e-MANTSHI

A KZNJETCOM Newsletter

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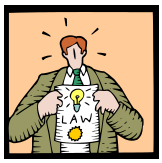
Welcome to the ninety first issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. *Act 15 of 2013, the Dangerous Weapons Act*, was published in Government Gazette no 36704 dated 24 July 2013. The Act is to provide for certain prohibitions in respect of the possession of dangerous weapons; to repeal the Dangerous Weapons Acts in operation in the areas of the erstwhile South Africa, Transkei, Bophuthatswana, Venda and Ciskei, as those areas were constituted immediately before 27 April 1994; to amend the Regulation of Gatherings Act, 1993 (Act No. 205 of 1993), and the Firearms Control Act, 2000 (Act No. 60 of 2000); and to provide for matters connected therewith. The Act will only come into operation on a date to be fixed by the President in a proclamation in the Government Gazette. The following sections are of interest:

1. Definitions.—In this Act, unless the context otherwise indicates—

"dangerous weapon" means any object, other than a firearm, capable of causing death or inflicting serious bodily harm, if it were used for an unlawful purpose.

2. Application of Act.—This Act does not apply to the following activities:

(*a*) Possession of dangerous weapons in pursuit of any lawful employment, duty or activity;

(*b*) Possession of dangerous weapons during the participation in any religious or cultural activities, or lawful sport, recreation, or entertainment; or

(*c*) Legitimate collection, display or exhibition of weapons.

3. Prohibition of possession of dangerous weapons.—(1) Any person who is in possession of any dangerous weapon under circumstances which may raise a reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

(2) In determining whether a person intends to use the object as a dangerous weapon for an unlawful purpose, all relevant factors, including but not limited to, the following must be taken into account:

(*a*) The place and time where the person is found;

(*b*) The behaviour of the person, including the making of any threat or the display of intimidatory behaviour;

(*c*) The manner in which the object is carried or displayed;

(*d*) Whether the possession of the object was within the context of drug dealing, gang association or any organised crime or any other criminal activity; or

(*e*) Any other relevant factors, including any explanation the person may wish to provide for his or her possession of the object: Provided that this paragraph shall not be interpreted as an obligation on the person to explain his or her possession of the object.

2. On 29 July 2013 *Act No. 13 of 2013: Prevention of Combating and Torture of Persons Act, 2013* was published in Government Gazette no 36715. The aim of the Act is to give effect to the Republic's obligations in terms of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; to provide for the offence of torture of persons and other offences associated with the torture of persons; and to prevent and combat the torture of persons within or across the borders of the Republic; and to provide for matters connected therewith. Sections 3 and 4 read as follows:

3. Acts constituting torture.—For the purposes of this Act, "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—

(*a*) for such purposes as to—

(i) obtain information or a confession from him or her or any other person;

(ii) punish him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or

(iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or

(*b*) for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

4. Offences and penalties.—(1) Any person who—

(*a*) commits torture;

(*b*) attempts to commit torture; or

(*c*) incites, instigates, commands or procures any person to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life.

(2) Any person who participates in torture, or who conspires with a public official to aid or procure the commission of or to commit torture, is guilty of the offence of torture and is on conviction liable to imprisonment, including imprisonment for life.

(3) Despite any other law to the contrary, including customary international law, the fact that an accused person—

(*a*) is or was a head of state or government, a member of a government or parliament, an elected representative or a government official; or

(*b*) was under a legal obligation to obey a manifestly unlawful order of a government or superior,

is neither a defence to a charge of committing an offence referred to in this section, nor a ground for any possible reduction of sentence, once that person has been convicted of such offence.

(4) No exceptional circumstances whatsoever, including but not limited to, a state of war, threat of war, internal political instability, national security or any state of emergency may be invoked as a justification for torture.

(5) No one shall be punished for disobeying an order to commit torture**.**

3. The *Prevention and Combating of Trafficking in Persons Act, 2013, Act 7 of 2013* was published in Government Gazette no 36715 dated 29 July 2013. The purpose of

the Act is to give effect to the Republic's obligations concerning the trafficking of persons in terms of international agreements; to provide for an offence of trafficking in persons and other offences associated with trafficking in persons; to provide for penalties that may be imposed in respect of the offences; to provide for measures to protect and assist victims of trafficking in persons; to provide for the coordinated implementation, application and administration of this Act; to prevent and combat the trafficking in persons within or across the borders of the Republic; and to provide for matters connected therewith.

4. The *Superior Courts Act, Act 10 of 2013* has been published in Government Gazette no 36743 dated 12 August 2013. The purpose of the Act is to rationalise, consolidate and amend the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa; to make provision for the administration of the judicial functions of all courts; to make provision for administrative and budgetary matters relating to the Superior Courts; and to provide for matters incidental thereto. The Act has not yet been put into operation. The following sections are of relevance to Magistrates:

8. Judicial management of judicial functions.—(1) For the purpose of any consultation regarding any matter referred to in this section, the Chief Justice may convene any forum of judicial officers that he or she deems appropriate.

