# e-MANTSHI

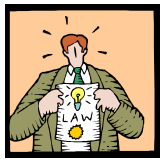
A KZNJETCOM Newsletter

**March 2010**: **Issue 50**

Welcome to the Fiftieth 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 all the 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 key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.The following comment was received recently:

**"I appreciate all your E-Mantshi and I am learning a lot from them. I share the E-Mantshi with my prosecutors and some attorneys. They are all appreciating them.**
**Thank you.**

**Mr. L Skrenya**
**Magistrate: Cala"**




## New Legislation

1. A Criminal Procedure amendment bill has been introduced into Parliament to amend section 49 of Act 51 of 1977. The purpose of the bill is to amend the Criminal Procedure Act, 1977, so as to bring the provisions relating to the use of force when effecting an arrest into line with a judgment of the Constitutional Court; and to provide for matters connected thereto. The proposed amendment reads as follows:

**Substitution of section 49 of Act 51 of 1977, as substituted by section 7 of Act 122 of 1998**

**1.** The following section is hereby substituted for section 49 of the *Criminal Procedure Act, 1977* (Act No. 51 of 1977):

"**Use of force in effecting arrest**

**49.** (1) For the purposes of this section—

*(a)* 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect; **[and]**

*(b)* 'suspect' means any person in respect of whom an arrestor has **[or had]** a reasonable suspicion that such person is committing or has committed an offence; and

*(c)* 'deadly force' means force that is intended or likely to cause death or serious bodily harm.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force **[that is intended or is likely to cause death or grievous bodily harm to a suspect,]** only if he or she believes on reasonable grounds—

(a) that the force is **[immediately]** necessary for the purposes of protecting the arrestor **[, any person lawfully assisting the arrestor]** or any other person from imminent or future death or **[grievous]** serious bodily harm; or

(b) **[that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or]** that the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.

**[(c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.]**".

2. An explanatory summary of a *Prevention and Combating of Trafficking in Persons Bill* was published in Government Gazette No. 32906 of 29 January 2010.The Bill has subsequently been introduced into Parliament. The objects of the Bill are as follows:

**1. PURPOSE OF BILL**

The purpose of the Bill is to give effect to South Africa's obligations as a party to international instruments, such as the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons), which address the issue of trafficking in persons, by bringing its domestic laws in line with the standards set by those instruments. The Bill is a result of an investigation and a report by the South African Law Reform Commission (SALRC) on Trafficking in Persons (project 131).

**2. OBJECTS OF BILL**

The objects of the Bill are to—
*(a)* give effect to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons;
*(b)* provide for the prosecution of persons and for appropriate penalties;
*(c)* provide for the prevention of trafficking in persons and for the protection and assistance of victims of trafficking;
*(d)* provide for effective enforcement measures; and
*(e)* combat trafficking in persons.

## Recent Court Cases

### S v Chauke and Another 2010 (1) SACR 287 GSJ

**One of the duties of a presiding officer is to ensure the correct numerical standing or seating positions of accused.**

The two accused appeared in the magistrates' court on charges of theft, alternatively, possession of stolen property. Accused 1 was convicted of the alternative count, while accused 2 was acquitted. Accused 1 was sentenced to three years' imprisonment. It was brought to the magistrate's attention that he in fact convicted the incorrect accused. The magistrate was unaware that, during the trial, the accused persons were in fact transposed in the dock. It was therefore apparent that the conviction and sentence imposed on accused 1 were irregular, and a nullity from inception. The error was also of such a nature that it could not be corrected by the magistrate in terms of the provisions of s 176 of the Criminal Procedure Act 51 of 1977.

"[18] There is one more matter that requires mentioning. Whilst the decision of the magistrate in referring this matter for review, and releasing both accused persons pending such review, is completely commendable, some caution is required in preventing confusions of this nature recurring. This will be so especially where not only multiple accused are involved, but also where serious charges, attracting severe penalties, are in issue. After all, a judicial officer is supposed to be in complete control and in charge of the court. This is over and above the necessary duty to ensure that the proceedings in court are conducted in a proper manner. Issues such as ensuring the correct numerical standing or seating positions of accused persons in the accused dock, the swearing in of witnesses, etc, although appearing to be mundane, should be attended to meticulously. Compliance therewith all contributes to the ideal atmosphere of an accused person's right to a

fair trial, as enshrined in the Bill of Rights. It will also obviate the need to refer matters for review unnecessarily. In S v May 2005 (2) SACR 331 (SCA) (2005 (10) BCLR 944; [2005] 4 All SA 334) at 341i—342a, although in a slightly different context, the court said:

'Judicial officers are not umpires. Their role is to ensure that the parties' cases are presented fully and fairly, and that the truth is established. They are required to be passive observers of a trial; they are required to ensure fairness and justice, and if that requires intervention then it is fully justifiable. It is only when prejudice is caused to an accused that intervention will become an irregularity.'
The magistrate seems to ascribe the error to the court orderly, the prosecutor and the defence. There is no doubt, however, that the magistrate was ultimately responsible to prevent the error. I state this as kindly as I can."

