e-MANTSHI

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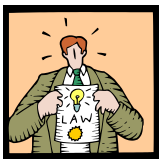
Welcome to the eighty second issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. In terms of Rules 241(1)(c) and 241(2) of the Rules of the National Assembly, Mario Gaspare Oriani-Ambrosini, MP gave notice in Government Gazette no 35876 dated 16 November 2012 that he intends introducing the National Credit Act Amendment Bill in the National Assembly shortly, and invites interested parties and institutions to submit written representations on the said draft legislation to the Secretary of Parliament within 40 days of publication of this notice

The objectives of the Bill are:

2.1 to clarify the definition of *consumer* to avoid unintended applications of the Act so that the Act applies only in respect of consumers at the retail level or as end users, which will make the Act consistent with international and comparative practices; and

2.1 to provide economic relief to deserving consumers under debt rearrangement by giving the discretion to a Magistrate acting on the recommendation of the relevant debt counsellor to suspend the accrual of interest on the debt(s) concerned for a period of up to five years, if granted under the circumstances of the case, so as to avoid that the cost of serving such debt becomes in itself beyond the debtor's financial capabilities, especially in the case of increased

interest rates or diminished earning on the debtor's side on account of the current economic downturn.

Recent Court Cases

1. S v MADONSELA 2012 (2) SACR 456 (GSJ)

Where an accused was recently found in possession of stolen goods the nature of the goods needs to be considered before drawing the inference that s/he stole the goods.

"[4] The appellant's conviction is solely based on the appellant's possession of the robbed motor vehicle, after the robbery (see R v Tshabalala and Others 1942 TPD 27 at 30). The robbery occurred on 15 July 2007 at Primrose. On 23 July 2007 the vehicle was found by members of the SAPS, where it was parked at the appellant's premises, in Tembisa. The appellant was present at the time and upon investigation it was established that the vehicle had been fitted with false registration plates and numbers. The appellant explained to the police that the vehicle had been left there by one Sandile. He was however unable to furnish any further particulars concerning what appeared to be nothing but a fictitious person. The appellant's version was correctly rejected as false by the court below.

[5] The question that needs to be addressed on appeal is whether the court a quo correctly invoked the doctrine of recent possession in convicting the appellant of robbery. It is common cause that the appellant was in possession of the stolen vehicle 8 days after the robbery. Can this be regarded as "recent possession"? In Shabalala v S [1999] ALL SA 583 (N) 587/8, possession of the stolen vehicle on the day of the robbery or the day thereafter, was accepted as sufficient for the doctrine of recent possession to apply. In S v Mavinini 2009 (1) SACR 523 (SCA) Cameron JA, writing for the court, held that the appellant's possession of the stolen vehicle less than 24 hours after the robbery, taken together with his "elusive conduct", overwhelmingly suggested criminal involvement in the robbery. In S v Matola 1997 (1) SACR 321 (BPD) 323i-324g, possession of the stolen vehicle a month after the theft, together with the further facts, that the stolen vehicle had been registered in the appellant's name, with false registration numbers, and that the original number plates of the stolen car had been found on the appellant's property, were held to sufficiently prove that the appellant had played a role in the theft.

[6] The nature of the goods involved, of course, needs to be considered (Matola 324e). In the present day and age stolen vehicles do change hands with amazing speed and disingenuousness. In itself possession of the stolen vehicle, a month after the robbery, in my view, is not so closely connected as to warrant the inference of involvement. Other factors need to be considered: in the present matter none of the other robbed items were found, either in the stolen vehicle, or in the appellant's possession. It is true that the appellant's explanation for his possession of the vehicle was dishonest, which is typical of a person disguising or avoiding the truth. But, I do not think that his unsatisfactory explanation, in the absence of any other incriminating evidence, is sufficient for the doctrine of recent possession to find its application.

[7] For all these reasons I conclude that the appellant was wrongly convicted of robbery. The facts of this matter, however, do establish an offence under s 36 of the General Law Amendment Act 62 of 1955, which in terms of s 260 (f) of the CPA, is a competent verdict on a charge of robbery. It follows that the conviction of robbery with aggravating circumstances, on count 5, must be substituted with a conviction of contravention of s 36 of the Act 62 of 1955. In the absence of evidence implicating the appellant concerning the items that were robbed form Ms Rennie, the appellant's conviction on count 4, cannot stand."

2. S v GANI NO 2012(2) SACR 468 (GSJ)

A court should consider diversion where the accused's age (as being under 18 years) was only established after conviction.

"DIVERSION FROM THE CRIMINAL JUSTICE SYSTEM

[8] It would seem that the submission by the child's counsel was that she should have been diverted from the criminal justice system. This approach found favour and hence the stay of the proceedings in the court a quo and referral of the proceedings to the High Court. In the addition the child has already found guilty and diversion from the criminal justice system would require a setting aside of the conviction. Ultimately the order of review in terms of S 16(3) of the act was granted. S 1 of the act defines the diversion of a child from the criminal justice system as:

'diversion' means diversion of a matter involving a child away from the formal court procedures in a criminal matter by means of the procedures established by Chapter 6 and Chapter 8;"

[9] In terms of S 14(3)(a) of the act, the age was changed on the charge sheet. The child had stolen toiletries to the value of R446.02 from Checkers Hyper. She understood the charges and pleaded guilty. The facts were very simple and it was clear that the plea of guilty was done voluntarily.

[10] The child is a Zimbabwean citizen and both her parents are deceased. She appears to have a sister here in South Africa. Her sister refused to attend court. The child does not have a fixed address and has a previous conviction for theft. On 15 June 2010 she was sentenced to R2000 or 4 months imprisonment of which R500 or 1 month imprisonment was suspended for 5 years on condition that she does not commit a similar offence. On 7 September 2010 she was released on parole. She has committed the current offence during the period of suspension. There is no evidence as to what her legal status is in this country. The South African justice system is charged with implementing our criminal jurisprudence whatever her residential status in this country.

