e-MANTSHI

A KZNJETCOM Newsletter

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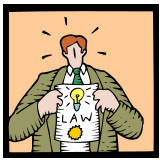
Welcome to the seventy eight issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 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 Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1.The Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 6 of , 2012 was promulgated in Government Gazette no 35473 dated 26 June 2012.The purpose of the Act is to amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to expressly provide that the imposition of penalties in respect of certain offences contained in the Act is left to the discretion of the courts; and to provide for matters connected therewith. Some of the amendments are the following:

4. Amendment of section 56 of Act 32 of 2007.—Section 56 of the principal Act is hereby amended—

(*a*) by the substitution for the heading of the following heading:

"Defences [and sentencing]"; and

(*b*) by the deletion of subsection (7).

5. Insertion of section 56A in Act 32 of 2007.—The following section is hereby inserted in the principal Act after section 56:

56A. "Sentencing.—(1) A court shall, if -

(*a*) that or another court has convicted a person of an offence in terms of this Act; and

(*b*) a penalty is not prescribed in respect of that offence in terms of this Act or by any other Act, impose a sentence, as provided for in section 276 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which that court considers appropriate and which is within that court's penal jurisdiction.

(2) If a person is convicted of any offence under this Act, the court that imposes the sentence shall consider as an aggravating factor the fact that the person—

(*a*) committed the offence with the intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or

(*b*) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.".

2. The regulations in terms of the Children's Act, 2005 (Act 38 of 2005) has been amended. The amended regulations have been published in Government Gazette No.35476 on 29 June 2012. One of the amendments are the following:

Regulation 33 of the Regulations is hereby substituted by the following regulation:

"Reporting of abuse or deliberate neglect of child

33. (1) A report by a person contemplated in section 110(1) of the Act, who on reasonable grounds concludes as provided for in that section that a child has been abused in a manner causing physical injury, sexual abused, emotionally abused or deliberately neglected, must be made to the provincial department of social development. a designated child protection organisation or a police official in a form substantially corresponding to Form 22 by completing that form to the best of that person's ability and by including in the form such particulars as are available to him or her.

(2) A designated child protection organisation or police official to whom a report contemplated in sub·regulation (1) has been made, must submit the completed Form 22 to the relevant provincial department of social development.

(3) The provincial department of social development or designated child protection organisation to whom a report contemplated in sub·regulation

(1) has been submitted, must submit the particulars of the abuse in a form identical to Form 23 to the Director-General for inclusion in Part A of the National Child Protection Register."

3. An explanatory summary has been published of a Criminal Procedure Amendment Bill, 2012. The notice was published in Government Gazette no 35500 dated 13 July 2012. The Bill is intended to amend the Criminal Procedure Act, 1977, so as to further regulate applications for condonation, leave to appeal and further evidence; and to provide for matters connected therewith. A copy of the Bill can be found on the websites of the Department and Parliamentary Monitoring Group at http://www.doj.gov.za and http://www.pmg.org.za

4. The Minister of Transport published a draft Bill and Memorandum on a National Road Traffic Amendment Bill for public comments. Interested persons are requested to submit written comments and inputs on the above Bill by not later than 18 August 2012. All comments should be addressed to the following address MasombuA@dot.gov.za. The proposed Amendment was published in Government Gazette no 35528 dated 18 July 2012. One of the proposed amendments are the following:

“Amendment of Section 65 of the Principal Act

38. Section 65 of the principal Act is hereby amended by,
(a) the substitution for subsection (2) of the following subsection:

(2) No person shall on a public road
(a) Drive a vehicle; or
(b) Occupy the driver's seat of a motor vehicle the engine of which is running,
while the concentration of alcohol in any specimen of blood taken from any part of his or her body is not less than [0,05] 0,02 gram per 100 millilitres, or in a case of a professional driver referred to in section 32, not less than [0,02] 0,00 gram per 100 millilitres.

(b) by the substitution for subsection (3) of the following subsection:

(3) If in any prosecution for an alleged contravention of a provision of subsection (2), it is proved that the concentration of alcohol in any specimen of blood taken from any part of the body of the person concerned was not less than [0,05] 0,02 gram per 100 millilitres at any time within two hours after the alleged contravention, it shall be presumed , in the absence of evidence to the contrary, that such contravention was not less than [0,05] 0,02 gram per 100 millilitres at the time of the alleged contravention, or in the case of a professional driver referred to in section 32 , not

less than [0,02] 0,00 gram per 100 millilitres, it shall be presumed, in the absence of evidence to the contrary ,that such concentration was not less than [0,02] 0,00 gram per 100 millilitres at the time of the alleged contravention.

(c) the substitution for subsection (5) of the following subsection:

(5) No person shall on a public road
(a) drive a vehicle; or
(b) occupy the driver's seat of a motor vehicle the engine of which is running,
while the concentration of alcohol in any specimen of breath exhaled by such person is not less than [0,24] 0,10 milligrams per 1000 millilitres, or in the case of a professional driver referred to in section 32, not less than [0,10] 0.00 milligrams per 1000 millilitres.

