E-MANTSHI

A KZNJETCOM Newsletter

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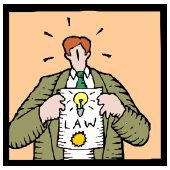
Welcome to the ninth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1) A Proclamation was published in Government Gazette no. 29343 on 31 October 2006 in which the following is stated:

Commencement of certain sections of the Maintenance Act,1998 (Act no. 99 of 1998)

Under section 47 of the Maintenance Act,1998 (Act No. 99 of 1998) 1 November is fixed as the date on which the following sections of the Act came into operation:

a) sections 5,7(1) (d), 7(2) (a), 7(2) (c), 7(2) (d), 7(2) (e) and 7(2) (f); and

b) section 7(2) (b) only in so far as it relates to the service of process of any maintenance court.

These sections deal with the appointment, duties and powers of the maintenance investigators. The partial implementation of section 7(2)(b) of the Act means that maintenance investigators will be able to serve process of a maintenance court but not execute such process.

2) The Regulations published in terms of the Maintenance Act, Act 99 of 1998 has also been amended by the insertion of chapter 4A in the regulations. These regulations regulate the powers, duties and functions of maintenance investigators. This amendment was published in Government Gazette no 29347 of 3 November 2006.

3) A discussion paper has been published by the SA Law Reform Commission on a Review of the Interpretation Act, Act 33 of 1057. The discussion paper

is available online on the website of the SA Law Reform Commission which can be accessed on the Department of Justice and Constitutional Development Website under Subject Specific pages.

4) The Older Persons Act, 2006 has been published in Government Gazette no 29346 dated 2 November 2006 and will come into operation on a date to be determined by the President by proclamation.

Section 29 of the Act is important for magistrates as it makes provision for a magistrate to hold an enquiry into the abuse of an older person and to make one of two orders:

a) authorize the perpetrator to accommodate or care for the older person concerned under such conditions as the magistrate may impose;

b) prohibit the perpetrator from accommodating or caring for any older person up to 10 years.

Recent Court Cases

1. S V MPHUTI 2006(2) SACR 391 (TPD)

The appellant was charged with contravening s 31 (1) of the Maintenance Act 99 of 1998, in that he had failed to pay periodic maintenance. His plea of guilty was amended to one of not guilty after he informed the court that he had arranged with his employer for the relevant amount to be deducted from his salary and paid to the beneficiary. Despite the amendment of plea, the appellant was convicted and sentenced to nine months' imprisonment, six of which were conditionally suspended. He appealed only against the sentence.

Held, that there were various problems with the conviction. No evidence had been led concerning the maintenance order that had supposedly been made in 1993, and the trial court had incorrectly relied on hearsay in this regard. Furthermore, no evidence had been led about the number of children to be maintained, their ages, or the circumstances which would terminate the maintenance obligation. (Paragraph [7] at 393*h.*)

Held, further, that since a charge under s 31 was a criminal matter, the State had to prove its case beyond a reasonable doubt. The elements of this offence were

that:*(a)* there existed a maintenance order; *(b)* the accused was legally liable to maintain the complainant; (c) he had failed to make regular payments in terms of the order; and *(d)* he had *mens rea.* The appellant's plea of guilty had been amended because he claimed that arrangements had been made for the maintenance payments to be deducted from his salary. No evidence had been led by the State to disprove this and, accordingly, there was no proof of *mens rea* on his part. Therefore, even though he had not appealed against conviction, the Court was obliged to exercise its inherent review powers in the interests of justice, fairness and equity. In the absence of evidence that he had contravened a maintenance order, the conviction could not stand. (Paragraphs [8]-[11] at 393*i*-394*d*.) Proceedings in the court *a quo* reviewed and conviction and sentence set aside.

2. S V SIKHIPHA 2006 (2) SACR 439 (SCA)

On appeal, it was contended on the appellant's behalf that the trial had been vitiated by various irregularities: he had been unrepresented and his rights had not been properly explained to him; a medico-legal report had been handed in while he had not fully understood the significance thereof; the complainant and her brother, both minors, had given evidence when it was not clear that they understood the nature of the oath; and the magistrate had failed to assist the appellant in the conduct of his defence and had himself cross-examined the appellant. There was also an appeal against sentence.