**S v Sibiya 2010 (1) SACR 284 GNP**

**A short term of imprisonment may do more harm than good and should be reserved for offenders who are a real threat to society.**

The accused was convicted in a magistrates' court of contravening s 17(a) read with ss 1, 5 and 7 of the Domestic Violence Act 116 of 1998. He was sentenced to 12 months' imprisonment, of which eight months were conditionally suspended for a period of three years. The accused informed the court before sentencing that he had been employed as a security guard earning R1 500 per month, out of which funds he was supporting his six siblings who were still at school. This employment was lost when he was suspended after having been charged. It was clear that he would lose this work permanently if he went to jail. On review,

*Held* that our courts had often emphasised that short terms of imprisonment did more harm than good, of which the present instance was a textbook example. Unfortunately, these admonishments appeared to be largely ignored, since the negative consequences of the accused's loss of employment for the victim and society alike were not considered. This had the result of the injudicious application of the short-term sentencing option which ought to be reserved for offenders constituting a real threat to society, not for young hotheads who had not yet learnt to act with restraint. (Paragraph [12] at 286c—e)

*Held*, further, that a suspended sentence—or an attempt to impose a sentence based upon an application of the principles of ubuntu (by effecting reconciliation between the victim and the offender)—would have been a more effective punishment. (Paragraph [13] at 286e—f)

**S v Chipape 2010 (1) SACR 245 GNP**

**A court's exercise of its discretion in sentencing must be dictated by all relevant factors - a suspended sentence should not be disregarded for fear that the community might take the law into their own hands.**

On automatic review the following concerns were raised: (1) Did the trial court consider correctional supervision as a sentencing option, regard been had that accused was a first offender, (2) if not, would this not have amounted to an irregularity? The trial court's response was summed up as follows: (a) That, on the day of the accused's trial, there were three cases of stock theft, (b) that the trial court did consider the correctional supervision sentence or suspended sentence, (c) that, due to the seriousness of the cases, people in the community might take the law into their own hands against the accused, (d) that, in rural areas, black people relied on cattle farming; (e) that, due to the escalation of stock theft in the area, the community was likely to take the law into their own hands to protect their cattle.

The anger of the community and the factors to be considered in sentencing

*Held*, that in casu stock theft as a rural offence was unduly overemphasized and by doing so every option of sentencing other than direct imprisonment was disregarded. (Paragraph [9] at 249d)
*Held*, further, that a court's judgments, if well motivated to deal with all the relevant factors and communicated in a manner that would make the community understand, should be sufficient to dispel any idea of any person taking the law into his or her own hands. To allow the community to dictate to the courts what kind of sentences ought to be imposed would bring the administration of the criminal justice system into disrepute.
(Paragraphs [10] and [11] at 249d—f)

*Held,* further, that not every serious offence should justify direct imprisonment. While the public was entitled to protection against any one individual, one could not sacrifice the individual entirely in offering that protection. While society expected that a serious offence should be punished, it also expected that mitigating circumstances be taken into consideration and that the accused's specific position be accorded thorough consideration. The seriousness of the offence and the protection of society should have been considered on an equal basis with mitigating factors. (Paragraphs [1 2]—[1 4] at 249f—i)

*Held,* further, that the presiding officer should be in possession of all necessary material facts relating to sentence. Although it was the duty of the parties to place the relevant and necessary facts before him, where they failed to do so, the court had a duty to see to it that it was done. This had the effect that a presiding officer during sentencing could not afford to play a passive role. He or she had to play an active role, but remain impartial and objective throughout the procedure of sentencing. (Paragraph [19] at 250g—i)

*Held*, further, that, after obtaining the necessary information, it was the duty of the presiding officer to consider all relevant facts and factors relating to sentence.