3. (d) the substitution for subsection (6) of the following subsection:

(6) If in any prosecution for a contravention of the provision of subsection (5), it is proved that the concentration of alcohol in any specimen of breath of person concerned was not less than [0,24] 0,10 milligrams per 1000 millilitres of breath taken at any time within two hours after the alleged contravention, it shall be presumed , in the absence of evidence, that such concentration was not less than [0,24] 0,10 milligrams per 1000 millilitres at the time of the alleged contravention, or

Recent Court Cases

1. S v DLAMINI 2012 (2) SACR 1 (SCA)

There is no duplication of convictions if a separate intent is formed for the commission of each offence in a case where a group of three women were robbed.

" [45] A useful point to start with is the charge sheet. Counts 1, 2 and 3 are germane to the appeal and I shall, in the interest of brevity, refer to them collectively as 'the charges'. There were three complainants on the charges. In count 1 the appellant was charged with 'robbery with firearms', understood by all concerned at the trial to mean robbery with aggravating circumstances where a firearm was used. The State

alleged that Mrs Acutt was unlawfully, intentionally and by force divested of a Toyota Corolla motor vehicle, a video camera, a cellphone, two pairs of sunglasses, one pair of prescription glasses and a handbag containing cosmetics. In count 2 the charge was one of robbery with aggravating circumstances in respect of Mrs Burgess. The State averred that Mrs Burgess had been robbed of a Volvo motor vehicle, a pair of prescription sunglasses, a pair of prescription reading glasses, various tapes and a pair of sandals. Count 3 was also one of robbery with aggravating circumstances in respect of Mrs Usher who was allegedly robbed of a handbag containing a purse, a cellular phone, a cheque book, cash, a cosmetics bag, two pairs of reading glasses and one pair of sunglasses. Counts 2 and 3 were wrongly framed inasmuch as Mrs Usher, and not Mrs Burgess, had been robbed of the Volvo and the other items listed above. It appears that the State had erroneously switched the lists of stolen items around in this regard.

[46] As stated, the appeal was before us only on sentence – the appellant sought leave on petition only against the sentence, which was granted. Counsel argued the duplication of convictions aspect without the advantage of prior preparation and research, in the circumstances explained by Cachalia JA.

[47] According to the evidence, one of the three robbers had a firearm which he pointed at all three complainants. Mrs Usher was in her car (the Volvo) in the driver's seat, Mrs Burgess was seated in the front passenger seat and Mrs Acutt was approaching the Volvo from the rear to occupy the seat behind the driver, when the firearm was pointed at them. This constituted the main threat to the complainants, although other threats and demands were also uttered and addressed to them individually and as a group. The complainants testified that one robber (identified by Mrs Burgess at an identification parade as the appellant) first approached Mrs Burgess and demanded her handbag and other possessions. The other robber approached Mrs Acutt to demand the keys of her Toyota Corolla, while the one with the firearm continued pointing it at Mrs Usher. Mrs Usher vacated the driver's seat, walked towards the rear of the Volvo and handed over her car keys to one of the robbers when this was demanded of her. The robbers eventually drove off with both vehicles and with various belongings of the complainants in their possession.

[48] Against this factual background, together with the facts set out by Cachalia JA, what falls to be decided is whether there has been a duplication of convictions on the charges. For the reasons that follow, I am of the view that the evidence established three separate counts of robbery and that the appellant had been correctly convicted. In my view, *S v Maneli**,** 2009 (1) SACR 509 (SCA)* relied upon by Cachalia JA, is distinguishable on the facts. But before I set out my reasons for differing on these aspects, it is necessary to restate the general legal principles regarding robbery.

[49] Cachalia JA cites the definition of robbery as set out in *Maneli* which, in turn, emanates from Prof Milton's work (J R L Milton *South African Criminal Law and Procedure* 3 ed (1996) at 642). That definition accords broadly with those advanced by Prof Snyman (C R Snyman *Criminal Law* 5 ed (2008) at 517). and by Prof de Wet. (De Wet and Swanepoel *Strafreg* 4 ed (1985) at 373). As Cachalia JA states, robbery comprises two unlawful acts, one the taking of property and the other the perpetrating or uttering of a violent act upon or violent threats to a person. While the definition and the essential elements of the offence are straightforward, the application thereof to factual situations is not, as this case demonstrates. Prof Milton correctly observes that '[t]his duality lends a measure of complexity to the analysis and application of the elements of the crime that has ensured a continuing quality of ambiguous uncertainty about the crime, which sometimes leads to strange anomalies'.

[50] Two further elements of the offence bear emphasis. Firstly, there must be a causal link between the violence perpetrated and the taking of the property.[26] Secondly, robbery, unlike theft, is not a continuing crime – the offence of robbery is complete once *contrectatio* is effected. These are important considerations in assessing whether there has been a duplication of convictions. I hasten to point out that the observation that robbery is not a continuing crime must not be confused with the factual matrix (as in *Maneli)* where two or more acts are done with a single intent, constituting one continuous transaction. In the first instance a robbery would be completed once property has been taken from the victim as a result of violence or threats directed at him or her. Where violence is directed at a person after the goods had been taken, our courts have held that it is not the offence of robbery that is committed. In the second instance, on the other hand, a single intent to take property by means of violence towards persons at separate locations in one continuous transaction can, in appropriate circumstances, constitute one robbery. This was the case in *Maneli,* which I turn to discuss next.