Held, that whether an irregularity resulted in an unfair trial depended on whether or not the accused had been prejudiced. *In casu*, the record showed that the appellant had been apprised of his rights, and there was no indication that he had been prejudiced by the absence of a legal representative - there was accordingly no irregularity in this respect. However, where an accused faced a charge as serious as that of rape, with a possible life sentence, he should not only be advised of his right to a legal representative, but encouraged to exercise it. As to the second alleged irregularity, there was no basis for any objection to the handing in of the medico-legal report; whether or not the appellant had fully understood its implications was irrelevant, and he was in no way prejudiced by its acceptance into evidence. In any event, the doctor's certificate and the J88 form would have been admissible, and *prima facie* proof of its contents, in terms of s 212(4) of the Criminal Procedure Act 51 of 1977. There was thus no irregularity in this respect. (Paragraphs [8]-[12] at 443*c*-444*e*.)

Held, further, regarding the failure of the magistrate to enquire of the complainant and her brother whether or not they understood the oath, that while a presiding officer had to be satisfied that a witness understood the oath, there was no requirement that a trial court had to make a formal enquiry in this regard, or that it had to record its findings on the point. There was, moreover, nothing in the evidence to suggest that either of these witnesses was ignorant of the import of the oath. Finally, it was so that the trial court had asked the appellant questions that went beyond mere clarification, but the appellant had been appropriately assisted by the magistrate when he gave evidence and underwent cross-examination. In the

result, there had been no irregularity and the appeal against conviction fell to be dismissed. (Paragraphs [13]-[14] at 444*f*-445*c*.)

3. S V NDOU 2006 (2) SACR 497 (TPD)

The accused, a boy of 16, was convicted in a district court of the theft of a cellphone and sentenced to one year's imprisonment. It appeared on review that the explanation given to the unrepresented accused regarding his rights to cross-examine State witnesses and to lead evidence in his own defence was inadequate. It further appeared that the sentence was too severe. The matter had been submitted on review some seven weeks after the imposition of sentence and it took a further four weeks for the magistrate to respond to the queries of the reviewing Judge, and another six weeks for the Director of Public Prosecutions to comment on the questions raised.

Held, that the delays in dealing with the matter had caused the accused great prejudice. If he had been dealt with as prescribed by s 303 of the Criminal Procedure Act 51 of 1977 the accused would have spent no more than a week or two in prison, instead of approximately four-and-a-half-months. This was an unacceptable situation - review proceedings affected the liberty of an individual and should be completed with due expedition. (At 4996*b-f*).

Held, further, that it ought to be basic procedure in all courts trying unrepresented accused that the presiding officer should inform the accused of his procedural rights and assist him or her in exercising those rights. It was of no use to inform an accused of the right to cross-examine without explaining to him or her what that entailed. Likewise, at the close of the State's case the presiding officer was to explain the accused's options and the potential consequences of exercising such options. (At 500*c-h*.)

Held, further, that evidence given by the complainant about certain extra-judicial statements or admissions made by the accused was not admissible unless the requirements for admissibility had been satisfied. The presiding magistrate had not advised the accused of his right to object to the introduction of these statements, or of the possibility of a trial-within-a-trial to determine their admissibility. This irregularity, together with the magistrate's failure properly to explain the accused's procedural rights, resulted in a failure of justice and the conviction and sentence should be set aside. (At 500*j-501*d.*)*

From The Legal Periodicals

PRICE, A.
"Dealing with difference,: admitting expert evidence to stretch judicial thinking beyond personal experience, intuition and common sense." 2006 - 19.2 SACJ 141

MEINTJIES - VAN DER WALT, L.
"Fingerprint evidence: probing myth and reality." 2006 19.2 SACJ 152

BEKINK, B.
"When do parents go too far? Are South African parents still allowed to chastise their children through corporal punishment in their private homes?" 2006 19.2 SACJ 173

LIDOVHO, G.J.
"Suggestions on the application of the bifurcated placement policy of the Department of Correctional Services." 2006 19.2 SACJ 212

CARSTENS, P.A.
"Medical negligence as a causative factor in South African criminal law: *novus actus interveniens* or mere misadventure?" 2006 19.2 SACJ 192

WATNEY,M
"Appelbevoegdheid van die staat ten aansien van vonnis" TSAR 2006 (4) 826

(If you would like a copy of any of the above articles please send your request to gvanrooyen@justice.gov.za)

Contributions from Peers

ALTERNATIVE SENTENCING

I cannot put it any better than the quote from the Honourable Justice M.S. Navsa, Judge of Appeal:

"A prison visit is a sobering experience. Massive overcrowding is the norm. As a puisne judge I stopped pontificating about rehabilitation – in my judgments on sentencing. Often prison administrators have their hands full dealing with the mere mechanics of managing prison populations – how to arrange meals and exercise times on rotation and how to marshal the limited resources at their disposal.

