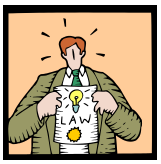
e-MANTSHI

A KZNJETCOM Newsletter

May 2016: Issue 120

Welcome to the hundredth and twentieth 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 Minister of Social Development in terms of Section 56(3)(a) of the *Child Justice Act, 2008 (Act No. 75 of 2008)* published particulars of each accredited diversion service provider and diversion programme in a schedule. This notice was published in Government Gazette no 38794 dated 15 May 2016 and it covers diversion programmes and diversion service providers that are granted an accredited status. Diversion programmes and diversion service providers that have been granted candidacy status, have received certificates and are allowed to operate, based on condition(s) set by the accrediting committee. The Policy Framework on Accreditation of Diversion Services in South Africa defines candidacy status as a 'pre-accreditation status, awarded to an organisation pursuing accreditation... Candidacy indicates that an organisation or programme has achieved recognition and is progressing towards receiving full accreditation, and has the potential to achieve compliance with standards within two years'.

2. The *Criminal Matters Amendment Act, 2015 Act 18 of 2015* has been put into operation with effect from 1 June 2016. The notice in this regard was published in Government Gazette no 40010 dated 24 May 2016.

Recent Court Cases

1. S v MAFIKA 2016 (1) SACR 623 (FB)

A magistrate cannot proceed with a trial where the accused has indicated that he wants a legal representative.

The accused was charged in the magistrates' court with two counts of housebreaking with intent to steal and theft. At the outset of the trial he informed his legal representative that he was unaware of one of the charges against him and would not plead to that charge. A conflict arose between the parties leading to the withdrawal of the legal representative. The magistrate pressed ahead with the case and insisted that the charges be put to the accused. He refused to plead and requested that his trial be adjudicated by another presiding officer. The magistrate noted a plea of not guilty in respect of both charges and proceeded to act in terms of s 115 of the Criminal Procedure Act 51 of 1977 (CPA). The accused responded that there were aspects which he did not understand. Despite this the magistrate instructed the prosecutor to proceed with the state's case. The accused was duly convicted on both counts despite further requests for legal assistance during the trial, and the matter was referred to the regional court for the imposition of sentence. The regional magistrate was of the opinion that the accused had not been given a fair trial and accordingly submitted the matter for special review in terms of s 304(4) of the CPA.

Held, that, despite the repeated requests from the accused for legal representation, the magistrate ignored the constitutional imperatives contained in s 35 of the Constitution and dispassionately informed him of his rights of cross-examination, well knowing that the failure of the accused to challenge the state case rested squarely on his refusal to allow the accused an opportunity to obtain such. Neither did he inform the accused of his right to apply for legal aid. Had the accused obtained the assistance of a legal representative, the outcome of the trial might well have been different. Such failure constituted a gross irregularity amounting to a failure of justice. The proceedings had to be set aside and the matter remitted to the magistrates' court for trial de novo before another magistrate. (Paragraphs [9]–[11] H at 628*c*–629*e*.)

2. S v HJ 2016 (1) SACR 629 (KZD)

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

Jeffrey AJ (Chetty J concurring):

[1] This is a special review referred to this court by the presiding magistrate, Mr PB Bhengu, at the Durban Magistrates' Court, who has requested that the conviction he imposed on the accused be set aside and that the matter be referred to the relevant children's' court.

[2] The accused was arrested on 9 August 2015 on a charge of contravening s 49(1)*(a)* read with ss 1, 9, 10, 25, 26 and 32 of the Immigration Act 13 of 2002. It was alleged that he was from Malawi and he entered or remained in South Africa without a valid permit.

[3] The matter came before the presiding magistrate on 11 August 2015. The accused conducted his own defence, pleaded guilty and was convicted as charged. The charge-sheet stated that he was 18 years of age, but, before being sentenced, he informed the presiding magistrate that he was 17 years of age. Upon being so informed, the presiding magistrate properly remanded the case to enable the Westville Youth Centre to assess the accused's age. This assessment was done and on 20 August 2015 the presiding magistrate was informed that it had been established that the accused was indeed 17 years of age. In addition he was informed that the accused's parents were dead and that the accused was living with a friend in Sydenham. The presiding magistrate then ordered that the accused be detained at the Westville Youth Centre and he referred the matter on special review to this court.

