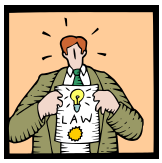
e-MANTSHI

A KZNJETCOM Newsletter

April 2015: Issue 108

Welcome to the hundredth and eight issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), with the approval of the Minister of Justice and Correctional Services amended the rules regulating the proceedings of the Magistrates Courts. The notice to this effect was published in Government Gazette no 38694 dated 17 April 2015. The amendments are to rules 14 and 60 and to Form 8 of Annexure 1 of the Rules.

Amendment of rule 14
2. Rule 14 of the Rules is hereby amended by substitution for sub rules (1) and (2) of the following sub rules:
"(1) Where the defendant has **[delivered]** served notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only
(a) on a liquid document;
(b) for a liquidated amount in money;
(c) for delivery of specified movable property; or
(d) for ejectment,

together with any claim for interest and costs.
(2)(a) The plaintiff shall within 15 days after the date of **[delivery]** service of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by plaintiff or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his or her opinion there is no *bona fide* defence to the action and that notice of intention to defend has been **[delivered]** served solely for the purposes of delay.
(b) A copy of the served notice of intention to defend must be annexed to such affidavit.
(c) If the claim is founded on a liquid document a copy of the document must be annexed to such affidavit.
(d) The notice of application for summary judgment must state that the application will be set down for hearing on a stated day not being less than 10 days from the date of the delivery thereof."

Amendment of Rule 60
3. Rule 60 of the Rules is hereby amended by the insertion of the following subrule (9):
"(9) The court may, on good cause shown, condone noncompliance with these rules."

Recent Court Cases

1. S v DITLHAKANYANE AND OTHERS 2015 (1) SACR 437 (GJ)

The purpose of s 49G of Act 111 of 1998 is to strike a balance between an accused's constitutional right to liberty and the interests of justice — It is insufficient for applicants to blandly state that respondent's case was weak or that, thus far, the state had not laid incriminating evidence against them.

The applicants brought an application in terms of s 49G(3) of the Correctional Services Act 111 of 1998 to be released from the remand detention facility in which they were being held pending the finalisation of their trial on contraventions of s 2(1)*(e)* of the Prevention of Organised Crime Act 121 of 1998. They had launched bail applications but these had all been refused. The applicants had all been in

custody for more than two years since being arrested. As the charges against the applicants fell within the ambit of schedule 5 to the Criminal Procedure Act 51 of 1977, the applicants bore the onus to show that their release from the remand detention facility would not prejudice the interests of justice. The state opposed the application and relied on an affidavit by the investigating officer who indicated that the applicants had been arrested after the discovery of a syndicate whose members had stolen R2 million from banking accounts held by the public at various post office outlets. The state contended that the applicants were charged with serious offences and faced the possibility of lengthy imprisonment, and it contended that it had a strong case against them, based on documentary evidence which showed their involvement in the commission of the offences, obtained from the post office branches where they were employed. Incriminating evidence of the particulars of the banking account holders was also allegedly found on the cellphones of the second to ninth applicants. The state alleged that the first applicant had three previous convictions for fraud, and details relating to unlawfully opened post office banking accounts were found on his cellphone. Furthermore, he had allegedly attempted after his arrest to bribe post office officials to release him.

Held, that the purpose of s 49G was to strike a balance between the accused's constitutional right to liberty and the interests of justice because, pending the finalisation of an accused's trial, he or she was presumed to be innocent until proven guilty. The provision enjoined the court to conduct a proactive interlocutory judicial enquiry to determine and establish whether the continued further detention or the release of an accused, who had previously been denied bail as an awaiting trial detainee or was denied bail after his or her trial had commenced, would be in the interests of justice. (Paragraph [35] at 444*e*–*f*.)

Held, further, that the applicants had blandly espoused their innocence by claiming that the respondent had not yet proven a prima facie case against them. None of them had set out a probable sustainable defence against the allegations made by the investigating officer in his affidavit. Having regard to the strength of the state's case and the probability of conviction, and the imposition of a lengthy custodial sentence, the applicants carried the burden to prove that their release would be in the interests of justice. It was insufficient for them to blandly state that respondent's case was weak or that, thus far, the respondent had not laid incriminating evidence against them. (Paragraph [46] at 446*g*–*i*.)