For juvenile awaiting trial prisoners imagine the shock of being thrust into these conditions. The number of prisoners awaiting trial for inordinate periods is substantial. The opportunity to develop human material so as to engage in a career or to study is limited, if not non-existent. Juveniles have no way of studying awaiting trial. The disproportionate number of warders in relation to prisoners is not only a security factor, it impacts directly on the manner in which prisoners are treated.

Internationally the prison population is notoriously at the bottom of priority lists. This trend should be resisted. Human capital should not be lost. People should be afforded an opportunity at redemption. While prisons should not be rest and recreation centres, they should however, not hold persons under medieval conditions. Ideally, persons returning to society should not return as hardened criminals but should return as persons who are able to reintegrate as useful citizens. Human rights activists should reconsider the low priority afforded to prisoner's rights."

My problem as a magistrate has been dealing with perpetrators of economic crimes. In my experience I have found that in most of these cases the same formula crops up each and every time. An accused between the ages of 16 and 50, with a standard two education (if that) and you can see straight away this crime has been committed because of hunger.

But, what happens when they come out of prison? We have these various organizations such as NGO's and Correctional Services. No matter how much you lecture to an accused or to prisoners about the ethical wrongs or the moral wrongs, the hunger is still there when they come out of prison. Yes, Correctional Services do have some skills development programmes but gangs and overcrowding militate against this. And, the only Government sponsored skills development programme in our area is for those with a matric.

It has been said that we are not responsible for what happens to us, as we are for how we react to our circumstances.

What we must do is ensure that rehabilitation begins the moment an accused is sentenced. We must restore a person's pride.

Du Toit et al in the *Commentary on the Criminal Procedure Act*, states on page 28-46 service 19: "A co-ordinator was appointed for each magistrate's office, who will contact institutions and persons in order to obtain their co-operation in the control and supervision of persons performing community service. The co-ordinator generally will be responsible for setting up the infrastructure necessary for the practical implementation of community service orders. Registrars of the various Divisions of the Supreme Court will also be put in possession of relevant information by the co-ordinator."

Here I suggest that this co-ordinator also ascertains from the community which projects are in need of attention. After interviewing the accused as to his/her talents or expertise, this co-ordinator makes a report to court . All this work is consuming and help is required for the magistrate either by this co-ordinator or a volunteer to run this project at each court.

I am a firm believer in community service. The benefits are: firstly, it enables the offender to have his dignity restored by helping others, and secondly, possible job opportunities may arise. That the community benefits goes without saying.

I try to ensure that the offender does not regard community service as punishment. He/her must understand that it is a vehicle to assist him, so that when his service is complete, he can still offer his services and be called upon when the need arises. I am certainly against community service being carried out at police stations or libraries for obvious reasons.
In Pinetown, we have a data base of some clinics, orphanages, old age homes and welfare organizations in the area and this list continues to grow. I usually ask the offender if there are any such organizations in his area and provide him/her with a pro forma letter to the person in charge, enquiring if they require assistance. The offender returns to court a few days later with the contact details and the prosecutor makes contact, explaining what the court has in mind and what the offender has been convicted of.
The offender is then sentenced. All or part of the sentence is suspended with the usual conditions, including attending a life skills course and community service. Section 297(8) letters are sent to both the life skills programme facilitator as well as the organizations where community service is being conducted, for them to "police" the offender, taking the pressure

off correctional services.

What one must bear in mind is that prison is the University of Crime. It is imperative to give the first offender a viable alternative so that he/she ends his criminal activity.

JEFFREY GAR

ADD MAGISTRATE

PINETOWN

If you have a contribution which may be of interest to other Magistrates please forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest to Magistrates

Sentencing of maximum concern

Michael O'Donovan and Jean Redpath

Posted to the web on: 07 November 2006 Business Day

PICKPOCKETING was punishable by death in England 200 years ago. Yet it was a common occurrence during public hangings for thieves to pick the pockets of enthralled onlookers. This story, related to illustrate the point that the severity of punishment is no deterrent to crime, was made at a conference on sentencing hosted by the Open Society Foundation of South Africa recently.

As researchers commissioned to unpack the impact of minimum sentencing in SA, we can confirm that SA is no exception to this rule.