[51] My brother Cachalia JA has already expounded the facts and findings in *Maneli*. The present matter differs in my view materially from *Maneli* on the facts in the following respects: firstly, all three women were threatened separately and together and their property taken from them individually, separate from the others. Unlawful threats of violence and the taking of property were thus perpetrated separately in relation to each of the women. In *Maneli* various people were threatened and violent acts were directed at various people, but only the complainant's (Mr Maske's) property was stolen. That property was in the complainant's possession and under his control, thus only one robbery was committed. The threats and violence against the persons present there, including the complainant, facilitated the theft of the complainant's property. The second difference is to be found in the intent requirement. In *Maneli* there was a single intent, namely to deprive the complainant of his property through violence. That single intent was executed in one continuous

transaction, at the complainant's office and at his house. As the appellant in the present matter denied involvement in the incident, his subjective intention could not be investigated during the trial. As his conviction is dependent upon him having had the requisite intention, it has to be inferred from his actions and those of his accomplices insofar as he associated himself with their actions, as testified to by the three victims. That evidence reveals:

1. A threat with a firearm by one of the perpetrators (I refer to him as the second perpetrator for ease of reference) aimed and directed at all three women;
2. That threat, together with threatening and demanding utterances by all the perpetrators, facilitated the removal of property from all three women;
3. The appellant took a handbag and other possessions from Mrs Burgess;
4. The inference that the appellant had the intention to rob Mrs Burgess lies in his own action of taking her property from her, threatening her and associating himself with the second perpetrator's threat towards her. That completes the crime of robbery of Mrs Burgess;
5. The third perpetrator (reference again for convenience) took the handbag, the Toyota motor vehicle and its keys from Mrs Acutt whilst threatening her and associating himself with the threat by the second perpetrator towards her. Thus the third perpetrator's actions fulfilled all the elements of the crime of robbery towards Mrs Acutt;
6. Because the appellant made common purpose with the second and third perpetrators, as correctly pointed out by Cachalia JA in para 21 above, he is also guilty of the robbery committed by the third perpetrator against Mrs Acutt although he personally took no action against her;
7. The same reasoning, applied to the robbery of Mrs Usher, leads to the conclusion that the appellant is also guilty of the robbery committed against her.
8. This illustrates that it is not possible to conclude, from the events testified to by the three victims, that the appellant had 'a single intent'.

In the present matter there was a separate intent by the three robbers to rob each of the three women. That separate intent in respect of each woman was executed separately in respect of each woman.

[52] One might ask rhetorically: if the three women had been raped by the appellant, can it ever be argued that there was only one offence of rape? Reverting to robbery: if violent acts are performed on a number of persons, but property is taken from only one of them, then there is only one robbery, and several assaults, as was the case in *Maneli*. If violence is directed at only one person, but property is taken from several persons, including the one against whom violence was directed, then there

is one robbery and several thefts. But where violence or threats are perpetrated against three persons and property taken from all three as a result of such violence or threats, there are three robberies. The point can be made by simply asking – who was robbed by the appellant? If it was only one robbery, the inevitable consequence must be that only one of the women was robbed of all of the property, despite the fact that it was taken from the possession of the others. The next logical question would be – who is the woman that was robbed? The difficulty in answering these questions does not arise when they are posed in respect of *Maneli*. There Mr Maske, the complainant, was robbed of all of the property, as it was in his possession or under his control. The presence of others against whom violence was directed in the course of the robbery, was merely incidental to the robbery of the complainant, although the accused in *Maneli* could legitimately have been charged with the assault of the other persons. In the present matter, however, property was taken from the possession and control of each of the women separately, through the use of threats of violence.

[53] It is difficult to comprehend how, for example, the taking by force of Mrs Acutt's property could constitute a robbery of Mrs Burgess, and vice versa. A similar difficulty arises with the finding that the appropriation of Mrs Usher's property by force constitutes a robbery of Mrs Acutt or Mrs Burgess. Snyman defines robbery as the 'theft of property' by intentionally and unlawfully using violence or threats to take the property from someone else. So, one of the elements of robbery is theft. All the requirements of theft also apply to robbery. Theft is in turn defined as appropriation of corporeal, movable property which, inter alia, 'belongs to, and is in the possession of another'. So, in the case of robbery, the fact that the perpetrator takes property belonging to and in possession of three different persons clearly constitutes three counts of robbery. In *Maneli,* on the other hand, property belonging to and in the possession of only one person was appropriated.

[54] The single intent and continuous transaction test, as applied to an enquiry regarding the improper duplication of convictions, has already been discussed above. Another test is the enquiry whether the evidence necessary to establish one crime involves proving another crime. As is the case with the single intent test, above, this second test also compels one to the ineluctable conclusion that there were three separate robberies. If the State had led the evidence of one complainant only in relation to the property she had been forcibly deprived of, all the elements of the crime of robbery would have been proved. This is true of all three complainants.