(2) The Chief Justice, as the head of the judiciary as contemplated in section 165(6) of the Constitution, exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

(3) The Chief Justice may, subject to subsection (5), issue written protocols or directives, or give guidance or advice, to judicial officers—

(*a*) in respect of norms and standards for the performance of the judicial functions as contemplated in subsection (6); and

(*b*) regarding any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts.

(4) (*a*) Any function or any power in terms of this section, vesting in the Chief Justice or any other head of court, may be delegated to any other judicial officer of the court in question.

(*b*) The management of the judicial functions of each court is the responsibility of the head of that court.

(*c*) Subject to subsections (2) and (3), the Judge President of a Division is also responsible for the co-ordination of the judicial functions of all Magistrates' Courts falling within the jurisdiction of that Division.

(5) Any protocol or directive in terms of subsection (3)—

(*a*) may only be issued by the Chief Justice if it enjoys the majority support of the heads of those courts on which it would be applicable; and

(*b*) must be published in the *Gazette.*

(6) The judicial functions referred to in subsection (2) and subsection (4)(*b*) include the—

(*a*) determination of sittings of the specific courts;

(*b*) assignment of judicial officers to sittings;

(*c*) assignment of cases and other judicial duties to judicial officers;

(*d*) determination of the sitting schedules and places of sittings for judicial officers;

(*e*) management of procedures to be adhered to in respect of—

(i) case flow management;

(ii) the finalisation of any matter before a judicial officer, including any outstanding judgment, decision or order; and

(iii) recesses of Superior Courts.

(7) The Chief Justice may designate any judge to assist him or her in his or her judicial leadership functions.

22. Grounds for review of proceedings of Magistrates' Court.—(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are—

(*a*) absence of jurisdiction on the part of the court;

(*b*) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(*c*) gross irregularity in the proceedings; and

(*d*) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts.

Recent Court Cases

1. S v CHETTY 2013 (2) SACR 142 (SCA)

The possibility of collateral harm for an accused's children is not sufficient to render a sentence of imprisonment inappropriate if it was otherwise appropriate.

"[10] The purpose of a probation officer's report in a case such as this, in which the magistrate's concern was whether the appellant was the primary caregiver for his daughter and the impact of the sentencing of the appellant on her best interests, was dealt with in *S v M (Centre for Child Law as amicus curiae)* 2007(2) SACR 539 (CC). Sachs J stated that while a trial court should 'find out whether a convicted person is a primary caregiver whenever there are indications that this might be so', it was not necessary to obtain a probation officer's report in every case: the accused could be asked for the necessary information or be required to lead evidence if needs be.

[11] In other words, the probation officer's report is not an end in itself. It is but one means of placing reliable information before a court in order to enable it to impose a properly informed sentence, taking into account along with all of the other relevant factors, the best interests of an accused person's minor children who will inevitably be prejudiced by the sentencing of their parent. If that information can be placed before the court in another satisfactory way, there is no need for a probation officer's report.

[12] In this case, that is precisely what happened. The relevant information was furnished by the appellant's attorney and the magistrate decided that that information could be accepted at face value. He considered it and took it into account, so the appellant can hardly complain. He was not prejudiced in the least by the magistrate deciding that it was not necessary for a probation officer to confirm the information when he imposed sentence; indeed, he obtained the advantage of his information being placed before the court without it being scrutinised by a probation officer or tested by the State.

[13] In *MS v S (Centre for Child Law as amicus curiae)* 2011(2) SACR 88 (CC) Cameron J warned against the application of *S v M* 'in cases that lie beyond its

ambit'. It only applies when the accused is a primary caregiver of a child, not when he or she is a breadwinner. A primary caregiver is 'the person with whom the child lives and performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly'.

[14] In this case, it is clear from the information placed before the magistrate that the appellant was not his daughter's primary caregiver. He and his wife lived together, along with their daughter, and in the same premises as his parents. Both the appellant and his wife were employed and so, it can safely be assumed, contributed to the maintenance and well-being of their daughter. This was not a case like *S v M* where the appellant was a single mother who had to care for her children without the assistance of anyone else. Despite that, the magistrate considered the effect of the incarceration of the appellant on the best interests of his daughter.

[15] The argument was advanced that because the appellant's wife had been injured in a motor accident some 11 years before, and is disabled to an extent as a result, the imposition of a custodial sentence on the appellant would work hardship on the appellant's daughter because the appellant was responsible for most of the physical caring for his daughter. The appellant's attorney conceded that the appellant's extended family was able to help with the care of the child but argued that it would not be as beneficial for the child as the continued presence of her father. That is no doubt so but, as Cloete JA pointed out in *S v EB* 2010(2) SACR 524 (SCA) para 14, while one has sympathy for children in situations such as this, 'their emotional needs cannot trump the duty on the State properly to punish criminal misconduct where the appropriate sentence is one of imprisonment'.