Very severe prison terms were introduced by legislation in 1998. This legislation prescribed minimum imprisonment terms for a variety of violent and other serious offences. Our research found that any trend towards a reduction in crime rates cannot be ascribed to the legislation or to escalating penalties. There has been a reduction in crime rates in recent years, however it is apparent that the trend preceded the introduction of these penalties. Moreover the declining trend has stabilised, and seems to be reversing, despite the continued application of the law.

While crime has not been reduced, our research shows that the legislation has wreaked havoc with the criminal justice system. The time taken to finalise cases has become longer and the courts more congested. This is predominantly because accused persons, who are generally unaware of the applicability of a minimum sentence until they appear in court, respond predictably. That is, they are increasingly reluctant to plead guilty, demand Legal Aid, spurn plea bargaining, and if bail is granted, abscond. If convicted and sentenced, they are increasingly likely to appeal.

As a result, the time between the offence and sentence is increasing. In the high and regional courts, where all serious cases including minimum sentencing cases are heard, the average is 25-27 months. In some instances, four or more years may pass between the offence and sentence. Longer case cycles mean fewer convictions each year. Even though the police are gamely referring an ever-increasing number of dockets to court, the National Prosecuting Authority (NPA) is unable to increase the number of cases prosecuted. The increasing case-cycle lengths have led to a drop of more than 30% in the yearly number of cases finalised with a verdict per regional court over the last four years. The net result is we are sending fewer people to jail each year.

The delays do not just relate to predictable behaviour of accused people. Imposition of a life sentence requires a complicated system of conviction in the regional court and subsequent referral of the case to the high court for sentencing. This is because regional courts lack jurisdiction to impose a life sentence, while the high courts would not be able to cope with the volume if all such matters were heard in the high court.

An estimated 90% of life imprisonment cases referred for sentencing involve the rape of vulnerable victims such as children. Unfortunately, the referral procedure involves “tertiary” trauma for victims, who are frequently called upon to give evidence a second time when the conviction is confirmed and sentence imposed.

While the referral procedure is costly and time-consuming, it appears to be necessary to avoid miscarriages of justice. Our research, drawing on NPA data, showed that in some 12% of cases, the convictions in the regional court were overturned at sentencing stage in the high court.

The legislation has succeeded in raising sentences for “ordinary” rape to an average of about 7-12 years imprisonment from the earlier norm of two to three years imprisonment.

But lengthier sentences for many violent offences are not solely related to the legislation and are also related to the expansion of the punitive jurisdiction of the regional court to 15 years imprisonment. These harsh sentences have resulted in prisons already operating beyond their

capacity — but this is not because we are sending more criminals to prison, but because we are sending fewer away for far longer. While some may view this as a good thing, there some important reasons why it is not.

First, the only way prisons will be able to cope is by way of periodic “special remissions”, that is, mass releases of prisoners before their parole date. As the proportion of non-violent offenders in prison reduces as a result of earlier remissions and the prosecution preference for prosecuting violent and sexual offenders, violent offenders will inevitably form part of future “special remissions”.

Second, conditions of overcrowding are brutalizing and not conducive to the preparation of prisoners for re-entry into society.

Third, although international research shows the severity of punishment is no deterrent to crime, that same research shows that the certainty of punishment is a better deterrent. The harsher sentences are affecting the capacity of the system to send out a warning of the certainty of punishment. This is because prison space and court time have become such scarce commodities that all but the most serious crimes are often punished by wholly suspended sentences — or are simply not being prosecuted at all. As the most serious matters consume court resources and prison beds, other offenders are increasingly getting “a free ride” from the criminal justice system.

Our research finds public confidence in the criminal justice system as a whole is declining. We know from survey data that public confidence among court users is closely related to delays. The more delays there are the lower the opinion court users have of the criminal justice system. It is also clear that minimum sentencing has contributed to the number and length of such delays. Additional delays arising from minimum sentencing will further undermine confidence in the criminal justice system.

Minimum sentencing legislation was originally intended to be a temporary intervention to address popular concerns about crime but has remained on the books for eight years. When it comes up for renewal in April next year, legislators will have to consider whether the damage the law is causing is worth the temporary political mileage gained by appearing to be “tough on crime”.

SA urgently needs a new sentencing regime that takes into account the capacity of the system to enforce prison sentences, and alternative punishments — rather than a free ride — for less serious offences. As things stand, politicians who peddle minimum sentences as a solution to crime will have to be reminded of their stance when the next mass release of prisoners takes place.

O’Donovan and Redpath are directors of Hlakanaphila Analytics and authors of an OSF-SA report on the impact of minimum sentencing in SA.

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