[55] A brief consideration of the principles regarding duplication of convictions is apposite. Section 83 of the Criminal Procedure Act 51 of 1977 enables the State to draft charges as widely as it may deem necessary, to the extent that it may technically amount to a duplication of charges. That the law permits. But what is not permitted is duplication of convictions in order to safeguard an accused against being convicted twice in the same case for the same offence. As stated by Cachalia

JA, where the application of the two tests to determine whether there has been a duplication of convictions yields no clear result, a court is called upon to apply its common sense, wisdom, experience and sense of fairness to reach a decision. As demonstrated above, on the evidence and in applying the two tests, three separate offences were committed. To hold otherwise would be to distort a fundamental legal principle, leading to anomalous results. As Wessels JA said in *S v Grobler en 'n ander: 1966 (1) SA 507 (A) at 523F*

'The test or combination of tests to be applied are those which are on a common sense view best calculated to achieve the object of the rule.'

The rule is primarily aimed at fairness. This, however, embodies fairness to both the accused and the State. Harms DP put it thus in the context of the Constitution's fair trial provisions in s 35:

'Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the State'.(*National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) para 5.)

The rule cannot be applied where it would lead to manifest unfairness to the State, as would be the case, in my view, were Cachalia JA's views to be upheld. To borrow again from Wessels JA in *S v Grobler en 'n ander:*

'The main purpose and social function of criminal proceedings are to establish the guilt of an accused person in respect of criminal conduct so that he may be punished according to law for that conduct.'

The practice of the DPP, referred to by Cachalia JA in para 26, is ill conceived as s 83 of the Act specifically permits a broader approach to be followed in the formulation of charges. But once evidence is heard a court should be mindful of the rules regarding the duplication of convictions. The manner in which charges had been formulated in the present matter constitutes the proper approach.

[56] To summarise: the evidence plainly established the commission of a separate robbery against each of Mrs Acutt, Mrs Burgess and Mrs Usher. The application of the single intent, continuous transaction test and of the evidence test inexorably leads to this conclusion. "

2. S v MM 2012(2) SACR 18 (SCA)

The mere handing in of a doctors statement in a rape trial is insufficient except where there is no confusion that penetration had been proved.

"[15] As appears to be an increasing feature of cases such as these the doctor's report was simply handed in by consent and the doctor was not called to give

evidence. That practice is generally speaking to be deprecated. It means that there is no opportunity for the doctor to explain the frequently subtle complexities and nuances of the report; to clarify points of uncertainty and to amplify upon its implications and the reasons for any opinions expressed in the report. That may make the difference between a conviction and an acquittal or perhaps a conviction on a lesser charge. Depending on the areas where there is a lack of clarity, the lack of clarification may either benefit or prejudice an accused. Neither result is desirable. Magistrates and judges who are confronted with these reports without explanation do not have the requisite medical knowledge to flesh out their full implications. Unless therefore there can be no confusion, for example in a case where the fact of rape is admitted and the only issue is one of identification of the perpetrator, it will generally be desirable for the doctor to give evidence in support of his or her report. In this case it was undoubtedly necessary and the fact that the doctor was not called has rendered the consideration of this appeal far more complicated than it should have been."

"[24] It is most unsatisfactory to have to reach a conclusion on the basis of uncertainty concerning the meaning of the medical report. Had the doctor been called as a witness and his evidence had revealed that penetration had occurred, then the conviction of rape would have been upheld and in the absence of substantial and compelling circumstances the sentence decreed by the legislature would have remained in place. That would have given satisfactory justice to his victim. On the other hand if the doctor's evidence had made it clear that it could not be said with certainty that penetration had occurred the trial judge would no doubt not have convicted the appellant of rape, but of the lesser offence of indecent assault and a substantial but lesser sentence would have been imposed. Given current norms for the grant of parole the appellant would probably have been released from prison by this time. All of this demonstrates that the decision not to call the doctor was erroneous. Regrettably this is too frequently a feature of rape cases and judging by the experience of the members of this court it is increasingly rare for the doctor who examined the complainant in such cases to be called to explain the medical report. We were however informed from the Bar that there is no instruction in the office of the National Director of Public Prosecutions that doctors should not be called. That is a start to addressing the problem and it may be helpful to afford some guidance to prosecutors. In principle unless there is no issue about the fact of rape the doctor should be called as a witness. Certainly wherever the implications of the doctor's observations are unclear the doctor should be called to explain those observations and to guide the court in the correct inference to be drawn from them."

3. S v MCOSEDI 2012(2) SACR 82 (ECG)

A presiding officer is required to set out the evidence and analyse the evidence in his judgment.