[4] The presiding magistrate properly concedes that the conviction that he imposed does not comply with the provisions of the Child Justice Act 75 of 2008 (CJA).

[5] It is clear that the conviction cannot stand.

[6] But more than that, on the facts before us, the accused is a minor, a foreign child whose parents are both dead and his only brush with the law, as far as we know, is his failure to be in possession of a valid permit to be in South Africa. The accused's background, what became of his parents, how he entered South Africa, for what reason, how long he has been here, and who, if anyone, is caring for him are just some of the matters that require thorough investigation.

[7] I respectfully agree with what Victor J said in *S v Gani NO* 2012 (2) SACR 468 (GSJ) at 468*j* – 469*a* para 1:

'Deeply embedded in the soul of our nation have been the protection and appropriate care of our children in situations of acrimonious matrimonial dispute, in wide-ranging forms of abuse, in orphanages, and amongst child refugees and those who clash with the law.'

The CJA, which commenced on 1 April 2010, was enacted with the specific objective

of protecting the rights of children that are entrenched in the Constitution. Section 28(2) of the Constitution requires that a child's best interests have paramount importance in every matter concerning a child, subject to any justifiable limitation under s 36. See *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) (2008 (3) SA 232; 2007 (12) BCLR 1312; [2007] ZACC 18) at I 556G – 557D para 26. The first guiding principle set out in s 3*(a)* of the CJA to be taken into account in its application states that:

'All consequences arising from the commission of an offence by a child should be *proportionate* to the circumstances of the child, the nature of the offence and the interests of society.' [Emphasis added.] Importantly the Act also provides a mechanism for diverting any matter concerning a child from the criminal justice system. In my view, on the facts of this case, a diversion of this matter would seem to be appropriate and in the interests of justice. But this must be thoroughly investigated in terms of chapters 7 and 8 of the Act.

[8] The order, therefore, that I propose is:

1. The conviction is set aside.
2. The matter is remitted to the court a quo to be commenced de novo and in compliance with the provisions of the Child Justice Act 75 of 2008 and in particular chapters 7 and 8 of that Act.

3. *Gayiya v S* (1018/15) [2016] ZASCA 65

Where an accused has been charged for murder in the regional court he has to be afforded an opportunity to decide whether or not to request that the trial precede without assessors before he was asked to plead to the charges he faced.

Mpati P (Wallis, Pillay and Mathopo JJA and Tsoka AJA concurring):

……When the application for leave to appeal was argued before him, Bertelsmann J rose with counsel what he considered to be an irregularity, which he dealt with in the first paragraph of his judgment granting leave to appeal, where he said:

‘There is one fundamental problem arising in this matter. The applicant was charged with murder in the regional court. An irregularity occurred as the presiding officer sat without assessors without having been requested to do so by the defence.’

And further:

‘There are conflicting judgments on the question whether the resulting irregularity is fatal to the proceedings, or can be condoned if the interests of justice are served thereby.’

The learned Judge consequently granted leave to appeal to this court against both conviction and sentence. It is not clear from the record why there was a delay of almost four years from the date upon which the accused’s application for leave to appeal was lodged until the application was argued before Bertelsmann J. The delay

is in any event unacceptable.

[7] It is not necessary, in my view, to mention the conflicting judgments referred to by the court below. They are collected and comprehensively discussed in *Chala & others v Director of Public Prosecutions, KwaZulu-Natal & another* 2015 (2) SACR 283 (KZP). Subsection (1) of s 93*ter* of the Magistrates' Courts Act reads:

'The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice –

(a) before any evidence has been led; or

(b) in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.'

In the present matter the proviso was undoubtedly of application as count 3 was a charge of murder. It is common cause that the accused was never afforded an opportunity by the regional magistrate to decide whether or not to request that the trial proceed without assessors before he was asked to plead to the charges he faced.

[8] In my view, the issue in the appeal is the proper constitution of the court before which the accused stood trial. The section is peremptory. It ordains that the judicial officer presiding in a regional court before which an accused is charged with murder (as in this case) *shall* be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors. It is only where the accused makes such a request that the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor. The starting point, therefore, is for the regional magistrate to inform the accused before the commencement of the trial, that it is a requirement of the law that he or she must be assisted by two assessors, unless he (the accused) requests that the trial proceed without assessors.