[16] *S v M* is not authority for the proposition that when incarceration is otherwise appropriate, the fact that it will cause collateral harm for the criminal's children is sufficient to render that sentence inappropriate. Given the appellant's attorney's concession that the gap left as a result of the appellant's incarceration could and would be filled by a member or members of the appellant's extended family, it cannot be suggested that, to borrow the words of Cameron J in *MS v S*, the 'fundamental needs or the basic interests' of the child will be neglected if the appellant is incarcerated. More importantly, for present purposes, the magistrate considered this issue on the basis of the information placed before him by the appellant's attorney, even though the appellant was not the child's primary caregiver. He cannot be faulted in that regard.

[17] There is, consequently, no merit in the argument that the magistrate erred in sentencing the appellant without a probation officer's report. I have also shown that the magistrate considered properly the effect of sentencing the appellant to imprisonment on the best interests of the appellant's daughter, even though the appellant is not a primary caregiver. I conclude that there is no basis for interference with the magistrate's sentence on either account. I can discern no other misdirection

on the part of the magistrate and, in my view, it most certainly cannot be said that the sentence imposed by the magistrate induces a sense of shock. That being so, there is no basis upon which the sentence may be interfered with and the appeal must fail."

2. S v VC 2013(2) SACR 146 (KZP)

A delay of 6 months in submitting a record of proceedings on review defeats the purpose of proceedings being reviewed.

The accused was a 17 year old male who had been convicted in a magistrates' court on two counts of housebreaking with the intent to steal and theft. He was sentenced on 22 March 2012 on each count to three years imprisonment. The matter was automatically reviewable but was only sent on review to the high court on 2 October 2012 which was more than six months after he was sentenced.

"[5] It is desirable to first deal with the inordinate delay of this matter. In a my view the delay created by the late submission of the record to the registrar, and the late answering of the review queries, impacted on the fairness of the accused's trial, albeit not in casu to the extent that it constituted an irregularity. The remarks of Jordaan AJ in S *v Hlungwane 2001(1) SACR 136 (T)* are apposite and I align myself with the view:

'The system of automatic review is indeed a salutary practice. Not only are injustices that occur corrected but junior magistrates receive guidance and training in the process. *The interests of the undefended accused are protected.* See S *v Mboyani* 1978 (2) SA 927 (T) at 928G. In the 1962 *South African Law Journal* at 267 a quote is contained from a report by two Judges dealing with these reviews:

"One of the important contributions made by South African law to the administration of justice is the system of review as of course, or, as it is more commonly known, automatic review. The system requires that every conviction and sentence of an inferior court falling within certain categories be confirmed by a Judge of the Supreme Court and each case is reviewed without any application by the accused. Automatic review is unknown both to the laws of England and of the Netherlands. When it is borne in mind that at least 90% of the accused persons are either wholly or partially illiterate and that the great majority of them are undefended, the vital importance of the system in the administration of justice in this country becomes apparent."' [My emphasis.]

The obligations as set out in s 303 of the Act were completely disregarded and ignored, despite their being peremptory. The failure to comply with the provisions constitutes a failure of justice. In S *v*

Manyonyo 1997(1) SACR 298 (E) the court succinctly stated the rationale for the expeditious transmission of review records as follows:

"The reason for the statutory insistence on the expeditious dispatch of records on review is generally to provide the speedy and efficient administration of justice, but in particular *to ensure that an accused is not detained unnecessarily* in cases where the court of review sets aside the conviction or reduces the sentence."[My emphasis.]

If a system of automatic review is valued as a form of protection of the fundamental rights of an accused, then it should not be compromised by administrative incompetency. The facts of this case show that the delay deprived the accused of the right to have the proceedings reappraised by a judge speedily. This young offender went to prison and a real likelihood existed that he would have served a greater part of his sentence before the matter was reviewed by a judge. At the time when this was considered the accused had already served 10 months of the imprisonment imposed. The necessary safeguards provided for in terms of s 303 of the Act can only be relied upon if the provisions relating to the time frames are strictly adhered to. As a result of the ineptitude to submit the record timeously a young offender was deprived of a fair review process. It is likely, depending on the circumstances and the context in which it occurs, that such delays may result in an unfair trial in future.

[6] It is important to remember that, when a review record is not dispatched to a judge expeditiously, a perception is created that presiding officers are indifferent to the freedom of an individual."

3. PRETORIUS v MAGISTRATE DURBAN 2013(2) SACR 153 (KZP)

Whether an attorney was right or wrong in his strategy in conducting a case could not be described as incompetence.

"[1] The Applicants, by way of Notice of Motion, supported by affidavits, seek an order in the following terms:

1. That the criminal proceedings conducted before the First Respondent in the Durban Magistrate's Court under Case No. 23/14444/10 wherein the Applicants were convicted of contravening Section 5(b) of the Drugs and Drug Trafficking Act, 140 of 1992 (dealing in dagga) on 4th April 2011 be reviewed and corrected or set aside.

2. That the Second Respondent may reinstate proceedings in respect of the same charge in terms of Section 324 (c) of the Criminal Procedure Act 51 of 1977.