"The regional magistrate's judgment reads as follows in its entirety:
"*Accused I will not go through the evidence in this matter, we have dealt with this matter just recently and the evidence is still clear in our minds. Must then the argument of the state indicates me what I have heard and thought going through this evidence? (sic) It was worse when you took the stand here, you wanted to deny everything, even a straight forward question which needed yes or no. Your sentences started like this "*as I have already said"*. Your sentences when you were in the witness box would start with "*as I have already said"*. You were in difficulty to explain why the police would want to frame you. In another colour you wanted to deny that this firearm was found at your place. Your version, or the story is highly improbable. We accept the story of the state's matter, you are found GUILTY on all these counts.*"
It is regrettable to have to criticise the calibre of a judgment of a regional magistrate but this particular judgment falls so far short of the minimum standard which can reasonably be expected of a magistrate, much less a regional magistrate, that I would be failing in my duty were I not to do so. So shoddy and careless is the judgment that it amounts, in my view, almost to a dereliction of the regional magistrate's duty as a judicial officer. This is all the more so when it is borne in mind that appellant was facing two charges in respect of each of which he could be sentenced (and indeed was) to a minimum term of imprisonment of 15 years.
The regional magistrate failed to set out the evidence at all. This is unacceptable. In *Value Truck Rental (Pty) Limited v John Dirker Engineering (Pty) Ltd* Case no 127/2007 Plasket J had occasion to comment on a magistrate's judgment in a civil trial where a magistrate similarly failed to set out the evidence, merely stating that "*Proceedings were mechanically recorded therefore I will not dwell much on facts.*"
Plasket J remarked that the word "*much*" was out of place because the magistrate thereafter did not deal with the facts at all. The learned Judge then stated in para 5:
"*He is required to do so in a judgment: the facts, whether they are common cause or contested have to be applied to the applicable legal principles in order for a judicial officer to arrive at a rational conclusion; and where the facts are in dispute, it is incumbent on the magistrate to decide, on the basis of well established rules, whether the facts asserted by the plaintiff or defendant are more probably true.*"
In *Mphalele v First National Bank of SA Ltd* [1999] ZACC 1**;** 1999 (2) SA 667 (CC) the following was stated at 671E – H:
"*There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of s1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the Judiciary is*

bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer."

From The Legal Journals

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"The National Credit Act and s74 administration orders"

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

Contributions from the Law School

The child witness: intermediaries, and the oath

In the case of *S v QN* 2012 (1) SACR 380 (KZP), the appellant had been convicted of the rape of a five year old girl, and sentenced to life imprisonment. The child complainant was six years old at the time she gave evidence in the trial. The appellant appealed against both sentence and conviction.

J88/DNA Swabs

The appellant's first argument was that the trial court had erred in assessing the evidence, and in finding him factually guilty. This argument was on the basis that

there were inconsistencies in the J88 form, and the appellant questioned whether there had even been a rape. However, the appeal court noted that the appellant himself had conceded that the rape had taken place in the court a quo, and so this line of argument was not seriously pursued. In any event, the inconsistencies in the J88 could be explained. The second argument here was that although swabs for DNA testing had been taken from the appellant, no results were placed into evidence. The appellant argued that these results would show conclusively that he was not guilty. The state could not explain why the results were not available, but made it clear that it was not in possession of them. The prosecutor undertook to make enquiries to establish what had happened to the DNA tests, but no further evidence or information was forthcoming. Nevertheless, the court found that there was nothing to suggest that the results of the DNA swab test had been deliberately withheld from the court as there was no evidence that the results had been made available to the prosecution. Thus, the court concluded, no adverse inference could be drawn against the state on this basis. Given that it was common cause that DNA swabs had been taken from the accused, I am concerned that the court was so easily persuaded that no adverse inference should be drawn against the state on this basis. Particularly since the evidence in question would have had such high probative value. In addition, the finding that the DNA results had not been provided to the prosecutor to excuse non production of the real evidence is not a sufficient safeguard of the appellant's rights. It may be that the police had withheld the results from the prosecution services. This was not canvassed. There have been many cases in which the courts have decried the failure to produce real evidence, and where they have suggested that it may be subversive of proper criminal justice (see, for example *S v Msane* 1977 (4) SA 758 (N)).

The court also considered the body of evidence presented by the state and the defence. The court concluded that the appellant had not been a credible witness, while the complainant had been. She had testified using dolls to demonstrate what had been done to her, and her evidence was consistent with the medical evidence, and her mother's testimony, which also corroborated aspects of her testimony. The court therefore found that the evidence was sufficient to establish guilt beyond a reasonable doubt.

The more substantial grounds of the appeal related to alleged procedural flaws in the manner in which the complainant's evidence had been taken, and the resultant argument that the complainant's evidence was inadmissible. This argument was based on two legs: firstly, that the complainant was not a competent witness and had not been properly sworn in; and secondly that the intermediary used in the case was not sworn in, and that this was a fatal irregularity in the proceedings.

Oath/Admonishment/Competence

The appellant's contention that the complainant was not a competent witness was based on a flawed argument conflating the procedures relating to the swearing in of the child witness, and those relating to establishing the child's competence to testify.

The appellant argued that section 162 of the Criminal Procedure Act 51 of 1977 requires that all evidence be given on oath, and that this requires that the witness understands the nature and import of the oath. The appellant argued that since the court a quo had not determined that the complainant understood the nature and import of the oath, she was an incompetent witness, and her evidence was therefore inadmissible. This argument seems to rest on the assumption that an oath was administered to the complainant, which is wrong. There was no oath administered. Instead the complainant was admonished to tell the truth in terms of section 164 of the Criminal Procedure Act 51 of 1977.