Failure to consider an important fact, whether mitigating or aggravating, may clearly cause an unjust sentence. Similarly, failure to obtain relevant facts and factors relating to sentence, where the parties have failed to do so, may amount to an irregularity. (Paragraphs [20] and [21] at 250i—j and 251a)

Correctional supervision as a sentencing option

*Held,* further, that the trial court should deal during its judgment with correctional supervision as a sentencing option, so that it appeared clearly that it was truly considered as such. In the instant case there was no probation officer's report to enable the trial court to consider correctional supervision under s 276(l) (h) of the Criminal Procedure Act 51 of 1977 as a sentencing option. (Paragraph [25] at 25 h—i)

*Held,* further, that the legislature had indicated that punishment, whether it be rehabilitative or, if needs be, highly punitive in nature, was not necessarily or even primarily attainable by means of imprisonment. It was particularly important to realise that there was now the possibility of imposing finely tuned sentences, without resorting to imprisonment with all its known disadvantages for both the prisoner and broader community. It was now possible to impose a severe punishment and to serve the interests of the community by imposing a deterrent and strict sentence other than imprisonment. (Paragraphs [28] and [29] at 252b—c and 252d)

The trial court's consideration of judicial notice during sentencing

*Held,* further, that a judicial officer was entitled to make use of his personal knowledge regarding the prevalence of crime in his jurisdictional area. The presiding officer, however, had a duty to inform the parties of his intention to make use of personal knowledge or to take judicial notice of facts. The party concerned must be afforded the opportunity to address the court on the facts of which judicial notice will be taken and to lead such evidence as he or she deemed necessary. It would be irregular merely to take into account the information without affording the party the opportunity of dealing with such facts. (Paragraphs [32] and [33) at 253c and 253d—e)

Suspended sentence as a sentencing option

*Held,* further, that it was very clear from the provisions of s 297 that suspension of a sentence was not a light sentence and it should not be seen as a discharge. If a suspended sentence was to be disregarded as a sentencing option for fear that the community might take the law into their own hands because they see it as a discharge, then there must be something wrong with the manner in which the court communicated judgments to the ordinary members of society. The court's exercise of discretion in sentencing must be dictated by all relevant factors and it must not allow the feeling of the community to usurp such a discretion. (Paragraph [35] at 254e—f)

*Held,* further, that it was not in the interest of society to create more criminals by sending everyone to jail. A person who was never in jail would be more fearful of jail than the one who had had a taste of life in prison. Of course there were cases which

were so serious that one could not escape a jail term. The present case was not one of those cases. (Paragraphs [41] and [42] at 255e—g)
The sentence of 18 months' imprisonment set aside and replaced with six months already served. (Paragraph [43] at 255h—i)

**From The Legal Journals**

**Van Heerden C M and Coetzee H**

*"Marimuthu Munien v Bmw Financial Services (SA) (Pty) Ltd Unreported* case no 16103/08 (KZD)"

**Potchefstroom Electronic Law Journal 2009 no 4**

**Du Plessis, L**

"Religious freedom and equality as celebration of difference: A significant development in recent South African Constitutional case-law"

**Potchefstroom Electronic Law Journal 2009 no 4**

**Roestoff, M et al**

"The debt counseling process– closing the loopholes in the National Credit Act 34 of 2005"

**Potchefstroom Electronic Law Journal 2009 no 4**

**Matthee, J L**

" Die Mishandelde vrou in die Strafreg: 'n Regsvergelykende ondersoek"

**Potchefstroom Electronic Law Journal 2009 no 4**

**Basdeo, V**

"The Constitutional validity of search and seizure powers in South African Criminal Procedure"

**Potchefstroom Electronic Law Journal 2009 no 4**

**Stadler, S**

"Section 85 applications in terms of the NCA"

**De Rebus March 2010**

**Stadler, S**

"Under debt review and sued: To defend or not to defend"

**De Rebus January/February 2010**

**Van Der Merwe, D**

"The current legal position regarding digital evidence (and XML as a possible solution)

**THRHR 2010 p 81**

**Knobel, J C**

"Wrongfulness and intention"

**THRHR 2010 p 115**

**De Villiers, W P**

"Notes on the investigatory powers of the prosecution"

**THRHR 2010 p 123**

**Shar, R**

"Eviction process made easy as PIE"

**Property Law Digest March 2010**

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

**Contributions from the Law School**

## Beyond reasonable doubt

In the recent case of *S v Van Heerden* 2009 JDR 0447 (ECP) a charge of culpable homicide was brought against the accused, a specialist gynaecologist, following the death of one of his patients in hospital as a result of internal bleeding following a vaginal hysterectomy. The court was first required to decide whether the accused was negligent in failing to treat the deceased once he had been notified of her post-operative condition. There was a dispute as to whether he had been sufficiently apprised of the condition of the deceased by the nurse on duty, but once the court accepted the credibility of the nurse's version of events over that of the accused, he was held to be negligent in relation to his failure to take immediate steps to deal with her condition, as well as in 'not taking appropriate steps to stop the internal bleeding of the deceased while suspecting that condition to exist' (at 19-20).