3. Further and/or alternative relief.

4. Costs of suit in the event that the application is opposed.

[4] The Applicants, all represented by the Third Respondent, duly instructed by attorney Sarah Pugsley, pleaded not guilty to a charge of dealing in dagga. At the end of the State's case, an application in terms of Section 174 of the Criminal Procedure Act was made. In his submissions to the Court a quo, the Third Respondent challenged the constitutional validity of the charge against the Applicants. He accordingly applied to have the charges set aside. The Magistrate correctly ruled that the Magistrate's Court did not have the power to rule on Constitutional issues and dismissed the application. She also informed the Applicants that such application ought to be brought to a higher court at the appropriate time. The application in terms of Section 174 was also refused. The Applicants thereafter elected not to testify and the defence closed its case. As a result, the Applicants were all convicted. The Applicants now seek the relief as hereinbefore mentioned. It is important to note that the Applicants have not been sentenced as yet. Sentencing has been postponed pending the outcome of this application.

[9] The specific ground of review is that the Applicants "did not receive a fair trial in accordance with their fundamental right to legal representation in terms of Section 35 (3) (f) of the Constitution, Act 108 of 1996 and Section 73 of the Criminal Procedure Act 51 of 1977". In this regard the Applicants have alleged that they did not have proper, effective and competent legal representation in that:

1. The Third Respondent "failed to identify the Constitutional challenge on which he based our entire defence, at the outset of the trial and to argue same as a point in *limine* prior to the hearing of evidence".

2. The advice given by the Third Respondent, namely that the Applicants would be acquitted on the basis of the Constitutional challenge, alternatively will be successful on appeal – did not constitute competent legal representation as envisaged in Section 35 (3) (f) of the Constitution and rendered the trial unfair; and

3. The Third Respondent "never obtained our versions on the merits which, in fact, provide a complete defence to the charge".

[10] The Applicants have averred that the Third Respondent failed to take the basic steps which relate to consultation and advice on how the defence would best be conducted. In this regard the First Applicant has alleged that she was "never invited

to give the Third Respondent my full version of events" and that the Third Respondent "never consulted at all with Accused 2 and 3" – the Third and Fifth Applicants.

[11] The thread which weaves its way throughout the version of the Applicants is that the Third Respondent had already decided that the Constitutional attack on the charge would succeed (even if on appeal if necessary). As a consequence he failed to consult with the Applicants and take proper instructions from them. Had he done so, he would have realized that some of them, if not all the Applicants, had a valid defence to the charge. The issue relating to the timing of raising the Constitutional challenge was only introduced after consultation with the Applicants new legal representatives. The same applies to the criticisms of the Third Respondent's representation of the Applicants in the Court *a quo*. I will return to this aspect later in the judgment.

[12] Section 35(3) (f) of the Constitution provides:

"(3) Every accused person has a right to a fair trial, which includes the right –

… to choose, and be represented by, a legal practitioner, and to be informed of this right promptly."

[13] The leading case, in my opinion, relating to the right to legal representation as envisaged in Section 35(3) (f) of the Constitution, is State v Halgryn 2002 (2) SACR 211 (SCA). Harms JA (as he then was) held, at paragraph 14 -

"The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence. ..… Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend upon the degree of *ex post facto* dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. ….. The Court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect ….. The failure to take certain basic steps, such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited."

[14] In answer to the Applicants allegations that he failed to consult properly or adequately with the Applicants and that he failed to invite the First Applicant (or all of them) to state their full version of events, the Third Respondent alluded to the fact that he spent approximately 40 hours in consultation with the Applicants (albeit not all of them at the same time). He also referred to the numerous instances where he,

upon returning to his home at the end of the day, found the First Applicant on his premises wanting to discuss matters. No mention of this was made by the First Applicant in her founding affidavit. In fact none of the Applicants (or their said attorney) provided full details of all the consultations held with the Third Respondent. Casual reference is made, in passing, in the founding affidavit, to the odd consultation which in the Applicants' opinion was merely to reinforce the belief that the Constitutional challenge would succeed. There are also allegations that the Third Respondent opposed any suggestion of obtaining a second opinion.

[15] In their affidavit in reply to the Third Respondent's allegations, the Applicants, although denying 40 hours of consultation, appeared to recall many more consultations and the contents thereof than those alluded to in their founding papers. The First Applicant also conceded meeting with the Third Respondent – although she does not confirm or deny that they were at the Third Respondent's home. She also casually mentions these as "informal meetings".

[16] What is startling is the failure of the Applicant's attorney, Ms Pugsley, to provide the Court with full and precise details of what transpired during all the consultations as well as her involvement in the case. This despite having had two opportunities and having filed two affidavits in support of the application. As an officer of the court I believe that it is her paramount duty to fully disclose her involvement and to assist the Court. In this regard it is noted that the Applicants have also waived their attorney-client privilege. All that Ms Pugsley does is to confirm the two consultations referred to by the First Applicant (in her replying affidavit to the Third Respondent) which consultations were confirmed by her notes as annexures. This in contrast to the Applicants' version that there were more than two consultations. These consultation notes are sketchy in character and do not even record who was present during the consultations.