This section provides that a child who is unable to understand the oath is not required to take the oath, and will still be a competent witness as long as she is admonished to tell the truth, the whole truth and nothing but the truth. It is true that the magistrate did not explicitly ask the complainant whether she knew or understood the oath, but it is well established that there need not be a formal enquiry into this question. The presiding officer may reach that conclusion simply by virtue of the young age of the child. This is what the magistrate did, appropriately in view of the fact that the complainant was six years old.

Section 164(2) provides that anything willfully and falsely said under admonishment will result in the same penalties as if the evidence were sworn. The court held that the admonishment need not refer specifically to the threat inherent in section 164(2) for it to be proper. In other words, there was no need to tell the six year old complainant that a punishment similar to that for perjury will follow if she willfully and falsely stated an untruth. The court held that all that is required is that the witness must 'understand that an adverse sanction will generally follow the telling of a lie ' (para 11).This is correct, and it would be nonsensical to require a magistrate to warn a six year old child (as the complainant was in this case) of the possibility of criminal sanctions for lying when such a child is in any event doli incapax.

As to the child's competence, the magistrate established, through interacting with the child, that the child understood the difference between truth and falsehood, and that she had sufficient maturity to understand questions put to her, and to formulate appropriate answers in response. The court thus found that the child was a competent witness, who had been properly admonished in terms of section 164 of the Criminal Procedure Act 51 of 1977. Her testimony was thus properly regarded as admissible.

Intermediary

The appellant then argued that the evidence of the complainant was inadmissible because the intermediary, appointed in terms of section 170 A of the Criminal Procedure Act 51 of 1977, had not been sworn in prior to assuming duty.

There is no provision in the Criminal Procedure Act 51 of 1977, nor in the rules of court, that require that an intermediary must be sworn in. However, the High Court in the case of *S v Booi* 2005 (1) SACR 599 (Bop), reasoned that an intermediary plays a role analogous to that of an interpreter, and thus that the rules requiring that an interpreter be sworn in should be interpreted as applying equally to intermediaries. The High Court did not specify exactly what form the administration of the oath/affirmation should take, but held that the intermediary must be required to 'specifically undertake to convey correctly and to the best of his/her ability the general purport of what is being said to the witness before s/he begins to help the witness. An intermediary needs to be reminded or cautioned that his/her role in court is, generally speaking, just as important as and similar to that of an interpreter'(*Booi* at para 25). The court found that failing to swear an intermediary in was so fundamental as to render the evidence of the child complainant inadmissible. This judgement was criticized (see, for example, N Whitear-Nel 'Intermediaries appointed in terms of section 170A of the Criminal Procedure Act 51 of 1977: New Developments?' (2006) 19(3) SAJCJ 334), but the finding was confirmed in the case of *S v Motaung* 2007(1) SACR 476 (SE) subject to the proviso that the irregularity in failing to swear in the intermediary would not necessarily result in the complainant's evidence being declared inadmissible. In *Motaung's* case, the court found that it did not render the complainant's evidence inadmissible, because the intermediary had not acted as an interpreter, but simply as a conduit for the child's evidence (*Motaung's* case para 10). The court in *QN's* case criticised *Motaung's* case, holding that it was inconsistent with the finding in *S v Naidoo* 1962 2 SA 625 (A) that evidence interpreted by an unsworn interpreter is unsworn evidence, and thus inadmissible. The court in *Motaung*'s case equated the functions of an interpreter and an intermediary, yet paradoxically found that the evidence presented via the unsworn intermediary was admissible by virtue of its reliability (*QN's* case para 24).

The court noted that the appellant's submission was based on the argument that the failure to swear the intermediary in was an irregularity which rendered the complainant's evidence inadmissible in itself. The appellant's submission did not address the second part of the enquiry as enunciated in *Motaung's* case.

The court also noted that neither court in *S v Booi* or *S v Motaung* had analysed the precise role envisaged for an intermediary in terms of section 170 A of the Criminal Procedure Act 51 of 1977 before reaching the conclusion that an intermediary must be sworn in as with an interpreter (*QN's* case para 19). The court held that when one considers that the role of the intermediary is to alleviate any undue mental stress

and suffering resulting from the complaint testifying in court, it becomes clear that the role of the intermediary is to convey the general purport of questions put to the child witness, but not to convey or interpret what is said by the witness. The court held 'the purpose of the section is met by mediating the questions put, not the answers given…it is not as if the witness will be unduly stressed if the answer is not conveyed by the intermediary. Neither is it the case that the court would require the answer to be phrased in a way that it understands' (para 21).