Having established negligence, the court was further required to ascertain whether there was a causal link between the accused's inaction and the death of the deceased. In answering this question, the court was required to systematically evaluate the evidence, including the opinion evidence of a number of expert witnesses (at 21ff). Some of these witnesses were prepared to place percentages on the possibility of death occurring despite timeous intervention, and reliance was placed on behalf of the accused on the Glasgow Coma Scale, in terms of which even if a person should achieve the highest possible score of 15, there is still a 1,9% chance of death occurring (at 27). However, the court expressed its disinclination to 'become embroiled in a game of numbers' in deciding whether the deceased's life would have been saved by timely treatment by the accused. It was further held that the submission that no matter how slight the possibility that the deceased would have died in any event (or, otherwise expressed, that at the time that the accused could have been expected to arrive at the bedside of the deceased the deceased was past the point of no return) could not be sustained, as the consequences of holding (as per the Glasgow Coma Scale) that there is always a chance of death occurring would be that

> 'it will never be possible in a case such as the present, to show beyond reasonable doubt that a life would have been saved if proper and timeous action was taken'. (at 28)

In reaching this conclusion the court relied on the dictum of Rumpff JA in *S v Glegg* 1973 (1) SA 34 (A) at 38H-39A (cited below), which states that proof beyond reasonable doubt is not equivalent to proof beyond all doubt, since setting the standard so high would subvert the administration of criminal justice. Thus the court

concluded that the evidence established ‘overwhelmingly’ that the deceased’s life would have been saved but for the accused’s inaction, and that despite the ever-present (in medical terms) possibility that the deceased may have died in any event, this was ‘remote and speculative’ *in casu*, and the accused was guilty as charged. (at 29-30)

This case raises once again the question of what the standard of proof beyond reasonable doubt entails. As noted by Roberts and Zuckerman (*Criminal Evidence* (2004) 361), ‘[n]otwithstanding its major theoretical importance, rhetorical purchase and popular resonance, the meaning of the phrase “proof beyond reasonable doubt” is far from self-evident or universally agreed’. In the remainder of this brief note it is proposed to draw together the principal sources in South African law dealing with this issue in order to bring some clarity on this matter.

In the *Glegg* case, which dealt with an appeal against a conviction of driving a motor vehicle with an excess of alcohol in the blood (contravention of s140 (2) of Ordinance 21 of 1966 (C)), counsel for the appellant contested the reliability of the blood sample, arguing that it was not ‘pure and unadulterated’. In response Rumpff JA stated the following (at 38H-39A):

‘Om te verwag dat die Staat in hierdie saak, bv., ‘n mikroskopiese en dermatologiese analiese van die vel moes gedoen het voordat die naald in die vel gesteek is en dan getuienis moes gelei het dat die mikroskopiese klein onsuiwerhede wat daar mog wees geen invloed op die alkoholpersentasie kon gehad het nie, skyn my volkome onredelik te wees. *Wanneer die Staat sy saak op so ‘n manier moet bewys dat die judex facti oortuig moet wees dat die misdryf gepleeg is, word dit nie van die judex facti verwag dat sy oortuiging gebaseer moet wees op ‘n sekerheid wat daarin bestaan dat ‘n onbeperkte aantal geopperde moontlikhede wat denkbeeldig is of op blote spekulasie berus, deur die Staat uitgeskakel moet wees nie. Die begrip “redelike twyfel” kan nie presies omskryf word nie, maar dit kan wel gesê word dat dit ‘n twyfel is wat bestaan weens waarskynlikhede of moontlikhede wat op grond van algemene gangbare menslike kennis en ondervinding as redelik beskou kan word. Bewys buite redelike twyfel word nie gelyk gestel aan bewys sonder die allerminste twyfel nie, omdat die las om bewys so hoog gestel te lewer, prakties die strafregsbedeling sou verydel*.’