[17] It appears from the papers that a consultation was held by the Third Respondent with the Second Applicant's mother and aunt. During this consultation the Third Respondent confirmed that given the circumstances the only defence he could raise was the "Constitutional challenge". It is further alleged that the question of obtaining a second opinion arose during this consultation. Once again, Ms Pugsley has failed to furnish the Court with her consultation notes or a confirmation of this important consultation.

[18] What is even more surprising is her failure to answer the allegations regarding the obtaining of a second opinion. Surely this is the duty of an instructing attorney and not that of the advocate who has been briefed to represent the accused. Even if the Third Respondent protested at the thought of having a second opinion it is, in my opinion, nonetheless the duty of the instructing attorney to act in accordance with her instructions. At best (and to the detriment of the Applicants) she has attested

that it was only after conviction that she was instructed by the Applicants to obtain a second opinion.

[19] What clearly emerges from the Third Respondent's affidavit is that there were consultations with the Applicants and that incriminating details emerged therefrom. These included, *inter alia*:

1. That the Third and Fifth Applicants were involved only in so far as supplying their manual labour. Indeed the details of the extent of the dagga manufacturing operation necessitated the labours of more than one person.
2. The involvement of Steven Cope.
3. The financing of the operation and the details of how the profits were to be shared.
4. The duration of the operation (approximately 12 months) prior to the Applicants' arrest and
5. The letter which was written by the First Applicant to Steven Cope.

[20] All these allegations have not been denied by the Applicants.

[21] The Third Respondent's and Ms Pugsley's meeting with Steven Cope at Cape Town International Airport also raises some concerns. Why was it necessary for the legal representatives to meet with Mr Cope if as the Applicants allege, was solely for the purpose of trying to secure funds for the trial? Surely the First, Second or Fourth Applicants could have phoned Mr Cope in this regard. What was the content of the letter written by the First Applicant to Steven Cope? Why was it necessary for the First Applicant, who has protested her innocence of the entire drug manufacturing operation, to write to Steven Cope? The probabilities favour the Third Respondent's version that:

1. The meeting with Steven Cope was as a result of instructions from the First, Second and Fourth Applicants.
2. Mr Cope was involved in the entire operation and wanted the assurance that he would not be implicated in the trial.
3. The letter written by the First Applicant probably sought to reassure Steven Cope.

[22] Other details that emerge from the consultations that have not been denied are, *inter alia*,

1. The possible seizure of the First Applicant's house as an instrument of the offence.
2. The status of the First Applicant's children.

3. The fact that the said childrens' father had instituted legal proceedings against the First Applicant and
4. The problems encountered with her employers and clients as a result of her arrest.

[23] All these factors could not have emerged and could not have been within the knowledge of the Third Respondent unless there were full and proper consultations with the Applicants.

[24] Of importance is the allegation made by the Third Respondent in paragraph 40 of his first affidavit. He states:

"40.

Having established the circumstances around the consultations and my decision to run the trial as I did, I would like to draw the Court's attention to the fact that it was my professional opinion that given the fact that the accused had confessed to me and because they refused to plead guilty to the charges, I could only conduct their defence on the basis of the interpretation of the definition contained in the Drugs Act.

41.

I informed the accused that I could not run an affirmative defence as I could not mislead the Court …"

[25] These averments remain unchallenged.

[26] On the Third Respondent's version, which (in terms of the Plascon Evans Rule) must be accepted, I am satisfied that there was adequate and proper consultation between the Applicants and the Third Respondent and that given the circumstances, they agreed to follow the Third Respondent's advice and to conduct the trial accordingly. In this regard it must be noted that "misplaced reliance on the legal advice of their counsel given in the *bona fide* (albeit mistaken) pursuit of his professional mandate is not a ground for claiming that justice has failed. (R v Matonsi 1958 (2) SA 540 (A) at 455 H to 456 D; S v Seheri en andere 1964(1) SA 29 (A) at 35 E-F) Per Heher JA – S v Daniels 2012 (2) SACR 459 (SCA) at 466 D-E.

[27] Paragraph 411 of the Uniform Rules of Professional Ethics of the General Bar Council of South Africa determines that where a client makes a confession to his counsel either before or during criminal proceedings, counsel should explain to the client the basis on which counsel may continue with the case, namely:

"Counsel may not in the proceedings assert that which he knows to be untrue nor may he connive at or attempt to substantiate a fraud or an untruth. He may appropriately argue that the evidence offered by the prosecution is insufficient to support a conviction and may take advantage of any legal matter which might relieve the accused of criminal liability.

He may not, however, set up an affirmative case which he knows to be inconsistent with the confession.

If the client, having been so informed, desires counsel to appear on the abovementioned basis, counsel should continue to hold the brief and act in accordance with the principles set out above. If the client desires counsel to give up the brief, counsel must do so."