[11] After entering her correct age on the record the approach which the court a quo adopted when considering her release or continued detention as envisaged in terms of section 21 and section 32 of the act was appropriate.

[12] The presiding officer from the outset took the view that a pre-sentence report was required. Her continued detention at the Walter Sisulu Place of Safety was appropriate. This approach although not expressly stated by the court a quo took account of the objects of the act.

[13] The question of diversion from the justice system was not specifically addressed by the court a quo when the child's plea of guilty was accepted. The input of a probation officer's report would have been helpful at the point prior to the plea. The failure to consider diversion from the criminal justice is of itself a fatal factor in the conviction process. The conviction cannot stand. I must state however that except for this factor the court a quo acted in a commendable manner in making sure that the child understood the process.

[14] This matter must be referred back to the court a quo for consideration. Hopefully in these circumstances there will be enough information in the pre sentence report which has already be requested for the fact of diversion to be considered and assessed by the court a quo. If not then an appropriate report will have to be obtained to assist the court a quo in the proper application of the act.

[15] This is the child's second conviction. If the principle of diversion had been applied in relation to the first charge she could well have been diverted away from the criminal justice system at that stage. Two criminal convictions before reaching the age of 18 years is the very kind of problem which the act aims to address.

[16] It is clear in my view that the court a quo must give consideration to diverting this child from the criminal justice system.The period of suspension for the

first crime of theft is still current. The curatrix ad litem may want to re-visit the first conviction as well in the light of this judgement.

[17] The facts in this case call for a proper application of the guiding principle as set out in s 3 of the act and provides

> "*(a)* All consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society."

[18] The objectives of diversion are set out very clearly in section 51 of the act. It is now incumbent on the criminal justice system including the presiding officers to give consideration to the objectives of diversion and to remove children from the system where appropriate. The jurisdictional principles to be applied are clearly set out.

> " The objectives of diversion are to—
>
> *(a)* deal with a child outside the formal criminal justice system in appropriate
>
> cases;
>
> *(b)* encourage the child to be accountable for the harm caused by him or her;
>
> *(c*) meet the particular needs of the individual child;
>
> *(d)* promote the reintegration of the child into his or her family and community;
>
> *(e)* provide an opportunity to those affected by the harm to express their views on its impact on them;
>
> *(f)* encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
>
> *(g)* promote reconciliation between the child and the person or community
>
> affected by the harm caused by the child;
>
> *(h*) prevent stigmatizing the child and prevent the adverse consequences flowing from being subject to the criminal justice system;
>
> *(i)* reduce the potential for re-offending;
>
> *(j*) prevent the child from having a criminal record; and
>
> *(k)* promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.

[19] In this case the child has acknowledged responsibility for the offence as envisaged in section 52 (1) (a) *(a)"* the child acknowledges responsibility for the offence". She pleaded guilty. Although the diversion options as envisaged in S53 may be limited as the child has no family in this country who has displayed an

interest in her, nonetheless S 53(1) diversion options must be considered. These may include a

" *(e)* ''a reporting order'' means an order issued in the prescribed manner, requiring a child to report to a specified person at a time or at times specified in the order so as to enable that person to monitor the child's behaviour; and

(f) ''a supervision and guidance order'' means an order issued in the prescribed manner, placing a child under the supervision and guidance of a mentor or peer in order to monitor and guide the child's behaviour. Or *(k)* compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose. Presiding officers are required to take all relevant factors into account when selecting a diversion option as envisaged in section 54(1) of the act The relevant minimum standard applicable to diversion must give consideration to the provisions of section 54 (2) where "diversion programmes must, where reasonably possible—

(a) impart useful skills;

(b) include a restorative justice element which aims at healing relationships,

including the relationship with the victim;

(c) include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution;

(d) be presented in a location reasonably accessible to the child;

(e) be structured in a way that they are suitable to be used in a variety of

circumstances and for a variety of offences;

(f) be structured in a way that their effectiveness can be measured;

(g) be promoted and developed with a view to equal application and access

throughout the country, bearing in mind the special needs and circumstances

of children in rural areas and vulnerable groups; and

(h) involve parents, appropriate adults or guardians, if applicable."

[20] The statutory introduction by parliament of a new approach to the criminal jurisprudence pertaining to children makes it peremptory that provisions of the act be applied. In these circumstances I find that the conviction should be set aside and the process envisaged in terms Chapters 6 and 8 of the act be considered afresh."

3. S V MEKULA 2012 (2) SACR 521 ECG

For someone to be convicted of theft the owner or possessor must be excluded from his property and the offender must assume control over the stolen item.

"[1] The accused herein was convicted in the Magistrates' Court in Port Elizabeth of the theft of a bottle of whisky and was sentenced to six months' imprisonment. The matter comes before us on review pursuant to the provisions of section 302 of the Criminal Procedure Act, 51 of 1977 (herein referred to as the Act).