The court thus found that the analogy between an intermediary and an interpreter is false, "unless the intermediary is permitted to supplant the role of the interpreter in conveying the evidence…to the court." For cases in which the intermediary was required to play the role of an interpreter, and was thus sworn in accordingly, see *S v Mponda* 2007 (2) SACR 245 (C) at 36, and *S v Bongani* 2001 1 SACR 670 C at 673 f-g. Also note the interesting development in Zimbabwe, were the functions of the intermediary and the interpreter have been conflated to good effect in response to the particular circumstances in that country, see K Muller and T Marowa-Wilkerson 'An innovative approach to the use of intermediaries : lessons from Zimbabwe' (2011) 12(2)CARSA 13.

The court held that its view that the failure to swear in an intermediary does not constitute an irregularity is consistent with the legislative intent which can be deduced from the fact that he legislature did not see fit to include a provision requiring this, and that section 170A (5) of the Criminal Procedure Act 51 of 1977 specifically provides that evidence given via an incompetent intermediary will not be rendered inadmissible solely on the basis that she was not competent to be appointed. The court reasoned that since *Naidoo's* case established that evidence given through an unqualified interpreter is inadmissible, the legislature could not have envisaged the functions of an interpreter and intermediary as comparable (para 25). In *Booi's* case, the court reasoned that section 170A(5) could not render the child's evidence admissible despite the unsworn intermediary because the irregularity was so serious that it could not be said that the intermediary had been appointed at all, which was a condition for the operation of section 170A(5).

It should be noted that section 170A (5) and (6) were introduced by the Criminal Procedure Amendment Act 17 of 2001 to anticipate the effect of the judgement in *S v Bongani* 2001 (1) SALR 670 (C) in which it was effectively held that former or retired educators were not competent to be appointed as intermediaries. In fact, this was a widespread practice, and there were many cases in which former and retired educators were acting as intermediaries. There has now been an amendment to the categories of person who can be appointed as intermediaries to include former and retired educators (E Du Toit 'Commentary on the Criminal Procedure Act' 1987 Juta at p 32C).

Interestingly, however, the court then added that it did not wish to denigrade the practice that had developed in the courts to swear in intermediaries. The court held that given the important function that an intermediary fulfills, it is a salutary practice to require the intermediary to discharge the function under oath. The court emphasised however that if this is not done, it does not amount to an irregularity in the trial prrocedure. As to the form of the recommended oath, the court held that the intermediary should be required to commit to fulfilling her functions 'honestly and faithfully and to the best of her ability' (para 26).

The court then held that if it were wrong, and the failure to swear an intermediary in was an irregularity, that it had not been a fatal irregularity per the test set out in *Matoung's* case, because it did not result in a failure of justice. The court noted that 'the interpreter heard what was put to the [complainant] by the intermediary, as did the appellant's legal representative. Neither of them saw fit to intervene to correct any inaccuracies. The interpreter interpreted the answers given to the questions by the [complainant] without the involvement of the intermediary. The record nowhere indicates any incongruity between the questions put, and the answers given which may support an inference that the intermediary did not perform her function adequately' (para 27).

The court therefore dismissed the appeal against conviction, but upheld the appeal against sentence and remitted the case back to the High Court for a proper determination in this regard.

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Matters of Interest to Magistrates

Transformation of the judicial system

By Victor Dercksen

In any scientific research, it is a *sine qua non* that there must be absolute agreement in respect of the keywords relating to the subject postulated. If not, the participants in

a subsequent debate will be arguing at cross purposes because they will advance from divergent vantage points.

In the article ‘Have your say on transformation of the judicial system’ in 2012 (Apr) *DR* 13 the word ‘transformation’ is used almost ten times.

Many years ago Professor Pierre Hugo, a former lecturer in the political science department of Unisa, indicated to me that it is imperative that the outcome of proposed transformation must be unambiguously clear. Should this criterion be applied to the proposed research referred to by the Justice Minister in the ‘Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state’, the test will fail because the research may result in changes in several spheres of the judicial system.

An analogue in the medical profession amply illustrates the point: In a celebrated court case a plastic surgeon performed an operation on the face of a female patient, the object of which was to vastly improve her looks. Unfortunately, the result was disastrous and the patient sued the specialist for damages. The court awarded substantial damages and found that the surgeon failed to explain to his patient that the proposed transformation could have disastrous results.

It is axiomatic, therefore, that the ultimate result of the transformation (as envisaged by the Minister) must initially be explained to the general public. This is a *sine qua non*. Should the Minister fail to discharge this obligation, the use of the word ‘transformation’ could simply be applied to disguise the real motive of the party pleading for transformation.

Of course, this is not the first time that this word or concept has been applied, but it was also canvassed at the negotiating table some decades ago. Arguably, the participants could palpably have been cross purposed as to its real intent. Dr Leon Wessels, one of the architects of the Constitution, stated publicly at the Stellenbosch Woordfees this year that the negotiating parties eventually agreed on 34 principles that were to be embedded in the Constitution. A Constitution Amendment Bill that aims to effect changes to the basic values of the Constitution requires a majority vote of at least 75% of the members of the National Assembly and of at least six provinces in the National Council of Provinces in order to be passed.

The question now arises whether the Minister is only treating the symptoms (as evinced by negative court experiences for the government) instead of attending to the real cause of the malady.