Held, further, that the interests of justice did not permit the release of the applicants in the present case. (Paragraph [50] at 447*f*.) The application was dismissed.

2. S v TS 2015 (1) SACR 489 (WCC)

In determining whether a child accused had criminal capacity, the magistrate had to consider, inter alia, the report of the probation officer in the preliminary enquiry and the expert assessment of the child.

The accused was a young girl who was charged in a regional magistrates' court with culpable homicide, in that she had stabbed her father, causing his death. She was just 13 when the offence was committed. She pleaded guilty and gave a full account of the incident in her statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977. She was sentenced to five years' compulsory residence in a Child Youth Centre. The reviewing judge was of the opinion that the reports of the psychologist and psychiatrist were possibly insufficient to establish that the accused had criminal capacity, as she suffered from borderline mental retardation. Furthermore, the section 112(2) statement appeared to be insufficient to satisfy the court that the accused was indeed guilty of culpable homicide. The reviewing judge requested the sentencing magistrate and the Director of Public Prosecutions to comment on these issues, as well as whether the sentence was not unduly harsh.

Held, as regards the mens rea of a child such as the accused, where the form of mens rea for the offence was culpa, that, whilst it was not necessary to finally decide the issue in the present case, there was much to be said for the view that the subjective frailties of the child found their proper place in the assessment of criminal capacity. If the child has criminal capacity (i.e. it could be held accountable as an adult would), negligence was tested objectively with reference to the standard of the reasonable person. (Paragraph [23] at 500*h*–*i*.)

Held, further, that, if in our law we were, in cases involving children, to judge negligence by the standard of the reasonable child of the same age, it was inevitable that the threshold enquiry into delictual or criminal capacity would also have to be adapted. If the child were only to be judged by the standards of the reasonable child of the same age, capacity would logically have to be directed at the question whether the child in question had the same capacities for appreciating wrongfulness and acting in accordance with such appreciation as the reasonable child of the same age. (Paragraph [27] at 502*b*–*c*.)

Held, further, that, despite the plea statement, s 11(2) of the Child Justice Act 75 of 2008 required the regional magistrate, in determining whether the accused had criminal capacity, to consider, inter alia, the report of the probation officer in the preliminary enquiry and the expert assessment of the child. The magistrate also needed to take into account the facts of the matter as they appeared from the plea statement. (Paragraph [35] at 503*j*–504*a*.)

Held, further, that, in the light of the expert assessment and the circumstances of the case in general, the accused's admission in her plea statement was not a sufficient basis for the magistrate, without more, to conclude that she had criminal capacity. A

generalised statement of her ability to distinguish between right and wrong, apart from not carrying much weight, did not focus on the important question whether she had the capacity to determine the extent to which she was entitled to use force against her father in the particular circumstances of the case, and to act in accordance with that appreciation. (Paragraph [37] at 504*e*–*f*.)

Held, further, that there appeared to be no material difference between the criminal capacity required for murder and for culpable homicide. If the accused lacked criminal capacity in relation to murder (because she lacked the capacity to understand the bounds of private defence and/or lacked the capacity, in the circumstances which confronted her, to act in accordance with her appreciation of these matters), she would also have lacked criminal capacity in relation to culpable homicide. If she had the necessary criminal capacity, the question whether she was guilty of murder or culpable homicide depended on whether she actually knew she was acting wrongly or whether, although she did not, a reasonable person would have known. As the magistrate could not properly have been satisfied that the accused had criminal capacity, she should not have convicted the accused on the basis of her guilty plea. (Paragraphs [39] at 504*j*–505*b* and [40] at 505*c*.)

Held, further, that, even if one concluded that her criminal capacity had been satisfactorily established, the plea explanation, read in the context of the expert assessment, raised doubt as to whether the accused's killing of her father was unlawful. It appeared from the magistrate's response to the reviewing judge's query that she understood the plea explanation as meaning that the accused had deliberately taken the knife with a view to seeking out and harming her father. Without further questioning, that inference was not justified. In order to assess the possible existence of private defence in the present case, it was necessary for the regional magistrate to have placed herself in the child's position. Although it could not be said that, on full examination, a prosecution would fail on the grounds of private defence, the plea explanation was not sufficient to satisfy the magistrate on that question. In the circumstances, the conviction had to be set aside and remitted to the court a quo to act in accordance with s 113 of the CPA and proceed with the trial. (Paragraphs [41] at 505*d* – *e*, [42] at 505*g* and [45] at 506*b*.) It was further ordered that the court a quo should determine what orders, if any, should be made in the best interests of the accused pursuant to the Child Justice Act and the Children's Act 38 of 2005, including her possible further detention or placement in a child and youth care centre. (Paragraph [49] at 507*b*.)