[2] The accused was unrepresented at the trial and elected to conduct his own defence. He pleaded guilty to the charge that he had on 1 March 2012 stolen a bottle of Jameson whisky to the value of R274,99 from a Shoprite Liquor Store in Port Elizabeth. An enquiry in terms of section 112(1)(b) of the Act followed. In response to questions from the magistrate the accused described the events which occurred as follows:

> "Okay you say you clearly remember what transpired. You took the bottle of the Jameson and you walked to the paypoint. --- I took it and concealed it on my person and I acted as if I'm going to the paypoint.
>
> Where was the Jameson when you were at the paypoint? --- It's tucked under my clothes, Your Worship. Did you have monies to pay for this Jameson, sir? --- I had not … it was not the full amount.
>
> How much was the Jameson? --- I think it was R279,00.
>
> You say you saw the security noticed you. You went back. --- Yes Your Worship.
>
> And the bottle broke? --- The bottle broke when I took it out from where it was tucked in on my person with the hope of putting it back into those crates and that's how it broke.
>
> Why did you want to place it back? --- I was frightened because I noticed that the security guard saw me.
>
> If the security had not seen you, would you have put it back? --- No certainly I was going to go out without putting it back.
>
> So what were you doing with that Jameson, sir? --- I was stealing it Your Worship.
>
> Did you have the permission of the authority of Shoprite or Craig Swarts to steal this item from their store without paying for it? --- No I did not have Your Worship."

[3] It is essentially on these facts that the magistrate convicted the accused of theft.

[4] When the matter came before me I enquired from the magistrate whether the accused should not have been convicted of attempted theft. She replied as follows:

> "4. In respect to my finding the accused guilty of theft and not attempted theft, the following was taken into consideration.
>
> 4.1 The accused concealed the item beneath his clothing.
>
> 4.2 The accused did not have the means to pay for the item
>
> 4.3 The accused clearly indicates that if the security guard had not seen him, he would have left the store with the whiskey.
>
> 4.4 When the accused concealed the item beneath his clothing the owner of the shop no longer exercised control of the said item.
>
> 5. I was satisfied that the accused had the necessary intention to steal and would have completed his actions had it not been for the security guard who spotted him."

[5] It is clearly correct that the accused had every intention to steal the bottle of whisky and, had the security guard not observed his intended theft, he would have left the shop without paying for it. That much he admits expressly. It is, however, implicit in the magistrate's reasoning that the accused "would have completed his actions" that she recognised that his actions were not yet complete.

[6] In ***S v Tau*** **1996 (2) SACR 97** (T) Stafford J at 102a-b stated as follows:

> "Wat betref die toe-eieningshandeling, *contrectatio*, verklaar Snyman *Strafreg* 3de uitg op 491:
>
> '… (B)y diefstal in die vorm van saakonttrekking bestaan die toe-eieningshandeling uit enige handeling ten opsigte van 'n saak waardeur X (i) die regmatige eienaar of besitter uitsluit van sy saak en (ii) self die bevoegdhede van 'n eienaar ook (*sic)* die saak uitoefen. …'"

(See also Snyman, Criminal Law 4th ed at 477.)

[7] For an act of appropriation to constitute theft it is accordingly necessary that both these elements be satisfied, namely that the rightful owner or possessor must be excluded from his property and the offender must assume the control over the stolen item.

[8] I have no doubt that the magistrate is correct in her conclusion that the latter requirement is satisfied. I consider, however, that she errs in concluding that when the accused concealed the item beneath his clothing the owner of the shop no longer exercised control over the said item. On the contrary the evidence establishes

that the security guard at the premises had observed the intended offence and the accused recognised that it would not be possible for him to leave the premises with the bottle of whisky. It was precisely because he recognised that the owner, through the security guard, continued to exercise effective control over the bottle that he resolved to retrace his steps and to replace the bottle to the position from which he had taken it. He made no attempt to remove the bottle from the building, clearly because he realised that he could not do so without surrendering the bottle to control of the security guard. In these circumstances I consider that the accused ought to have been convicted of attempted theft."

From The Legal Journals

Esselaar, P

"Technology the answer to s 129 delivery dilemma"

De Rebus November 2012

Van Dorsten, J

"Discovery of electronic documents and attorneys' obligations"

De Rebus November 2012

Lochner, H, Benson, B & Horne, J

"Making the invisible visible: the presentation of electronic (cell phone) evidence as real evidence in a court of law"

Acta Criminologica 25(1) 2012

Reyneke, M & R

"Implementation of preliminary inquiries at the Mangaung one-stop Child Justice Centre"

Acta Criminologica 24 (3) 2011

Reyneke, J M & R P

"Process and best practices at the Mangaung One-Stop Child Justice Centre"

SACJ 2011 137

Van Heerden, M

"Parole board administrative action: an encroachment on the judicial decisions of the courts of law of South Africa"

Acta Criminologica 24 (2) 2011

Kreuser, M

"The application of section 85 of the National Credit Act in an application for summary judgment".

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Otto, J M

"Die Toepaslikheid (al dan nie) van die Nasionale Kredietwet op rentevrye kontrakte"

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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

Chastisement under the new Constitutional Dispensation: South African common-law position

In terms of common law, a parent when faced with an assault charge against a child could raise the defence of chastisement. In *R v Janke and Janke 1913 TPD 382*) the court in elaborating what constitutes "unreasonable" punishment, the court referred to the case of *Regina v Hopley (1960) 2 F & F 202* where it was held that punishment would meet this threshold if "administered for gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's power of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life and limb" (at 386) Other factors noted by this court include "the character of the offence, the amount of punishment

inflicted the bodily and mental condition of the child, the nature of the instrument used and the objects purposes and motives of the person inflicting the punishment should also be considered" (at 386). The factors utilized in *Janke* have been expanded upon. (Berkink " When do parents go too far? Are South African parents still allowed to chasite their children through corporal punishment" (2006) *South African Journal of Criminal Justice supra* 176). In *R v Theron and another 1936 OPD 166* the court noted that the discretion given to parents to chastise children should not be exercised in an arbitrary an capricious manner but rather should be exercised on just and reasonable grounds. The question is not whether punishment was immoderate but rather whether such punishment was in fact inflicted. The sole question is whether the person acting did so reasonably and moderately (Berkink *supra*) Such an objective evaluation of all relevant circumstances of each case would afford minors a certain level of protection against physical abuse and maltreatment (Berkink *supra* 178).