It is my submission that the real causes are failures on the part of the government, including:

• Laws are passed through parliament without carefully assessing whether they conform with the provisions of the Constitution.

• Draftsmen serving the aims of politicians and ignoring the exigencies of the law.

The Minister alludes to the proposed assessment as being an ordinary evolutionary development and not an unusual exercise.

However, there is an uneasy feeling that the purpose of the exercise is to restructure the Constitutional Court in order for government to have the final say. Similarly, the feeling remains that this exercise has been triggered by Constitutional Court rulings that disturbed the government. Recently, members of the ruling party protested that the fundamental basis of the Constitution is that the people shall govern and that the Constitutional Court could not be allowed to undermine the voice of the people.

Ultimately, this gave birth to the entity now being appointed by the Minister to *inter alia* assess the decisions of the Constitutional Court since its inception (it is of course an open question whether research like this is not in the ambit of the South African Law Reform Commission).

I can safely assume that the very best legal brains in the country are being elevated to the higher courts.

A serious concern is who will be entrusted to act as 'super judges'. It is a frightening thought that any layperson can be entrusted to assess the complicated domain of intricate legal matters. A politician also cannot be entrusted with this absolutely important mission (even if he is a lawyer, his principal duty is loyalty to the party).

South Africa recalls the abominable steps taken by a previous government, which packed the senate and declared itself a High Court of Parliament when a constitutional crisis occurred.

The branches of state are enshrined in the Constitution and they govern the administration of the country. Two of these branches are the legal and political spheres, both very important.

It is absolutely imperative that these two branches should not encroach on each other's terrain. The citizens of the country must at all times be assured of the independence of the courts, and that the rule of law is fully respected and practised.

The predicament of the present government (or any civilised government) is contained in the more than 2000-year-old maxim emanating from Rome:

Quis custodiet ipsos custodiet? (Who guards the guards?/Who governs the government?)

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A Last Thought

Guidelines for writing in plain language

By Michele van Eck

Writing in plain language means using language that is clear, effective and understandable to the reader. It is understood by the reader the first time around and it is the most effective way to communicate to ensure that the message being conveyed is not misunderstood.

The Consumer Protection Act 68 of 2008 has brought legal drafting under the spotlight, in particular the need to use plain language in legal documents. The Consumer Protection Act is not the only legislation that requires the use of plain language: The National Credit Act 34 of 2005 and the Companies Act 71 of 2008 also require the use of plain language in certain documentation.

The Consumer Protection Act (s 22), the National Credit Act (s 64) and the Companies Act (s 6(5)) essentially have the same requirements for plain language, save in respect of which documents the requirements apply. In essence, a document will be in plain language:

If it is reasonable to conclude that a person of the class of persons for whom the document is intended, with average literacy skills and minimal experience in dealing with that particular subject matter, could be expected to understand the content, significance and import of the document without undue effort, having regard to –

- the context, comprehensiveness and consistency of the document;
- the organisation, form and style of the document;
- the vocabulary, usage and sentence structure of the document; and
- the use of any illustrations, examples, headings or other aids to reading and understanding in the document.

These requirements are, at best, subjective and there appears to be no tangible, objective measure to determine whether or not a document is in plain language.

What is apparent from this legislation is that the reader's understanding is key to whether or not a document can be considered to be in plain language. Traditionally, legal practitioners have drafted documents for the benefit of the courts and based on how an adjudicator would interpret them. With the new requirements of plain language, the legislature has created a dual audience for legal practitioners to consider when drafting; the first being the reader or consumer and the second being the courts.

It therefore seems clear that before embarking on any form of drafting exercise, the intended audience of the document must be considered. The following factors could influence the language used and the style adopted:

- **Age**

  The average age of the reader will influence how easily a document is interpreted.

- **Education**

  The education of the reader will have an impact on the use of jargon, industry-specific terminology and the type of language used. For example, the language use between two doctors will be very different to the language used between a doctor and a patient.

- **Literacy level**

  The simplicity of language and sentence structure will have to be adapted when considering the average literacy level of the reader.

- **Language**

  Whether the reader predominantly speaks first, second or third language of the language in which the document is drafted will influence how easily the document is understood. The drafting style will have to be adapted accordingly.

The following guidelines can assist in drafting documents in plain language:

- Use short sentences.
- Use headings to guide the reader through the document.
- Use diagrams, illustrations and tables, where possible, to enable easy dissemination of information.
- Use bullet points and lists where possible. This makes the document easier to

read.

- Use short paragraphs. The comprehension of ‘bite-size chunks’ is easier to interpret than blocks of sentences, which can be overwhelming.
- A clear and well-thought-out layout helps in the understanding of the document.
- Remove unnecessary and repetitive words.
- Use the active voice instead of the passive voice. For example: ‘He drew up the contract’ versus ‘The contract was drawn up by him.’
- Use pronouns such as ‘I, you and we’. Readers will find it easier to identify with the document.
- Where possible, remove the use of jargon, technical terms and Latin phrases.

When drafting legal documents, it is important to consider how these are presented and will be understood by the average reader. To ensure full compliance with legislative requirements, plain language cannot be ignored.

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