From The Legal Journals

Erasmus, H J

"Judicial case management and the adversarial mindset – the new Namibian rules of court"

TSAR 2015:2 259

Buchner, G

"The debt collection scandal"

De Rebus May 2015

Swanepoel, M

"Legal aspects with regard to mentally ill offenders in South Africa"

Potchefstroom Electronic Law Journal 2015 Volume 18 No 1

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

Contributions from the Law School

The rule against self-corroboration: A discussion of *S v AM* 2014 (1) SACR 48 (FB)

Introduction

The rule against self-corroboration is to the effect that a witness may not corroborate her own evidence with any previous written or verbal statements she may have made. The reason for this is rooted in common sense, and seeks to avoid the danger of the witness manufacturing evidence in her favour. There are no exceptions to the rule against self-corroboration: not even in the case of a previous consistent statement (or first report) of a rape complainant. The rule against self-corroboration

was not applied in the case of *S v AM* (2014 (1) SACR 48 (FB)), and this note will discuss this aspect.

Judicial history and scope of note

The appellant had been convicted in a regional court of the rape of his 14 year old stepdaughter, and was sentenced to life imprisonment. He appealed against his conviction, and his sentence, both of which were dismissed. This case note will consider the high court's reasoning in relation to the dismissal of the appeal against conviction only.

Facts

The appellant was a 40 year old man who was 'in a love relationship' with the complainant's mother. He lived with her and her children. The high court described the relationship between the appellant and the complainant as that of a stepfather and stepchild (at para [2]). The house they lived in was a one roomed house divided by curtains and wardrobes into a kitchen and bedroom area. The bedroom area was divided in two by a curtain. The complainant and her 9 year old sibling slept in one room, and the appellant and the complainant's mother slept in the other (at para [3]). It was common cause that the family had been watching television together before they all went to sleep in their bedrooms (ibid). The complainant alleged that in the early hours of the morning the appellant raped her and threatened to kill her if she told anyone about the incident (ibid).

At some stage shortly after the incident the complainant wrote a letter in which she stated that the appellant had given her R5, and that although she had at first thought this was a gift she later realised it was because he wanted to rape her. She said in the letter that after her mother and sister had gone to bed the appellant had come to her. She concluded her letter as follows: "Dit was vroeg in die oggend to hy na my toe gekom en hy was kaal. Dit is ek…Ek gaan eers nog n bietjie ver. Toe hy vir my daardie geld gegee het was dit toe ek nog TV gekyk het. Dis is al." The next day she gave the letter to her aunt's daughter to give to her aunt who lived on the same premises in their backyard (at para [5]). This was 'hardly 6 hours after the incident' (at para [6]). The aunt testified that the complainant was 'crying, was anxious and complained of pains in her bladder' (at para [5]). She also testified that the complainant had a foul smell of 'a female after sexual intercourse' (ibid). Subsequent DNA analysis revealed the appellant's semen on the complainant's underwear (at para [7]).

The appellant did not deny that the complainant had been sexually penetrated at the time she alleged, but he denied that he was the perpetrator. He insinuated that she was sexually active, and that she had been reprimanded for going out with boys and coming home late, and he suggested that this may have been the motive for falsely implicating him (ibid).

Judgement

The high court observed that the complainant's evidence was beset with discrepancies 'which made her evidence not satisfactory in all respects' , and it was noted that she was a single child witness 'who was clearly not sophisticated in sexual matters' (at para [6]). However, the court held that her evidence was corroborated by the DNA results and by the 'first report she made to her aunt at the slightest opportunity she got' as well as by her observed emotional distress, her physical pain, and the foul smell emanating from her (ibid). The high court was satisfied that the trial court had been alive to the dangers inherent in relying on evidence from a single child witness, and that it had addressed the discrepancies in her evidence and had correctly concluded that the discrepancies were not material given the corroborative evidence mentioned above, especially the DNA results (at para [9]).The high court was not persuaded that the trial court misdirected itself on any aspects of the merits of the case, and consequently found no reason to overturn the conviction (at para [10]).