Analysis

The courts reluctance to both pronounce on whether chastisement was still acceptable in light of the Constitution and to develop the common-law in this regard with a view to promoting "the spirit, purport and objects of the Bill of Rights," indicates that South Africa is at odds with its long-standing commitment to children's rights or their "best interests" (Berkink *supra* 182 (n 51). As both a signatory to the CRC and the African Charter of Rights, South Africa must adhere to the object and purpose of these conventions, a fitting requirement in light of the South Africa. The Constitution guarantees equality of everyone before the law and the right to equal protection and benefit of the laws. Likewise, it prohibits unfair discrimination, directly or indirectly, by the State, as well as by any other person, based on various grounds, including age (in terms of section 9(3)-9(4). The Constitution creates a refutable presumption that discrimination based on any of the grounds mentioned, is unfair (Van der Vyver "The Contours of Religious Liberty in South Africa: (2007) *Emory Law Journal* 77 at 78 81). However, a discriminatory distinction, exclusion, restriction or preference which is unfair may nevertheless be lawful if it is found to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (Berkink *supra* 182). This raises the question as to what is meant by unfair in comparison with unreasonable discrimination (Berkink *supra*). If the discrimination is deemed "unfair", the question is whether it is nevertheless reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (Berkink *supra*) In affording substance to the reasonable prong of the limitations provision, South African courts have opted to follow the reasoning of the Canadian court case of *R v Oakes [1986] 1 S.C.R. 103 (Can*) In this judgment it was noted that the proportionality test inherent in the concept of reasonableness entails three essential components "First measure

adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations; In short, they must be rationally connected to the objective. Second, the means, even if rationally connected the objective in this first sense, should impair 'as little as possible' the right or freedom in question…third, there must be a proportionality between the effects of the measures which are responsible for limiting the…right or freedom, and the objective which has been identified as of 'sufficient importance'" (at 139).

In *S v Makwayane* (*1995 (3) SA 391 (CC)*) outlined the essential components of the limitations clause: "The limitation of constitutional rights of for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality… The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In balancing process the relevant considerations will include the nature of the right that is limited an it importance in an open and democratic society based on freedom and equality, the purpose for the which the right is limited and the importance of that purpose to such a society, the extent of the limitation, its efficacy, and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question" (at 436). What is required in terms of reasonableness is more than "merely a rational connection between the purpose to be served and the invasion of the constitutionally protected right; what is required in the end is a balancing process within a holistic, value-based and case-orientated framework" (Van der Vyfer *supra* 83). In light of chastisement, it is necessary to consider the competing rights in both the Constitution and the CRC.

The nature of the right in question is that of the parent's right to chastise his child. South African law places a high premium on the family environment (Van der Vyfer *supra* 107). In this regard, the Constitutional Court has noted that "Parents have a general interest in living their lives in a community setting according to their religious beliefs, and a more specific interest in directing the education of their children. A Bill to consolidate and expand the laws dealing specifically with children is currently under advisement. A lengthy section in the Bill enumerates circumstances that must be taken into account in establishing the best interests of the child, and those circumstances include "the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling closely as possible a caring family environment" *(Christian Education of South Africa v*

Minster of Education 2000 (4) SA 757 (CC) at 768). This finding has support in Article 27.2 of the CRC. Therefore, the exercise of parental rights is subject to the limitations, dictated by the best interests of the child (Van der Vyfer *supra* 107). The best interests "are to be the paramount factor in determining issues regarding children's rights" (Van der Zalm "Protecting the innocent: Children's Act 38 of 2005 and Customary Law I South Africa – Conflicts, Consequences and possible solutions" (2008) *Emory Law Journal* 892 at 916).

Protecting the dignity of each individual is a fundamental guiding principle in international human rights law. Chastisement violates a child's right to human dignity (Farmer & Stinson "Failing the Grade: How the use of Corporal Punishment in U.S. Public Schools demonstrates the need for U.S. Ratification of the Children's Right's Convention and the Convention on the Rights of Persons with Disabilities" (2010) *New York Law School Law Review* 1036 at 1046). It has been noted that "corporal punishment has evolved to be considered a direct assault on the dignity of a person and therefore prohibited by international law (Farmer & Stinson supra). In *S v Williams* 1995 (3) SA 632 (CC) the court held that judicial corporal punishment was an infringement of dignity and amounted to "cruel, inhuman or degrading treatment or punishment" for the following reasons "Corporal punishment involves the intentional infliction of physical pain on a human being by another human being at the instigation of the State. This is a key feature distinguishing it from other punishments. The degree of pain inflicted is quite arbitrary, depending as it does on the person who is delegated to do the whipping. The court merely directs the number of stokes to be imposed. The objective must be to penetrate the levels of tolerance to pain; the result must be cringing fear, a terror of expectation before the whipping and acute distress which often draws involuntary screams during the infliction. There is no dignity in the act itself; the recipient might struggle against himself to maintain a semblance of dignified suffering or even unconcern; there is no dignity even in the person delivering the punishment. It is a practice which debases everyone involved in it… The deliberate infliction of pain with a cane on a tender part of the body, as well as the institutionalised nature of the procedure, involves an element of cruelty in the system that sanctions it. The activity is planned beforehand, it is deliberate. Whether the person administering the strokes has a cruel streak or not is beside the point. It could hardly be claimed in a physical sense at least, that the act pains him more than his victim. The act is impersonal, executed by a stranger, in alien surroundings. The juvenile, is indeed, treated as an object and not as a human being" (supra at par [89]-[90])