[9] In *R v Price* 1955 (1) SA 219 (A) the appellant had been charged on, among others, a number of counts relating to breaches of regulations dealing with the price and control of hides. The Minister of Justice, acting in terms of relevant legislation, ordered that he be tried by a Judge and two assessors. He was accordingly arraigned in the appropriate superior court where he pleaded not guilty to the charges. After the State had closed its case the defence did likewise without leading any evidence. At the conclusion of submissions from both counsels in respect of the verdict, judgment was reserved. But before a verdict had been determined on any of the charges one of the assessors collapsed and died. At a later sitting of the court counsel for the appellant made a request, in terms of another section of the relevant legislation, for an order that the case proceed before the Judge and the remaining

assessor. The Judge made the order sought and a verdict (of guilty) was delivered at a subsequent date.

[10] Following the guilty verdict, a special entry was made on behalf of the appellant for consideration by this court of the question:

'Whether the presiding Judge, notwithstanding the application made to that end on behalf of the accused and the concurrence therewith of the Crown, wrongly and irregularly ordered the proceedings to continue after the death of the assessor, . . . inasmuch as there was after his death, no longer a properly constituted Court.'

In answering that question this court said:

'It was rightly not contended on behalf of the Crown that the appellant was precluded in any way, because of the request made on his behalf at the trial, from contending in this Court that the Court which had convicted him was not a properly constituted Court. If in fact the Court was not properly constituted then its verdict, and consequently also its sentence, are irregularities that cannot be waived by an accused person.' At 223C-D.

And further:

'. . . it is also clear from *Green v Fitzgerald & others* 1914 AD 652, that where a certain number of Judges are necessary to form a quorum, the Court is not properly constituted if its number falls short of that quorum, even though that number would be enough to constitute a majority of the Court. In the present case, the quorum clearly was three members . . . and the fact that, in such a quorum, the decision of two would be an effective majority does not cure the deficiency in its quorum.'

This court accordingly allowed the appeal and set aside the appellant's convictions and sentences.

[11] In the present matter, the quorum prescribed by the proviso to sub sec (1) of s 93*ter* of the Magistrates' Courts Act was three members, namely the regional magistrate and two assessors, unless the accused had requested that the trial proceed without assessors, in which event in his discretion the regional magistrate could, sitting alone, have constituted a quorum. No such request was made by the accused. The fact that the accused, when informed of his right to assessors only after the guilty verdicts, indicated that he did not require assessors and that he would only do so at the sentencing stage, did not cure the deficiency. It follows that the court that tried and convicted the accused was not properly constituted. That defect could not be waived by the accused at the time that he purportedly did so, or cured by the subsequent proceedings before the court below. Counsel for the State did not argue otherwise. The appeal must accordingly be upheld.

[12] In the result the following order is made:

The appeal succeeds and the convictions and sentence is set aside.

From The Legal Journals

Spies, A

“Perpetuating harm: The sentencing of rape offenders under South African law”

2016 SALJ 389

Theophilopoulos, C & Tuson S

“'Dissecting the dead in order to safeguard the living': Inquest reform in South Africa”

2016 Stellenbosch Law Review 161

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

Contributions from the Law School

When will restorative justice concerns not apply in sentencing an offender?

Restorative justice has been defined as follows by one of its leading local proponents (Bertelsmann J in *S v Maluleke* 2008 (1) SACR 49 (T) at para [26]):

‘Restorative justice has been developed by criminal jurists and social scientists as a new approach to dealing with crimes, victims and offenders. It emphasises the need for reparation, healing and rehabilitation rather than harsher sentences, longer terms of imprisonment, adding to overcrowding in jails and creating greater risks of recidivism.’

Bertelsmann J further cites with approval (at para [28]) a definition employed by Cormier:

'Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by the crime – victim(s), offender and community – to identify and address their needs in the aftermath of the crime, and seek a resolution that affords healing, reparation and reintegration, and prevents further harm.'

Thus, restorative justice focuses 'less on a punitive element and more on attempting to restore the disputants to a condition similar to that which existed prior to the disturbance by the criminal conduct' (Burchell *Principles of Criminal Law* 3ed (2005) 85). Such reconciliation is achieved by a process of deliberation involving the victim, offender and community representatives (ibid). In *S v Saayman* 2008 (1) SACR 393 (E) at para [34] the court cites the judgment of Sachs J in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at para [114] (citing in turn the work of Skelton) that the key elements of restorative justice are: encounter (focusing on dialogue enabling the victims and offenders to discuss 'the hurt caused and how the parties are to get on in the future'); reparation (with the focus on repairing harm done rather than punishment); reintegration into the community (dependent on mutual respect for and mutual commitment to each other); and participation (involving a less formal encounter between the parties, facilitating the participation of others close to them).