Comment

First report of rape/Previous consistent statement by rape complainant

A previous consistent statement is a verbal or written statement made prior to the trial which accords with that person's later evidence in court (PJ Schwikkard et al Principles of Evidence (2008) 3ed 104). In rape cases, the previous consistent statement of the complainant is often referred to as the 'first report' or 'first complaint'. The general rule is that a previous consistent statement is inadmissible because it is irrelevant (*S v Moolman* 1996 (1) SACR 267 (A); *S v Mkohle* 1990 (1) SACR 95 (A), *R v Rose* 1937 AD 467*, S v Bergh* 1977 (4) SA 857 (A)). This is because there is a significant danger of manufactured evidence and because the evidence is not given on oath, and nor can the demeanour of the witness be observed (PJ Schwikkard et al op cit 105-106). However there are some exceptions to this general rule and one of them is the previous consistent statement, or first report, by a rape complainant (PJ Schwikkard et al op cit 108). The common law requirements for the admissibility of such a statement are that the statement must have been made voluntarily, the complainant must testify in the trial, and the complaint must have been made at the first reasonable opportunity. Section 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that no adverse inference may be drawn against a rape complainant merely because of the delay between the rape and the first report of it. Section 58 of the Act provides that 'evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings…' It has been argued that the necessary implication of ss 58 and 59 of the Act is that the common law requirement that the report must have been made at the first reasonable opportunity falls away (PJ Schwikkard et al op cit 114). It is thus interesting to note that the high court found it important to stress that the complainant's first report was made at the first

reasonable opportunity she had after the incident. It is also interesting to note that the first report of the complainant does not actually state that she has been raped. This may have provided fodder for an argument that the statement was thus inadmissible since it was not a first report of a rape. In my view, this argument would be regarded as unduly technical and would have failed. In my assessment, the previous consistent statement by the complainant was properly admitted into evidence.
The question however is what evidentiary value it held. Both the trial court and the high court accepted that it served to corroborate the complainant's evidence. This is, with respect, wrong.

Evidential value

Corroboration

Corroboration is independent evidence which tends to confirm other evidence (PJ Schwikkard et al op cit 530.See also *S v B* 1976 (2) SA 54 (C)). In *S v Gentle* (2005 (1) SACR 420 (SCA)) the court held that 'it must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable*, on the issues in dispute*' (at 430 j-431 a: emphasis in the original judgement (Cf *R v W* 1949 (3) SA 772 (A) at 778-9. See also *S v P* 1957 (3) SA 444 (A), *S v Heslop* 2007 (1) SACR 461 (SCA) at para [12] and *S v Scott-Crossley* 2008 (1) SACR 229 (SCA) at para [8]). In the case of *Director of Public Prosecutions v Kilbourne* (1973 1 AER 440) Lord Simon held that 'corroboration is…nothing other than evidence which 'confirms' or 'supports' or 'strengthens' other evidence…it is…evidence which renders other evidence more probable.' In *Popovich v Derks* (1961 VR 413) it was held that corroboration is evidence rendering the factum probandum more probable by strengthening the proof of one or more facta probabilia.
The rule against self-corroboration provides that a complainant cannot corroborate her own evidence with a written or verbal statement that she has made (PJ Schwikkard et al op cit 531). In *Director of Public Prosecutions v Kilbourne* (supra) the court held that it would be too dangerous to allow a witness to corroborate herself because of the danger of fabrication, and thus that there must be a universal rule disallowing it (at 456).