Parents derive their right to chastise their children from common law. Does the present common law which authorises parents with a right to chastisement in exercising their right of self-determination infringe any of the rights contained in the Bill of Rights? (Pete "To Smack or not to smack? Should the Law prohibit South

African parents from imposing corporal punishment on their children?" (1998) *South African Journal of Human Rights* 430 at 448) The purpose of limiting the right to chastisement is clear: it infringes a child's right to dignity and not to be treated in a cruel, inhuman or degrading way. The question remains whether there is a less restrictive means of limiting parent's rights in this regard. If an "institutionalised" form of punishment versus familial nature of punishment is crucial in determining whether or not the punishment is cruel, then the relationship between the parents and child becomes crucial (at 499). Perhaps then, the answer lies in the fact that chastisement must meet a threshold of severity. Consider the way English case law has answered the question in what level of chastisement meets this threshold level.

In *A v United Kingdom (*(1999) 27 EHRR 611) a nine year old child was beaten by his stepfather with a garden cane on numerous occasions. This resulted in bruising on the thighs, calves and buttocks. The trial court acquitted the father on the basis that the beating amounted to reasonable chastisement. Their reasoning was that "he was a difficult boy who did not respond to parental or school discipline" (at 614). The European Court of Human Rights however found that the beating was a violation of Article 3 of the European convention on Human Rights since it amounted to inhumane degrading treatment of the child. The court went on to note that the United Kingdom was responsible for such a violation since the law did not deter the stepfather from beating the boy by making it clear that such conduct fell outside the scope of the defence (*Regina v Hopley supra* at 622).

This lack of guidance demonstrated in the case is apparent when the trial judge directed the jury in terms of law set out in *R v Hopley (supra)* where the court held that "little guidance was provided as to the meaning of 'reasonable and moderate chastisement': in particular, no specific guidance was given as to the relevance of the age or state of health of the applicant, the appropriateness of the instrument used, the frequency of the punishment, or the physical or mental suffering of the applicant or as to the relevance, if any, of the defence claim that the punishment of the applicant was 'necessary' and 'justified'" (*A v United Kingdom supra* at 623-624). This decision did not imply that all corporal punishment of children was in violation of article 3 of the Convention (Parson *supra* 311) Rather this decision required that English law give clear guidance as to what constitutes lawful and unlawful chastisement so that children would be protected from inhuman or degrading treatment (Parson supra). But the European Court of Human Rights did not go on to pronounce that all physical punishment violated Article 3. Instead, it relied on earlier case law, that of C*ostello-Roberts v United Kingdom (1995) 19 EHRR* 112 where the court held "that the humiliation or debasement involved must necessarily attain a particular level of severity and must in any event be other than that usual element of humiliation inherent in punishment...The assessment of minimum level of severity depends on all the circumstances of the case. Factors

such as the nature and the context of the treatment, its duration, it's physical and mental effects and in some cases, the sex, age and state of health of the child must be taken into account" Keating "Protecting or punishing children: physical punishment, human rights and English Law Reform" (2006) *Legal Studies* 394 at 399.

Given the above finding, the British government accepted that it was unnecessary to change the law, and therefore did not abolish the defence since "it would be intrusive and incompatible with our aim of helping and encouraging parents in their role" (supra) Furthermore, the government believed that the defence of chastisement did in fact comply with Article 3 of the Convention as a result of the decision in *R v H* 1 [2002] Cr App R 59 (Parson *supra* 311). In this case, the accused beat his son across the back with a leather belt causing bruising and was subsequently charged with assault. His defence was that he applied reasonable chastisement to his son who refused to obey a request to write his name. The judge held that "[w]hen considering the reasonableness or otherwise of the chastisement, they must consider the nature and context of the defendant's behaviour, its duration, its physical and mental consequences in relation to the child, the age of and personal characteristics of the child and the reasons given by the defendant for administering punishment" (at 67) The Court of Appeal took the view that giving a jury a list of factors to consider in cases of reasonable chastisement would represent a proper "incremental development of the criminal law" (Keating Protecting or punishing children: physical punishment, human rights and English law reform" (2006) *Legal Studies* 394 at 400).

When considering the factors set out in South African case of *R v Janke and Janke* (*supra*) two points are well demonstrated. First, it is clear that the directions given by the court in this case as to what level of chastisement meets the threshold level, it is clear that the direction given is insufficient to comply with CRC. The starting point is not the emphasis on the issue of reasonableness, but rather on the fact that children have an absolute right to be protected from violations as listed in the above Conventions (Parsons supra 311) Specifically in terms of the CRC, children have the right to be in terms of Article 37 not to be subject to "cruel, inhumane or degrading treatment." The question therefore, is whether the chastisement is reasonable so as not to amount to inhuman or degrading treatment (Keating *supra* 400). Second, when considering the factors mentioned in both English case law and South African law, the factors listed may not necessarily be under inclusive.(Parsons *supra* 311). While in *A v United Kingdom* no reference is made as to the appropriateness of the instrument used or whether any significant bruising occurred, the Court of Appeal in R v H (supra) made an "incremental development" by allowing parental reasons for punishment which provided a much wider consideration to be applied than merely