[‘When the State must prove its case in such a way that the *judex facti* must be convinced that the offence was committed, it is not expected of the *judex facti* that his conviction must be based on a certainty which consists therein that an unlimited number of possibilities raised by the defence, which are hypothetical or merely speculative, must be eliminated by the State. The concept “reasonable doubt” cannot be precisely defined, but this can be said: that it is a doubt which exists because of probabilities or possibilities which are considered reasonable on the ground of generally accepted human knowledge and experience. Proof beyond a reasonable doubt is not equated with proof beyond the slightest doubt, because to render the onus of proof at so high a standard would practically frustrate the administration of the criminal law.’ (italicized section in translation)]

The italicized portion of the dictum was cited in *Van Heerden* supra (at 28-29), and has further been applied in a number of cases (*S v Pepenene* 1974 (1) SA 216 (O) at 218E-G; *S v Xaba* 1975 (4) SA 354 (O) at 357A-B; *S v Claassen* 1976 (2) SA 281 (O) at 284A; *S v Brumpton* 1976 (3) SA 236 (T) at 239F-H; *S v S* 1977 (3) SA 305 (O) at 312H-313A; *S v Woldermar* 1991 (4) SA 497 (ZS) at 506J-507B; *S v Radebe* 1991 (2) SACR 166 (T) at 180E; *S v Van Wyk* 1992 (1) SACR 147 (NmS) at 155A; *S v Reddy* 1996 (2) SACR 1 (A) at 10A-B; *S v Mark* 2001 (1) SACR 572 (C) at 58G-H), and in addition has been referred to in various other cases (*S v Chesane* 1975 (3) SA 172 (T) at 174A; *S v Mathatha* 1977 (4) SA 228 (T) at 230C; *S v Van Wyk* 1977 (1) SA 412 (NC) at 414E; *S v Majenge* 1978 (2) SA 661 (O) at 667B).

The South African approach in this regard corresponds with the approach in English law (*S v Phallo* 1999 (2) SACR 558 (SCA) at para [11], in turn cited in *S v Toubie* 2004 (1) SACR 530 (W) at 534B-C), and the similarity of the *Glegg* dictum to the following dictum (also cited in *Pepenene* supra 218C-D) in *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB) at 373H (per Denning J) is evident:

'[F]or that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice.'

Unterhalter (1988 *Annual Survey* 445 at 452) points out that one of the ideas encapsulated in the criminal standard of proof is 'to specify the degree of belief that a trier of fact must possess as to the likelihood of past events having happened'. In this regard the degree of belief required by the criminal standard of proof is not absolute certainty, but, as *Miller* demonstrates, the standard is met where the evidence in the accused's favour is only remotely possible or fanciful.

It follows then that one need not be concerned with 'remote and fantastic possibilities' (*R v Herbert* 1929 TPD 630 at 636, cited *S v Chesane* 1975 (3) SA 172 (T) at 174A). As noted in *Van Wyk* supra 155A, proof beyond reasonable doubt does not mean that the State must exclude an unlimited number of preferred possibilities which are imaginary or speculative and for which no factual basis has been laid or established in the evidence.

In this regard the minority judgment of Malan JA in *R v Mlambo* 1957 (4) SA 727 (A) at 738A-C (cited in *S v Rama* 1966 (2) SA 395 (A) at 401A-B; *S v Kundishora* 1976 (4) SA 51 (RA) at 54E-F; *S v Sauls* 1981 (3) SA 172 (A) at 182H-183B; *S v F* 1990 (1) SACR 238 (A) at 248B-D; *S v Van Wyk* 1992 (1) SACR 147 (NmS) at 157F-I; *S v Omar* 1993 (2) SACR 5 (C); *S v Phallo* 1999 (2) SACR 558 (SCA) at para [10] (in turn cited in *S v Toubie* 2004 (1) SACR 530 (W) at 533E-J; *S v Buda* 2004 (1) SACR 9 (T) at para [17]); *S v Msimanga* 2005 (1) SACR 377 (O) at para [5]) directly

addresses the argument that proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or which, as it is also expressed, is consistent with his innocence:

'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.'