Consistency

The value of the first report, or previous consistent statement by the rape complainant is to prove consistency on her part. The report is admitted as relevant to her credibility in the sense that it enhances her credibility by showing consistency (*S v Hammond* (2004 (2) SACR 303 (SCA) at para [11].See also *S v Gentle* 2005 (1) SACR 420 (SCA) at para [19] and *R v M* 1959 (1) SA 352 (A)). It may also be used to show that it is inconsistent with the accused's defence that consent was given to

the sexual act – but it is not in itself proof of a lack of consent (*R v Lillyman* [1896] 2 QB 167 at 170, and *R v Osborne* [1905] 1 KB 551 at 557-8, followed in *Kilby v R* [1973] 1 ALR 283 (High Court of Australia), and all quoted in *Hammond's case* (supra) at paras [13], [14] and [15]). However the rule against self-corroboration means that the report cannot provide corroboration for the complainant's evidence. The position in South African law can be contrasted with that in England where s 20(4) of the Criminal Justice Act 2003 provides that the complaint is admissible to prove the truth of its contents and not only to show that the complainant has maintained consistency in her version of events. There is no similar legislation in South Africa, so the common law rule prohibiting self-corroboration applies.

Emotional distress

There was evidence by the complainant's aunt that the complainant was crying, and anxious (at para [6]).
Evidence of emotional distress may amount to corroboration of aspects of the complainant's evidence in a rape case, namely that she was subject to conduct which caused her distress (but cf *S v S* 1990 (1) SACR 5 (A) where the shocked condition of the complainant was incorrectly held to corroborate her allegation of rape). It may also be admissible to prove a lack of consent (unlike the evidence of the complaint itself) (*S v S* 1990 (1) SACR 5 (A) at 11a-c, and 12 a-c, and *S v J* 1998 (1) SACR 470 (SCA) at 477g-h: both quoted with approval in *Hammond's* case (supra) at para [20]. See also *R v Redpath* 1962 46 Cr App R 319 and *R v Knight* 1966 1 WLR 230). However 'caution must be exercised when the emotional state of a complainant is taken into account' (*Hammond's* case (supra) at para [21]). This is because the emotional state may be simulated, or may be due to other factors (*Hammond's* case (supra) at paras [21] and [23]). It must also be remembered that corroboration must be of a fact in dispute. In *AM's* case, the only issue in dispute was the identity of the person who had had sexual intercourse with the complainant at the relevant time. The evidence of her emotional state could not provide corroboratory evidence on this aspect.

Physical state

There was evidence by the complainant's aunt that the complainant complained of pains in her bladder and that a foul smell like that of a 'female after sexual intercourse' emanated from the complainant (at para [6]). Like emotional distress, the circumstances of the case will determine whether the evidence of the complainant's physical distress can amount to corroboration of her evidence (*R v Trigg* 1963 1 All ER 490). If the physical state can be attributed to other factors it will be of low probative value (as it was found to be in *Hammond's* case (supra) at para [19]. See also *Gentle's* case (supra) at para [20]). The physical evidence in any event could not corroborate the evidence of the complainant as regards the identity of the person

who had had sexual intercourse with the complainant at the relevant time, and this was the only issue in dispute in *AM's* case.

Probabilities

It is submitted that there were a number of improbabilities in the complainant's evidence which the high court did not address. For example, it seems improbable that the appellant would walk naked from his bedroom into the bedroom shared by the complainant and her sibling with the purpose of raping the complainant. Further, it is improbable that the complainant did not shout out for help, especially in such a small, uninsulated space. The testimony was that the appellant had threatened to kill her if she told anyone, but if that was the case why did she then report the incident the very next day. Of course these apparent inconsistencies may well be explicable, but it is submitted that they should have been dealt with in the judgement, for completeness.

Conclusion

Even though the court erred in accepting the complainant's previous consistent statement as corroborating her evidence, my view is that the outcome of the appeal was nevertheless correct. The DNA evidence was damming and served as strong evidence corroborating that of the complainant. It is nevertheless a little alarming to note that the counsel for the appellant conceded that he could not persuade the high court that the trial court erred in any manner in relation to the conviction (at para [10]). One trusts that the DNA evidence was properly interrogated in court.
In the case of *S v M* (2006 (1) SACR 67 (SCA), the SCA found that the trial court had made the same error as in the case under discussion. It had treated evidence of the rape complainant's report of such to her teacher as corroborating her evidence, instead of using it to find consistency in her evidence. Nevertheless since the conviction was justified on other grounds, the SCA confirmed the finding of the trial court on guilt (at paras [5] and [8]). This is what should have been done in *AM's* case.