whether the parent was acting in a rage (Keating *supra* 400) The reasons for punishment were clearly noted in *R v Janke & Janke (supra).* It would appear as if Article 37 of the CRC as well as section 28 of the Constitution removes the defence of chastisement when assault causes actual bodily harm or worse. In English law this bodily harm is defined as "any hurt or injury calculated to interfere with the health or comfort of the victim. Such hurt or injury need not be permanent, but must…be more than merely transient and trifling" (*R v Donovan* [1934] 2 KB 498 at 509, discussed in Parsons *supra* 313). Such a definition gives a low severity threshold and criminalises anything more than a mild smacking (Parsons supra 313). This would indicate that the defence has not completely been eliminated. Perhaps the most principled solution would be to require that the parent have acted with a disciplinary motive. This exists where "the parent has decided that the degree of force used is necessary to deter a repetition of a specific type of offending behaviour" (Rogers "A criminal lawyer's response to chastisement in the European Court of Human Rights" (2002) *Criminal Law Review* 98 at 110). This means that the child must be capable of understanding the reason why he is being punished and be capable of changing his conduct in accordance (Rogers *supra*). Evidence can be deduced of previous (failed) methods of disciplining the child for the activity in question. This would show that he felt that corporal punishment was necessary in this instance. By the State not interfering where parents have acted in good faith, "the law would succeed in realising the rationale of the defence itself, that is, the respect for the religious and philosophical convictions of those parents who consider that they act in their children's best interests" (Rogers *supra* 110). Such an approach is already demonstrated in R *v Janke v Janke (supra)* (following *Hopley supra*) where it was he said that punishment is excessive "if administered for the gratification of passion or of rage" (*supra* 206). However, motive was listed alongside other factors which bore upon the reasonableness of the parent's reaction (such as the duration of punishment and the instruments used.

How would such an approach apply in practice? The best evidence of motive with which the parent acted may lie in the time taken between the triggering act and the resulting chastisement. If the parent reacted immediately towards certain novel misconduct, this could suggest that he acted through rage (and without disciplinary motive) (*Regina v Hopley supra* 111). But in other cases it could show disciplinary motive, despite the fact that the parent reacted quickly. For example, where the parent tells the child a number of times not to perform a specific act. The parent then informs the child that if they persist in the course of conduct, they will receive a smack. Such a reaction cannot be seen as uncontrolled rage seen it was already contemplated as a measure of last resort (Rogers *supra* 106). While the South African government may not have been wrong to retain the defence of chastisement, but it is wrong to assume that compatibility with the CRC will be ensured by pointing out the various factors which may be relevant to the reasonableness of the parent's

conduct. It could still be possible for an acquittal where the facts do reveal a violation of the Constitution.

Conclusion

The question of whether parents should still be allowed to chastise their children by means of corporal punishment, needs to be answered not only in relation to the common law provisions but with due regard to the constitutional and international treaties. While both the Constitution and the CRC emphasise the best interests of the child as a reason to abolish corporal punishment. While the purpose of limiting the right to chastisement is clear in that it infringes the child's right to dignity and not to be subject to cruel, inhuman or degrading treatment, it is submitted that there is less restrictive means of limiting a parent's right. Chastisement ought to meet a threshold level of severity. The factors in South African common law are not under-inclusive and therefore are adequate in the sense that they also take into account the motive of the parents for acting.

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Matters of Interest to Magistrates

How the JSC selects judges

Paul Hoffman
15 November 2012

The Constitution is violated by the approach of the JSC to appointing judges.

The question probably uppermost in the mind of retired Deputy President of the Supreme Court of Appeal, Louis Harms, is whether the Judicial Service Commission has rationally explained its preference for Attorney Dolamo from Mpumalanga over his nominee, Cape silk Jeremy Gauntlett, for one of the five vacancies on the Western Cape High Court Bench.

The essence of the explanation is that the JSC would be "doing violence" (its words) to the provisions of section 174(2) of the Constitution were it to perpetuate the alleged oversupply of white male judges in the Western Cape by appointing two

instead of one white male applicants in filling the five vacancies. This suggests a race based "slate" designed to limit the number of white males introduced to the Cape Bench, presumably until it reflects a content that matches national demographics, being 5%, or provincial demographics perhaps, where the proportion is somewhat higher.

The overwhelming preponderance of white men on the Cape Bench at the dawning of the new constitutional era has been whittled away by retirement, promotion and death to the point where, at the time of the interviews, only 9 out of 29 permanent judges are in fact white men. White males make up just over 9 % of the population of the Province. This rapid attrition rate represents, in the context of the average timespan of about 20 years of judicial service by individual judges, a remarkably efficient reduction in the proportion of white men. The Proteas still have a majority of white players and cricketing careers are far shorter than those of judges.

By contrast, the number of white women has remained steady at around 1 or 2 while all other demographic groups have increased by leaps and bounds. The deliberations in public by the JSC suggest that it still, quite illegally so, adheres to the race classifications of the apartheid era. If these have any relevance, it is apparent that "Indians" are over-represented on the Bench in Cape Town. Women remain grossly under-represented in the judiciary as a whole and on the Cape Bench too.

By its bean counter standards, the JSC should not rest until more than half of our judges are women. No great urgency to do this has manifested itself in the activities of the JSC; women applicants, including women who did not vote before 1994, are regularly rejected in favour of the appointment of men. It is doubtful that merit plays any role in this. Nor, on the record of reasons given, did the fact that Gauntlett would probably not tarry long in Cape Town. Also, not under consideration is the fact that most of the senior and soon to retire judges there are white males.

The notion of achieving a perfectly balanced judiciary which mathematically reflects race and gender demographics in the country is deeply and darkly unconstitutional. This is because non-racism and non-sexism are foundational to our new order. Ideally, litigants should want a good judge, no more and no less. It is so that the equality clause in the Bill of Rights contemplates affirmative action for previously disadvantaged individuals or groups in order to promote the achievement of equality. The clause does not equate race and disadvantage, but the JSC seems to think that to do so is legally acceptable. It hangs its hat on its tortured interpretation of the wording of section 174(2) of the Constitution which reads:

"The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."

