 247 (T) a person had called another person a 'baboon' in the presence of two co-workers. The court (two justices of the High Court) found that the magistrate was right 'to find that the words complained of fall within the definition of "hate speech" as defined in section 10 of PEPUDA [the Equality Act].' Referring to *Mangope v Asmal and Another* 1997 (4) SA 277 (T) at 286J – 287A, the court stated that: 'Applying that definition, it is, in my view, clear that when the epithet "baboon" is attributed to a person when he is severely criticised, as in this case, the purpose is to indicate that he is base and of extremely low intelligence. But I also think that it can be inferred from the use of the word in such circumstances that the person mentioned is of subhuman intelligence and not worthy of being described as a human being.'

There can therefore be no doubt that the word 'Kaffir' constitutes hate speech as defined in s 10(1) of the Equality Act as it refers to the race, colour, ethnic or social origin of the complainant and it is both hurtful and harmful.

Section 11 of the Equality Act provides that: 'No person may subject any person to harassment.' 'Harassment' is defined as 'unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to –

(a) sex, gender or sexual orientation; or (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group ...'. It is clear that the conduct that the complainant was exposed to meets the requirements of this definition and as such constitutes harassment.

How to interpret s 10(1) of the Act

Section 10(1) has given rise to interpretation issues. It reads as follows:

'10 Prohibition of hate speech

Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred.'

The question is whether subsections (a), (b) and (c) should be read with an 'and' or with an 'or', in other words whether the conjunctive or disjunctive approach should be used. If the conjunctive approach is used, it means that three requirements must be present or the acts must occur in a group-context, before a court can find that an utterance amounts to hate speech. For the disjunctive approach, it is sufficient for a complainant to prove that the prohibited words were either hurtful or harmful. This issue was expressly discussed in the Herselman case, where two justices of the High Court considered this provision and held the following: 'If one has regard to the purpose of the Act, the object of the Act and the Interpretation clause it militates against the acceptance of the conjunctive approach ... In this case the disjunctive approach appears to be the correct approach in interpreting the provisions of section 10(1) or else the very purpose of the Act may well be defeated.'

The court held the following: 'If one were to adopt a conjunctive approach then racially discriminatory words which are clearly hurtful and even harmful, which are directed at an individual may not fall within the ambit of the Act simply because they may not per se promote or propagate hatred because they were not uttered in a group context. This is untenable and could not have been the intention of the legislature, having regard to the purpose and objectives of the Act and the interpretation clause. Such an approach would undermine the purpose of the Act.'

User-friendly courts

In the case of *Woodways CC v Vallie* 2010 (6) SA 136 (WCC), the following was said: 'It is clear to me that the Act creates an informal and inexpensive platform for adjudication of unfair discrimination [as well as hate speech] disputes. It marks a shift from the conventional way of litigation, which emphasises elegance in the formulation of pleadings.

It creates a space for the victims of unfair discrimination to tell their stories so that systemic inequalities and unfair discrimination, which ... remain deeply embedded in social structures, may be eradicated.'

At para 32 it states: 'The informal nature of proceedings before the Equality Court was considered in *George and Others v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC)', where the following was held: 'An integral part of the Equality Act, then, is the focus on the creation of a user-friendly Court environment where proceedings are conducted along inquisitorial lines, with an emphasis on informality, participation and the speedy processing of matters ... The formal, adversarial, often expensive and potentially intimidating proceedings that

prevail in an ordinary magistrate's court or High Court and which may act as a barrier to those seeking justice, have no place in an Equality Court.'

In *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, and Others (No 2)* 2009 (6) SA 589 (SCA) at para 53, the Supreme Court of Appeal held, as per Navsa J that: 'The Equality Court was established in order to provide easy access to justice and to enable even the most disadvantaged individuals or communities to walk off the street, as it were, into the portals of the Equality Court to seek speedy redress against unfair discrimination, through less formal procedures.'

In *Manong and Associates (Pty) Ltd v City of Cape Town and Another* 2011 (2) SA 90 (SCA) the court held: 'Section 20(2) of the Act provides that a person wishing to institute proceedings in terms of or under the Act must, in the prescribed manner, notify the clerk of the Equality Court of their intention to do so. Regulation 6 of the Regulations governing proceedings in the Equality Court provides for a prescribed form to be completed in which the complaint is to be formulated. It is clear that a succinct statement of complaint is required.' The court then went on to criticise one of the parties, stating that, 'instead of using the prescribed form, (he) resorted to a rambling 30 page exposition.'

Equality Act v Employment Equity Act

Section 5(1) of the Equality Act provides that the Act does not apply to any person to whom and to the extent that the Employment Equity Act 55 of 1998 applies. In Kente's case, although the incidents occurred partially at her workplace, the main incident occurred outside her working hours. It was perpetrated by someone who was not her employer and the various incidents occurred sometimes during working hours and sometimes outside of her working hours. At the time of instituting proceedings, Kente's employer was sympathetic towards her and supported her. For that reason Kente did not deem it necessary to institute proceedings against her employer. She would have had a case against her employer as well, since her employer has an obligation to maintain a safe working environment. In the case of *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others* (2007) 28 ILJ 897 (LC), Nel AJ awarded constitutional damages against an employer even though the applicant was subjected to sexual harassment at the workplace by an unknown perpetrator. The court found that where an employee cannot obtain relief through statutory or common-law remedies and their constitutional right to fair labour practices are violated, the employee may approach the Labour Court for relief in terms of s 23(1) of the Constitution.

Conclusion

The Equality Act is a product of the South African Constitution, which has been described as a transformative constitution. This concept entails that law can serve as a medium for social change and that through the enforcement of individual rights

(such as in the present case) people can change not only their own lives, but also effect change in society. The Equality Court serves as an important tool to transform society from the vestiges of apartheid and should serve as a vehicle for transformation.

• In *The State v Andre van Deventer* (unreported case no 17/1430/2013, 6-02-2015, Cape Town Magistrates Court) (Magistrate Alta Le Roux) the court sentenced Andre van Deventer to two years' house arrest and he is also required to complete 70 hours of community service for calling Ms Kente a 'kaffir'. The community work will be in the service of black women - *Editor.*

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A Last Thought

'It needs to be stressed once again that the duty of prosecutors is not to secure a conviction at all costs or to defend convictions once obtained. Their duty is to see that so far as possible justice is done. As Jones J expressed it in S *v Fani & Others* 1994 (1) SACR 636(E) at 638e-f:
'The object of criminal proceedings in our law has never been to secure a conviction at all costs. The duty of the prosecution is to present all the facts in an objective and fair manner so as to place the court in a position to arrive at the truth.' per Wallis J A in S v Macrae 2014(2) SACR 215 (SCA) at 225F- H2