[28] I am satisfied that the Third Respondent's conduct was in accordance with this Rule."

From The Legal Journals

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"Challenges of diversion strategies in meeting the diversion objectives of the Child Justice Act (75 of 2008)"

Acta Criminologica 2012 76

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

Contributions from the Law School

Inalienable Rights: The Limits of Consent in HIV Cases

Abstract

This article will demonstrate how non-disclosure of HIV to a sexual partner can legitimately be criminalized within the context of the existing crime of statutory rape which at present only acknowledges rape in relation to error in persona or error in negotio. By extending the meaning of fraud, the focus will not be on prohibiting specific causes of conduct, but rather on any conduct (such as transmission of HIV or potential transmission) which causes a specific condition. Since mere wrongdoing does not necessarily provide an objective basis for criminalizing conduct, an alternative account of the wrongfulness of the harms is required. It is suggested that this difficulty can be solved if rights are defined in such a way that they protect crucial welfare interests. By giving legal weight to the perpetrators act, it would show respect for autonomy of the victim.

In South African law, prosecuting offenders for transmission of HIV in cases where an accused has failed to disclose his HIV-status in cases of consensual sex does not provide us with any precedent for punishing the offence in terms of statutory rape. In terms of section 3 of the Sexual Offences and related matters Amendment Act 32 of 2007 rape is defined as "Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B) without the consent of (B), will be guilty of rape" Only error in persona or error in negotio (*R v Williams* [1923] 1 KB 340) will void the act.

The question is whether it is fraudulent to fail to disclose ones HIV positive status to a sexual partner? This question was addressed in the leading case of *R v Currier* (1998), 127 C.C.C. (3d) 1, 162 D.L.R. 4th 513). In this case the accused had sexual relations with two complainants after finding out that he was HIV positive. L'Heureux-Dube minority finding held that in order to show fraud, the Crown should only be required to prove beyond a reasonable doubt that the accused acted dishonestly in a manner designed to induce the complainant to submit to a specific activity, and that absent the dishonesty, the complainant would not have submitted to the activity (*R v Currier supra* at par [16]). This approach acknowledge that the essence of the offence of sexual assault is not the presence of physical violence or the potential for serious bodily harm but the violation of the complainants physical dignity in a manner contrary to her autonomous will (supra at par [19]). Second in terms of the scope of Cory J's approach in *Cuerrier* is dependent on the interpretation given in future cases regarding the requirement that the deceit must lead to actual harm…or risk of harm (Ginn "Can Failure to Disclose HIV Positivity to Sexual Partners Vitiate Consent? R v Cuerrier" 2000 *CJW/RFD* 239-240). However, the majority of the court widened the definition of fraud by finding that it had two constituent elements, namely "dishonesty which can include non-disclosure of important facts and deprivation (that is proof of detriment or prejudice) (*R v Currier supra* at par [113]).
Should such an approach be adopted in the new definition of fraud, it would raise various issues. For instance, would the harm have to be physical? From whose perspective would the presence or absence of the harm have to be a measured? Would such harm be measured from the perspective of the person who is deceived, the deceiver or that of the reasonable person? (Gin 240) The problem in following Cory J's approach in Cuerrier in South African law is that where no physical harm (or risk of physical harm is done), a judge may not be sensitive to harm done to one's sense of personal inviolability and selfhood (Ginn *supra).* However L'Heureux Dube J's minority finding in the same case is instructive for South African law in this regard: "the effect of maximizing the individual's right to determine by whom, and under what condition she will come into physical contact with" (*R v Cuerrier supra* at par [18]). The judge went on to note: "[t]he essence of the offence [of sexual assault]… is not the presence of physical violence or the potential for serious bodily harm but the violation of the complainants dignity in a manner contrary to her

autonomous will (*R v Cuerrier supra* at par [19]). It is unlikely that the crown would prosecute cases in which deceit was minimal or in which it would be difficult to prove that had the complainant known the truth she would never have consented to sexual intercourse (Ginn *supra* 241)

Practical application

Since South African common law refused to treat such fraud as negating consent, it may nevertheless be relevant to the general definition of consent under section 3 of the Sexual Offences Amendment Act 2007 (Slater "HIV, Trust and the Criminal Law 2011 *The Journal of Criminal Law* 309 at 313). Section 3 gives a general and positive definition of consent which means voluntary consent (Slater *supra* 316). What is meant by the term voluntary? In answering this question, English law was faced with a similar predicament where the failure to disclose HIV positive status is currently not dealt with by section 76(2)(a) of the Sexual Offences Act of 2003. In *R v B* ([2007] 1 WLR 1567 Latham LJ noted this point "…the Sexual Offences Act 2003 does not expressly concern itself with the full range of deceptions other than those identified in section 76 of the Act, let alone implied deceptions…{T]his leaves, as a matter of some uncertainty, the question… 'what if D deceives C into thinking that he is not HIV-positive when he is?...There is no suggestion in that article that whatever may be the answer to that question an implied deception can be spelt out of the mere fact that the person does not disclose his HIV status, or his infection by some other sexually transmissible disease, that such a deception should vitiate consent… All we need to say is that, as a matter of law, the fact that the defendant may not have disclosed his HIV-status is not matter which could in any way be relevant to the issue of consent under section 74 of the Act of 2003 in relation to the sexual activity in this case" (at 1571) .