The JSC has chosen to elevate the race element of this consideration into an imperative of the Constitution which has to be complied with come hell or high water. The basic requirements: "appropriately qualified" and "fit and proper" persons seem

to play second fiddle. This is to the detriment of the quality of the Bench and the proper administration of justice.

Gauntlett and Dolamo, on any reasonable conspectus of the basic requirements, are not batting in the same league. The JSC's risible excuses that Gauntlett's fitness for office is tainted in some way by his admittedly acerbic tongue and his "short thread" (JSC speak for quick temper, presumably) do not stand up to objective scrutiny as disqualifying factors. If Gauntlett had a disciplinary record half as long as Dolamo's for infringements, attributable to his perceived dark side, either during his 38 year long career at the Bar or during his many acting stints both in the Cape, since 1992, and Lesotho (where he served for many years with distinction on its appeal court) there may be some substance in the reasoning.

In fact, his disciplinary record is squeaky clean, something that cannot be said of Dolamo. In the "appropriately qualified" stakes they are as similar as chalk and cheese. Dolamo told the JSC that in his career he has only run one civil and one criminal trial in the High Court. He admitted to tardiness in the handing down of judgments, something his "short threaded" competition has never been accused of doing. Preferring Dolamo is like selecting a novice in his first season to bat for the Proteas and dropping an on form Jacques Kallis to do so. It's irrational.

Timing of delivery of judgments is an important aspect of the proper administration of justice. The long overdue judgment of Dolamo in the unfair competition matter that featured in his JSC interview is a case in point. An attempt to interdict former employees from competing with their former employer failed and Dolamo purported to discharge a rule nisi which he thought had been issued by another judge at an earlier stage in the case. In other words, Dolamo thought that a temporary interdict was in place and he purported to cancel it. In his mind the successful litigants had been prevented from earning a living for more than a year while he pondered his judgment and were being relieved of this burden by his belated and misconceived order.

The problem is that no such rule nisi had been issued. There is no reasonable explanation for the long delay. Justice delayed is justice denied. Even the "newness" of Dolamo cannot be justification. If he made up his mind that there was no case he ought to have dismissed the case or discharged the rule nisi which he erroneously thought was in place and given his reasons later. He did not. This is not something dredged up out of his early history as an acting judge. It is something that happened in the very week that he beat Gauntlett to a permanent place on the Bench. Discharging a rule that has not been issued is hardly a recommendation.

It is obvious that a race based slate system, lubricated by a well whipped ANC caucus, is actually in place in the JSC. The very proper need to consider race appropriately has been elevated to an imperative in the work of the JSC. It is true that the legitimacy of the Bench is affected if all the judges are seen as strangers by the population they serve. However, the helter skelter rush to replace able candidates with poor ones, imported from afar, does not serve the public interest, the upholding of the rule of law and the proper administration of justice. Replacing

the naked racism of apartheid with a race quota system is not a viable way in which to create a non-racial and non-sexist order. Litigants will not choose arbitration over litigation when they have confidence in the merit of judicial appointments. It is only when two equally meritorious candidates are competing for the same vacancy that demographics can be brought into play. This is not what happened in this instance.

It is fervently to be hoped that Justice Harms will launch a review of the decision to overlook Gauntlett in favour of Dolamo, not because of the personalities involved, but because it is important that the JSC's interpretation of the section of the Constitution quoted above be subjected to the scrutiny of the Constitutional Court in the interests of clarity and certainty for the future.

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Family Court Matters

REHABILITATION CENTRE ENQUIRIES IN TERMS OF THE PREVENTION AND TREATMENT OF DRUG DEPENDENCY ACT, NO. 20 OF 1992

1. **Procedure for bringing persons eligible for admission to a treatment centre before a magistrate (section 21).**

- affidavit by any person (including a social worker) lodged with public prosecutor which
- alleges that any person is dependent on drugs and in consequence therefore –
  - squanders his means or
  - injures his health
  - endangers the peace
  - in any way harms his own welfare or that of his family
  - fails to provide for his own support
  - fails to provide for dependant legally liable to maintain

a) Clerk of the court shall issue a summons on request of the public prosecutor only after a social workers report has been obtained to be served by police officer to appear in court on date and time stated therein.

or b) on application by public prosecutor, a magistrate can issue a warrant directing arrest of such person to be brought before court.

(Criminal Procedure Act applies to services of summons, warrants of arrest, arrest, detention and failure to appear in court.)

2) Enquiry (section 22)

- Public prosecutor shall appear at enquiry
- Enquiry in presence of person brought in terms of section 21.
- Rights to legal representation and legal aid explained
- Enquiry *in camera*:
- Laws governing criminal trial applicable even if held in absence of person (s 159(1) Act 51 of 1977).
- cross examination on report to be allowed.

Finding - Magistrate must make a finding.

a) that person is a person described in section 21(1). and

b) that person requires and would probably benefit by the treatment and training provided in a treatment centre or registered treatment centre or that it would be in the interest of himself, his dependants or the community to be detained in a treatment or registered treatment centre.

Order Make order that person be detained in treatment or registered treatment centre designated by Director-General.

S22(7) - order that person be detained in custody in treatment centre, hostel, prison, police cell or place regarded as suitable by magistrate (under 18 in place of safety). (not continuously longer that 28 days – section 24 (1)(b)) released on bail or warning until such time as effect can be given to order court has made.

- after designation of treatment centre order in the form of Form 1 (Regulation 6).