As noted by the Constitutional Court in the case of *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (2) SACR 101 (CC) at para [60], the principles underlying the Truth and Reconciliation Commission process involved a commitment to restorative justice. The Constitutional Court has also emphasised that restorative justice is linked to the foundational value of u*buntu-botho*, which recognises the inherent human dignity of the individual offender (in the case of *Van Vuren v Minister of Correctional Services* 2012 (1) SACR 103 (CC) at para [51]). Parole has a restorative justice aim, seeking the eventual rehabilitation and reconciliation processes of the offender, which are 'themes that underpin restorative justice'. These interests must in turn be balanced against the interests of the community, which include the right to be protected against crime (ibid).

Restorative justice is a primary focus of the Child Justice Act 75 of 2008, allowing for diversion, and providing that where punishment is required, it may be imposed with the purpose of implementing restorative justice. It has also been acknowledged in the case law, in particular over the past decade of jurisprudence. Thus, in *S v Shilubane* 2008 (1) SACR 295 (T), which involved the theft of seven fowls by a 35-year-old first offender, who had been sentenced to direct imprisonment by the trial court, the court on appeal highlighted the importance of where possible *not* exposing such offenders to 'the corrosive and brutalising effect of prison life for such a trifling offence', and made a plea for rather considering an option like paying compensation for the

complainant's loss, in the light of the 'new philosophy of restorative justice' (at para [4]-[5]). Most recently in *S v Seedat* 2015 (2) SACR 612 (GP), a rape case where the victim had expressed a willingness to accept compensation rather than the offender receiving a sentence of imprisonment, the court was prepared to follow a restorative justice approach, suspending the trial court's sentence of imprisonment on condition of payment of compensation.

Although there are many aspects of restorative justice that deserve examination, for the balance of this short contribution I wish to simply highlight where the courts have held restorative justice concerns *not* to be appropriate in imposing sentence, and the reasons for such finding.

First, when the crime is too serious. Thus the Supreme Court of Appeal sought to intervene in a restorative justice sentence in *DPP North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA), where the offender had raped the 15-year-old daughter of his life companion, which crime falls to be sentenced in terms of the minimum-sentencing provisions, absent substantial and compelling circumstances. In the court *a quo* Bertelsmann J had imposed a fully suspended sentence of 10 years' imprisonment on various conditions, where it was clear that the family depended on the offender for financial support, and the victim had pleaded for a non-custodial sentence, lest such support be extinguished. However the appeal court, whilst affirming restorative justice as a valid sentencing option, cautioned against the use of restorative justice in sentencing serious offences, which would cause community outrage, and a loss of credibility for this sentencing option (at para [20]). The sentence was thus altered to 10 years' imprisonment. (It seems that the failure to charge the appellant under the minimum-sentencing provisions, as ought to have been the case, was decisive in *Seedat* in allowing the court to employ a restorative justice approach.) Other instances of a restorative justice sentence being excluded where the crime was deemed to be too serious include: *S v Mtshabe* 2008 JDR 1308 (Tk) at para [13] (where the offender, an attorney, committed fraud to the value of more than R450 000); *S v Mbuyisa* 2012 (1) SACR 571 (SCA) at para [17] (where the offender committed attempted murder by setting the victim alight); and *S v Mkhize* 2014 JDR 0771 (SCA) at para [21] (where on a verdict of culpable homicide the court held that to consider this option under the circumstances of the case at hand 'where a life has been lost, in a country where the level of violence is so high it would send the wrong message to society').

Secondly, a restorative justice sentence has also been deemed inappropriate where there is no relationship to restore. Hence in *Mtshabe* (supra) at para [13] the court posed the question as to whom the appellant would apologise, what relationship he would seek to repair and how? He defrauded the fiscus, not an individual, and thus restorative justice had little meaningful application. Similarly in the Lesotho case of *R v Mochebelele* 2010 (1) SACR577 (LesA) at para [17], where bribery was in issue, the court pointed out that the principles of restorative justice do not apply, as 'the briber and the bribe are equally guilty of the crime and the former is not entitled to

any recompense or compensation from the latter'. In short, there is no victim to reconcile with.