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Matters of Interest to Magistrates

Not reportable

When a judgement is marked “not reportable”’ and “not of interest to other judges” you don’t expect to find much in the decision.

Quite the opposite was true in the case of *Raletsoho v S*. Bad enough that Abiel Thabiso Raletsoho, a South African Police reservist, murdered a suspect and tried to lie his way out of it. But on top of this the high court found serious problems with the decision of the trial court: the magistrate failed to give a reasoned judgement on sentence and the high court was left with the impression that the magistrate “*might not have applied his mind properly*”.

Surely you wouldn’t think that a problem like this isn’t “*reportable*” and that it won’t be “*of interest to other judges*”?

When a serious shortcoming in the administration of justice takes place, such as the failure of a judicial officer to deliver a reasoned judgement, can it be possible that it is not a matter of concern? And when the matter is reconsidered by a higher court it will always be of interest to know how that court proposes to deal with the problem.

At the very least, we would like to know whether that higher court will lay down the law to the magistrate concerned, and explain that justice cannot be seen to be done where the judicial officer neglects to provide a reasoned decision. You might even reasonably expect that the judgement, with its comments on the magistrate’s shortcomings, will be forwarded to the Magistrates’ Commission for action.

Raletsoho was convicted and sentenced to 10 years in jail by the Standerton magistrate court during October 2012. His victim, Vincent Sipho Hlatshwayo, was killed near Sakhile, Mpumalanga.

The story starts with two key witnesses sitting outside round a fire at a family gathering. They noticed what appeared to be a robbery happening nearby and called the owner of the house (a brother of Raletsoho) who said he wasn’t at home. So one of the witnesses went closer and saw that the key person involved was someone he knew very well. He asked him what he was doing and that person, Hlatshwayo, said he “*needed to earn a living*”. He ran away and hid in a toilet. At that point Raletsoho

arrived, hauled Hlatshwayo out of the toilet and marched him off towards his own house, near the house where the family gathering had taken place.

The witnesses said they left Raletsoho to deal with Hlatshwayo, who was quite uninjured at that stage, because as Raletsoho was a policeman they trusted him.

Next morning they heard that Hlatshwayo had been taken to the intensive care unit where he died five days later.

Another witness said when she went to Raletsoho's house the following morning she saw blood and water, turned to ice because of the cold, under the door of his garage. When Raletsoho opened the door she saw Hlatshwayo, her cousin, naked, covered with blood. He couldn't stand. Raletsoho did nothing to help.

The court called Raletsoho's version "*bizarre to put it mildly*", "*highly improbable*" and noted the number of different versions he produced to explain his behaviour. Basically Raletsoho claimed that when he arrived on the scene Hlatshwayo was already injured, assaulted by unknown local people. He took him to his garage for his own protection. However, he couldn't explain how he came to be wet and naked or why he had left him in that condition in his garage. He also couldn't explain satisfactorily why he hadn't arrested Hlatshwayo and why he hadn't taken him to hospital despite knowing he was severely injured. The court concluded that his evidence was "*so inherently improbable*" that it was safe to say it was false. The judge also commented on the "*absolute callousness*" of Raletsoho's behaviour, which, together with all his lies, was "*shocking*".

The trial magistrate had even asked who would guard the guardians when they behaved as Raletsoho had done. No wonder the magistrate convicted him, commented the judge. At this point in the judgement the shortcomings of the trial magistrate become clear for the first time.

The judge notes that the magistrate, "*in a very short sentence*", gave Raletsoho 10 years instead of the minimum sentence of 15 years stipulated for such an offence. The magistrate did not explain the substantial and compelling reasons for deviating from the minimum sentence. He recorded a brief summary of Raletsoho's (not unusual) personal circumstances: 40 years old, clean record, sole caretaker for his four children, sacked from his job because of his conviction.

As aggravating circumstances the magistrate noted that Raletsoho should not have taken the law into his own hands and that the police should protect, rather than harm, people. However, the magistrate erred in not explaining which factors he considered substantial and compelling in order to deviate from the prescribed minimum sentence. *"One can only infer that the facts … placed before (him) persuaded him that such a deviation from the minimum sentence was called for."*

The judge then quoted authority that discretion to impose sentence belongs to the trial court and can only be set aside when this discretion is exercised *"improperly or*

unreasonably". "Given the fact that the magistrate did not give a reasoned judgement regarding sentencing, it is impossible to state which misdirections, if any, he committed. The magistrate also did not cite any case law at all. However, as stated, various mitigating factors were placed before the magistrate which clearly persuaded him to exercise his discretion in the manner which he did. In the result that it cannot be held that the magistrate misdirected himself."