3. Postponement of order.

a) If it appears to magistrate at enquiry in terms of section 22(6) that a person is a person as referred to in that subsection the magistrate may make an order postponing the making of an order for a period not exceeding three years **and** release the person on condition:
   - person submits to the supervision of a social worker;
   - person undergoes any prescribed treatment; and
   - complies with prescribed requirements magistrate may determine.
   - Order as per Form 5 (Regulation 21(1)).

b) If person fails to comply with conditions under which released may be arrested upon order of magistrate and order i.t.o. section 22(6) can then be made as if such an order had never been postponed.

4. Review:

Orders i.t.o. section 22(6) are reviewable i.t.o. section 302(1)(a) of the Criminal Procedure Act, 51 of 1977 if not legally represented.
Orders i.t.o. section 23 are not reviewable (See *In re Afrikaner* 1996 (1) SACR 359 (c).

5. Example of proceedings and orders.

On 25.2.2010
Appearances:
Magistrate: G.H. van Rooyen
Prosecutor: Ms N. Ngubane
Respondent: In Person
Interpreter: Ms C. Mabaso

In camera:

Purpose of enquiry explained to respondent. He understands. His rights to legal representation and legal aid explained to him. He understands. He elects to conduct his own defence.

PP. calls:

BONGIWE MONICA ZONDI SS.
I am the applicant and the respondent is my brother's son. He stays with my mother. I have made a statement which I read out and hand in as Exh "A".

Rights to cross examination explained to respondent. He understands.
He has no questions – he agrees with what she has said.

PP. calls:

PATIENCE PHINDILE NDULINI SS.
I am a social worker in the employ of the KZN Dept. of Social Development. I have 7 years' experience. I have compiled a report on the background of the respondent which I read out and hand in as Exh "B".

XX Respondent:

No questions.

PP leads no further evidence.

Respondent's rights explained. He understands. Explained that he has the rights to give evidence under oath and to call witnesses or otherwise to remain silent. Implications explained. He understands.

Respondent elects to remain silent and calls no witnesses.

PP: asks that respondent be sent to Rehab Centre.

Respondent: I agree with her.

Court:

Finding: I.t.o. section 22(6) Act 20 of 1992 the Court finds that the respondent is a person who is dependent on dagga and as a result thereof becomes violent and uncontrollable. He is a person who requires and would probably benefit from the treatment and training provided in a registered treatment centre.

Order: 1) I.t.o. section 22(6) Act 20 of 1992 it is ordered that the respondent be detained in a treatment centre or registered treatment centre to be designated by the Director-General.

2) I.t.o. section 22(7) Act 20 of 1992 the respondent is released on warning until such time as effect can be given to the order the court has made.

Review Rights explained. He understands.

G.H. VAN ROOYEN
MAGISTRATE/GREYTOWN

PREVENTION AND TREATMENT OF DRUG DEPENDENCY ACT, 1992 (ACT NO. 20 OF 1992)

ORDER OF COURT: REGULATION 6 (4)

Magistrate's Court ……
In the matter of the enquiry held in respect of ……
……
(full name of person)
Born on the …… day of ……20…
Before magistrate ……..
On the …… day of …… 20…
Having heard ……..
and having considered other evidence adduced and the report of the social worker, …… (organisation/place), ……
……
and it having appeared that the said person is such a person as is described in section 22 (6) of the Prevention and Treatment of Drug Dependency Act, 1992, and that he should receive treatment and training in an institution, it is ordered that the said …… be detained in ……
(name of treatment centre or registered treatment centre)
Dated at …… this …….. day of …… 19…

……
Magistrate

PREVENTION AND TREATMENT OF DRUG DEPENDENCY ACT, 1992 (ACT NO. 20 OF 1992)
POSTPONEMENT OF ORDER: REGULATION 21 (1)
Magistrate's Court ……
In the matter of the enquiry held in respect of ……
……
(full name of person)
Born on the …… day of ……19…
Before magistrate ……..
On the …… day of …… 19…
Having heard ……..
……
and having considered other evidence adduced and the report of the social worker …… (place), and it having appeared that the said persons is such a person as is described in section 22 (6) of the Prevention and Treatment of Drug Dependency Act, 1992, and that he should receive treatment, the making of an order in respect of the said …….
……
Is postponed under section 23 for a period of …….
(months or years) from ……
subject to the following conditions:

(a) He shall submit himself to supervision by the social worker at …….. (place);

(b) he shall comply with the following requirements: ……
……

Given under my Hand at this …… day of …….. 19…..

……
Magistrate

6. Prevention of and Treatment for substance abuse Act No. 70 of 2008 – not yet in operation.

Relevant sections 33 – 41
Provisions essentially similar

Gerhard van Rooyen
Magistrate/Greytown

A Last Thought

" The data thus suggest that (LLB) students' engagement with curriculum is often founded on strategic ways of "getting through" and not seeking anything more than the qualification at the end. For many aspiring lawyers, their family background and educational history does not prepare them for the experience of becoming a professional: Fazila (a student) revealed that her ideas about what it meant to become a lawyer came from popular television images. Thus for many "non-traditional" students, their status as "outsiders" – both within the university and beyond it, once they enter the realm of professional enculturation – along with their personal history and expectations, tends to replicate their social positioning. Identity dissonance amongst "outsider" students in professional degree programmes has been identified as creating a distracting struggle which can lead to academic underperformance by such students. The outsider students' personal identities are at odds with the dominant perception of professional identity in law schools, which privileges middle-class (often male, and in South Africa, white) viewpoints. In order to be successful, students may have to internalise appropriate professional identities that require a suppression of their personal identity and value system. Diverse cultural, religious, language and socio-economic values jostle for acceptance within an historically middle class, white English-speaking, male cultural ethos."

From "Experiencing the South African undergraduate law curriculum" by ***Lesley Greenbaum De Jure 2012 104 at 123***