In *S v Mavinini* (224/2008) [2008] ZASCA 166 Cameron JA said:

"[26] It is sometimes said that proof beyond reasonable doubt requires the decision-maker to have 'moral certainty' of the guilt of the accused. Though the notion of 'moral certainty' has been criticised as importing potential confusion in jury trials,[12] it may be helpful in providing a contrast with mathematical or logical or 'complete' certainty. It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction – in our case, the rules of evidence interpreted within the precepts of the Bill of Rights – remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system." (Footnote omitted)

This poses questions as to the reasoning process to be employed by the court. Dlamini has criticised the undefined context of the reasonable doubt standard ('Proof beyond reasonable doubt: an analysis of its meaning and ideological and philosophical underpinnings' 1998 11 *SACJ* 423). It is indeed so that in assessing this standard we are dealing, not with the 'clinical balancing metaphors employed in the civil law' but instead a test that employs as its standard 'a notional fixed point that lies forever beyond our powers, or even our will, accurately to identify it' (Zeffertt, Paizes and Skeen *The South African Law of Evidence* (2003) 57), but apply it we must.

In this regard, in *R v Mtembu* 1950 (1) SA 670 (A) at 679 (per Schreiner JA) it was stated that 'it is not clear to me that the Crown's obligation to prove the appellant's guilt beyond reasonable doubt required it to negative beyond reasonable doubt all pieces of evidence favourable to the appellant. I am not satisfied that a trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt'. Even if a number of inferences can be drawn from a certain fact, taken in isolation (*Reddy* supra 10B-C), as stated in *Sauls* supra 182G-H (cited in *Van Wyk* 1992 supra 157E-F; *F* supra 247J-248A), 'the State is, however, not obliged to indulge in conjecture and find an answer to every possible inference

which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it is incriminating.'

In conclusion, it is perhaps instructive to advert to the instruction given to the jury by Alderson B in the old English case of *R v Hodge* ((1838) 2 Lew CC 227, 228) to the effect that a guilty verdict should not be returned unless jurors were 'satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person'. Roberts and Zuckerman (at 373) note that this direction is 'well-suited to conveying the significance of the criminal standard of proof', and it is submitted that it accords with the approach of the South African courts in this regard.

**Shannon Hoctor**
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## Matters of Interest to Magistrates

### Attorneys should smarten court dress

It is with sincere alarm that over the past several months that I have, when appearing in the magistrate's court, in Johannesburg, observed attorneys appearing in court most inappropriately dressed. All too often presiding magistrates find it necessary to reprimand practitioners in open court for such disrespectful conduct. One observes attorneys not wearing ties, or not wearing a jacket underneath their robes. Of greater concern I have even had to witness colleagues of the fairer gender appearing in court in sun dresses and sandals. This trend seems to be emerging as the norm rather then the exception.

There can, in my mind, be nothing more embarrassing than to be present in open court and witness a colleague being reprimanded not only in the presence of his colleagues but in the presence of members of the public for inappropriate attire. Apart from being disrespectful to the presiding officer and to the dignity of the court, where justice must at all times be seen to be done, it undermines the integrity of our profession in the eyes of the public.

I therefore not only appeal to all colleagues to ensure they are appropriately dressed for court appearances at all times, I suggest that perhaps the time has arrived for us to insist on a uniform dress code for all court appearances. This suggestion came up for much discussion and debate some years back but the issue was shelved in favour of us retaining the present status quo. Perhaps it is now necessary for this issue to be revisited in the fervent hope that a uniform dress code is implemented.

Being attired smartly in a dignified manner, makes us as professionals feel smart, and when we feel smart we will perform our duties in a smart, competent and professional manner. Above all, the dignity of our courts and integrity and image of our profession must be maintained at all costs, and we as officers of the court have a duty to enhance that dignity.

**Leslie Kobrin,**
*attorney, Johannesburg*

(The above letter appeared in the January/February issue of ***De Rebus***.)

**A Last Thought**

"Judges are also entitled to equal treatment under the Constitution. Something that annoys me is the selection of holy cows – judges who can do no wrong and whose judgments are uncritically hailed as chapters in another holy book. Holy cows are conspicuous, and tend to chew the same cud, while the poor water buffalo carry the yoke. Judgments are often assessed with reference to the result and sound bites, and not by their logic. In other words, what Max Weber would have referred to as formally irrational judging has become the acceptable norm: it is one not guided by general norms; it proceeds in either pure arbitrariness or jumps to a conclusion in a purely casuistic manner upon the emotional evaluation of the particular case. Some tend to forget that a founding value of the Constitution is the rule of law and not the rule of judges. And that, as the Indian Supreme Court once said, "legalese and logomachy have the genius to inject mystique into common words, alienating the laity . . . from the rule of law". The court did not notice the irony of its statement. I did not know that 'logomachy' is an argument about words – but maybe the laity do know."

Per *L.T.C. Harms* in *The Bench and Academia PER 2009 no 4*