The outcome was that the Raletsoho lost his appeal: the court simply affirmed the 10 year sentence imposed by the magistrate, despite the judge's concern as to whether the sentence was appropriate or whether a isdirection had taken place.

From my platteland perspective, this isn't good enough. The law says that the presiding officer must record the substantial and compelling reasons that resulted in the minimum sentence not to being imposed. When a court doesn't do so, it misdirects itself. In this case the high court apparently assumed that the mitigating factors recorded by the magistrate were also the substantial and compelling circumstances justifying the lesser sentence. But it would have been open to the high court to ask the magistrate to clarify. Even, in appropriate circumstances, for the high court to reconsider the sentence itself. One might also have expected some clearly worded criticism of the magistrate's failure so that he could improve in future.

At the very least the matter should have been taken up with the Magistrates' Commission. As it now stands the magistrate concerned may well never discover the judge's comments and could continue as before, in blissful ignorance, delivering sentences without proper reasons.

Carmel Rickard

(The above article appeared on page 36-37 in the ***Without Prejudice*** Journal of March 2015)

A Last Thought

"Applicant's view in this context is that it is undoubtedly justifiable and considered medically ethical to withdraw life sustaining or life extending medical treatment to a patient, in order to recognise and give effect to a terminally ill patient's dignity. In this

context I was referred to L. B. Grové's thesis for the degree of Magister Legum titled "Framework for the implementation of euthanasia in South Africa" prepared under the supervision of Prof. P. A. Carstens at the Faculty of Law University of Pretoria in 2007 at pages 30 – 31. Applicant said in this context that there could be no logical or justifiable distinction between:

21.1 The withdrawal of life sustaining or prolonging medical treatment; and

21.2 Active voluntary euthanasia or assisted suicide.

He said that the main intention for the medical practitioner remains to ensure the patient's quality of life and dignity. The secondary result, namely death or the hastening of death is exactly the same in both instances. I agree that that is so. On behalf of Applicant it was therefore submitted that where a doctor withdraws life sustaining or life prolonging treatment, he or she knows that the result would be a hastening of the patient's death, which a doctor could have avoided, yet reconciled himself or herself with the result and still acted accordingly. Is this not a good example of dolus eventualis? Where life sustaining or life prolonging treatment has been administered and is subsequently withdrawn, the act of withdrawal is nonetheless a commission – it remains an active and positive step taken by the medical staff directly causing the death of the patient (on a factual basis). It is accepted that such medical treatment may be refused from the outset by a terminally ill patient, in which the failure to render treatment would constitute an omission only on the part of the medical practitioner. It was therefore submitted that there can be no distinction between active euthanasia and passive euthanasia in the circumstances where such argument is based on so-called ethical considerations. Once it is recognised, so it was put, as was indeed conceded at least by implication, that a medical practitioner has a duty to recognise and ensure that a terminally ill patient's dignity is protected by an omissio or passive euthanasia, then, the same duty remains on a medical practitioner through a commissio or active euthanasia. From a philosophical point of view and a jurisprudential point of view, I do believe that this argument is sound. One must also remember that suicide and attempted suicide are not criminal offences. The State allows abortion and so does the medical profession. Birth control measures are implemented universally. Cessation of treatment which hastens or causes death happens on a daily basis no doubt. Academics by and large appear in favour of voluntary active euthanasia or assisted suicide as is clear from chapter 7 of the Grové thesis. In the context of conscientious objections, the Applicant said that his rights are sacrosanct to him, which should not be sacrificed on the altar of religious self-righteousness. He also submitted that "conscientious objections" to homo-sexuality, same-sex marriages, mixed-race marriages and abortion did not detract from enshrined constitutional rights and it should not do so now."

Per **Fabricius J** in **Stransham-Ford v Minister of Justice and Correctional Services and others (27401/15) [2015] ZAGPPHC 230 (4 MAY 2015)**