What is instructive about the passage on fraud in relation to the statutory offence of rape in South African law is that this passage acknowledges the possibility that expressly deceiving a person as to his HIV-positive status, as opposed to mere failure to disclose that status (Lathams LJ's 'implied deception'") could negate consent. It could then be argued that expressly lying about HIV status could be part "of a network of pressure and lies that could, overall, negate consent" (Slater supra 316). While South African courts are not precluded from adapting existing crimes to meet contemporary requirements, this process can prove to be a fine line between the extension and adaption of the definition (Van der Bijl "Rape as a materially defined crime: Could 'any act which causes sexual penetration' include omissions? 2010 *South African Journal of Criminal Justice* 224 at 230). While South African courts are not precluded from adapting existing crimes to meet contemporary requirements, this process can prove to be a fine line between the extension and adaption of the definition (Van der Bijl supra). By giving "rape" a wide interpretation it would no longer conflict with the Bill of rights: more specially the provision of section 12(1)(c) which is the right to be free from all forms of violence from either public or private sources (Van der Bijl supra 230). Broadening the term "voluntary" would

acknowledge the central precept underlying rape law: sexual autonomy. This would include falsehoods about health risks (Falk "Rape by Fraud and Rape by Coercion" 1998 *Brooklyn Law Review* 39 164). This would be the case even where no actual harm occurred (that is where the HIV virus was not in fact transferred to the victim). Autonomy would be the main focus. Clearly in cases of materially-defined crimes, it should not be specific cases of conduct which should be prohibited but rather any conduct (consensual sexual intercourse with HIV positive person who conceals it) which causes a specific condition (Falk *supra* 238).

Since mere wrongdoing does not necessarily provide an objective basis for criminalizing conduct, an alternate account of the wrongfulness of certain harms is required (Baker "The Moral Limits of Consent as a Defense in the Criminal Law" 2009 *New Criminal Law Review* 93 at 120). Such an interpretation may be supported by the following argument. One of the limits of the concept of harm is that a set-back to interests is not harm if one whose interest is set back has voluntarily consented to the risk of the harm (Stewart "Harms, Wrongs and Set-Backs in Feinberg's Moral Limits of the Criminal Law" 2001 *Buffalo Criminal Law Review* 48 at 52). But consent cannot override the prima facie wrongdoing involved (having sexual intercourse without informing the consenting party of HIV status). While there may not be any specific range of inalienable rights, there are at least two rights that cannot be waived. These include the right to life, the fact that death is a set-back to interests and this might be understood as supporting the right against being killed and the right to dignity, that is the right to maintain a certain level of respect as a rational being (Baker *supra* 112). This is the essential difference between rational autonomy (in the Kantian sense) as opposed to personal autonomy: "it only allows one set of principles which people can rationally legislate and they are the same for all. No one can escape the rule simply by being irrational and refusing to accept them. Personal autonomy, by contrast, is essentially about the freedom of persons to choose their own lives. Thus a person cannot alienate the right to be treated with a minimum degree of respect as a human being merely by being irrational. A person can forfeit or alienate her personal autonomy but she cannot alienate her dignity. It could be said that given the time delay between being infected with HIV and when that person may actually die, such a consenter has not forfeited their humanity. The problem with this theory is that '[t]he consenter of HIV has not really forfeited her humanity but has postponed its alienation by consenting to HIV infection which can take a considerable period of time to end her life.' Therefore the consenter puts her powers to an end at some future point. Although in HIV cases, non-violent means may seem to be used to inflict grave harm, this does not essentially alter the wrongfulness of infecting others with the deadly disease. HIV transmission results in irreparable harm of an extraordinary kind regardless of whether the consenter has alienated her right to life, because the grave harm involved more generally degrades the consenters dignity in a serious way. The irreparable nature of the harm involved in infecting others and the rights it limits provides a sound alternative objective

justification for limiting consent. It is one thing to consent to reversible or curable harm; it is something entirely different to consent to irreparable harm of an extraordinary grave kind" (Baker *supra* 113).
When speaking of "irreparable harm" it becomes clear that it is impossible to predict with exactitude the eventual harm brought on by HIV. Current antiretroviral therapy, while it may increase life expectancy up to 32.1 years, does not always achieve optimal results (Baker *supra* 113). For instance the treatment can have a success rate of below 50 percent. Further, some patients are intolerant to medication or they may have a drug resistant strain of HIV. Thus while the consenter lives for some years it cannot be denied that shortening a person's life regardless of the length of time is irreparable harm of an extraordinary grave kind (Baker *supra* 108). Further, the quality of the life will be impacted. Thus the unqualified nature of the right to life provides of an interpretation of the concept of life as something more than mere physical existence. This was acknowledged in *S v Makwanyane* 1995 6 BVLR 665 (CC) where the court held that "[T]he right to life, thus understood, incorporates the right to dignity, so the right to human dignity and life are entwined. The right to life is more than existence, it is the right to be treated as a human being with dignity, without dignity, human life is substantially diminished" (at par [326]-[327]).

Regardless of the consent in cases of sexual intercourse, where one party has kept his HIV-status a secret, the harm that it causes (whether the transmission occurs or not) violates a person's dignity as a human being and is therefore wrongful and should be prosecuted under the statutory offence of rape.

Samantha Goosen
School of Law UKZN
Pietermaritzburg

Matters of Interest to Magistrates

Dear Mr Van Rooyen

Most of the *bigger* Magistrate's Offices hire **contract** Magistrates to alleviate the *pressure* on the court roles, probably *now* even more in the light of the 'go-slow' / 'strike-action' by magistrates in the **district** courts. Unfortunately, most of the said contract magistrates are normally merely **attorneys** **without** *any* experience as a *magistrate* (or even as a *public prosecutor*). To overcome the said 'lack-of-experience', I recommend that you urgently **urge** these *contract* magistrates (and other *newly appointed* magistrates) to use my book *Questioning: The Undefended Accused - Practical Examples for Magistrates* (Juta: 2011). In this regard I have attached *below* the following for your convenience:

(1) the **advert** issued by **Juta Law** regarding the said book;

(2) a copy of a **letter of PRAISE** regarding the said book which I have received from **Justice Edwin Cameron** of the **Constitutional Court**; and

(3) a copy of a **letter of PRAISE** regarding the said book which I have received from **Judge Belinda van Heerden** of the **Supreme Court of Apeal**.

I noticed that *my* book is **cited** with **APPROVAL** in *Du Toit et al*. I have attached four of *these* pages for your convenience.

Kind regards

Adv Kobus Steyn

(I have not attached the letters of praise or the citation in *Du Toit et al*. I received the above letter by e-mail from the author and have included it because it may be of assistance to magistrates in general. Ed.)

A Last Thought

"[15] A disturbing feature of this case is the lack of collegiality on the part of the applicant's legal representatives. Collegiality is a relationship between colleagues. Colleagues are people united in a common purpose in a professional or work situation. Broadly, it connotes a commitment to the common purpose and working towards it. Narrowly, colleague and collegiality refer to fellow members of the same profession. Respect for the commitment to the purpose and to fellow members welds the relationship amongst colleagues. In academic circles collegiality may count as one of the pillars of performance. Collegiality on the bench means that judges have a common interest as members of the judiciary to getting the law right and to dispensing justice efficiently and effectively. This must also be the common purpose of the legal profession as a whole. The common purpose must be to resolve disputes efficiently and effectively. Interlocutory applications that tend to seek tactical advantages and which do not remedy disputes substantively tend not to be effective. Applications for cost that tend to unsuite litigants are equally ineffective. Not only do such applications fail to resolve disputes finally but they could also deny a litigant the constitutional right to access to the courts. I generalize mindful that in a particular case resolution of a technical point could be decisive of the entire dispute.

This is not such a case.
[16] In contrast to the conduct of the applicant's legal representatives, the respondent's representatives had an opportunity to retaliate with equal vitriol but chose not to do so. Despite the applicant's counsel delivering his heads of argument and practice directive one day late without an accompanying application for condonation, respondent's counsel Mr Topping, did not ask the court to strike the matter off the role or even impose an adverse order for costs as he was technically entitled to do in terms of Rule 49(15). If he had asked for any such order, not only might the costs have escalated but also the acrimony. Collegiality is therefore important not only for the efficient resolution of a particular dispute but also for the cordial functioning of the legal profession to attain the common purpose.

[17] The Uniform Rules of Professional Conduct of the General Council of the Bar of South Africa, Rule 4.12 exhorts as follows :
'Clients, not counsel, are the litigants. Whatever may be the ill feeling existing between clients it should not be allowed to influence counsel in their conduct and

demeanor towards each other or towards suitors in the case'.

In a similar vein Rule 9 of the Rules of the KwaZulu-Natal Law Society Code of Ethics for Legal Practitioners provides :
'All legal practitioners shall . . .
(9) extend to all colleagues, judges, academics, professionals, litigants and students including persons from foreign jurisdictions cordiality and respect at all times'
[18] More significantly for the purposes of this case the International Code of Ethics attached to the Law Society's Rules as the 8th Schedule provides at Rule 11 :
'Lawyers shall, when in the client's interest, endeavour to reach a solution by settlement out of court rather than start legal proceedings. Lawyers should never stir up litigation'.
[19] The age old mantra that clients may come and clients may go but colleagues go on forever seems to have been lost in this case"
As per D Pillay J in **Helen Roper Consulting v Toyota Tshusho Africa Case 1171/2010 [2012] ZAKZPHC 37**