Thirdly, restorative justice would also not be applicable where there is no possibility of compensation (where this has been requested by the victim's family). Thus in *Mkhize* (supra) at para [21] the court pointed out that a compensation order would be 'hollow' where the offender is unemployed. (This situation may be contrasted with that in *Seedat*, where the appellant offered the victim more compensation than was granted by the court.)

Finally, restorative justice could not be effected where there is no remorse on the part of the offender. In *Mtshabe* (supra) at para [13] the court noted the appellant's steadfast refusal to acknowledge his wrongdoing as an insuperable obstacle in this regard. Moreover, in *S v Jonker* 2015 JDR 2440 (ECG) at para [24] the court agreed that the appellant had made no effort to rectify the harm done or compensate the victim for the damage suffered as a result of his fraud, and that restorative justice therefore had no application in this matter.

In conclusion, it is clear that sentencing options which accord with restorative justice such as correctional supervision (see *S v M (Centre for Child Law as Amicus Curiae*) 2007 (2) SACR 539 (CC) at para [57] and following) and community service should increasingly be considered as restorative justice finds favour as a primary sentencing rationale. However, it cannot be overlooked that restorative justice will always be limited in its application – it is inimical to the minimum-sentencing provisions (*S v Wasserman* 2004 (1) SACR 251 (T) at para [3]), and as the brief survey above has demonstrated, ought not to be considered where the circumstances of the offence do not fit the aims of restorative justice.

Shannon Hoctor

University of KwaZulu-Natal, Pietermaritzburg

Matters of Interest to Magistrates

The loaded danger of deduction when dealing with illegal possession of ammunition

By Hendrik Beukes

This article considers the danger of deduction when dealing with technical issues in a case where an accused has been charged with the unlawful possession of ammunition. I submit that in a case where an accused has been charged with either the illegal possession of ammunition and/or illegal possession of a firearm, the result is that the prosecution bears the burden to prove the charge. In doing so, it is critical for the prosecution to lead evidence of a technical nature and failure to do so, should lead to an acquittal. Case law will be considered to illustrate the nature of the technical considerations and application in such matters.

The definition of ammunition and technical aspects

Relevant definitions in terms of the Firearms Control Act

The Firearms Control Act 60 of 2000 (the Act) provides the following definition in s 1 with respect to –

- '"ammunition" means a primer or complete cartridge;' and
- '"cartridge" means a complete object consisting of a cartridge case, primer, propellant and bullet'.
- '"Firearm" means any –

(*a*) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6ft-lbs);
(*b*) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;
(*c*) a device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm with the meaning of paragraph (*a*) or (*b*).'

For purposes of this article, the focus is on ammunition/cartridge as defined in the Act, which requires propellant to function through a firearm as contemplated in the

definition of ‘firearm’ in
s 1 of the Act.
This brings one to examine the question as to how testing is conducted to establish whether the material contained in a cartridge is indeed propellant. One definition (see M Bussard *Ammo Encyclopedia* 5ed (USA: Blue Book Publications Inc 2014) at 53) of propellant is a flammable solid which, ‘when confined and ignited, rapidly completes an exothermic reaction (deflagrates) which releases its stored chemical energy in the form of hot, expanding gases. As a heat engine, a firearm converts this energy to kinetic energy using the propellant as fuel’.
Now in order for propellant to be considered as such, it is tested to determine its ballistic properties in a closed vessel.

The closed vessel test

There is only one test (to determine gas volume formation and properties for propellant) as to whether the ‘powder’ inside a cartridge case is in fact propellant and that is the closed vessel test. It is important in the process of determining as to what exactly it is one is dealing with in terms of whether the ‘powder’ inside the cartridge is propellant and, therefore, regulated in terms of the Act. Also, that by simply burning (the suspected propellant) without testing for gas volume formation, does not constitute proper scientific testing. (See *S v Thinzi and Others* (WCC) (unreported case no SS27/2013, 7-8-2014) (Dolamo J)).

Case law

The following case law will be considered in order to examine how the court deals with the technical nature of the subject.
In the matter of *S v Filani* 2012 (1) SACR 508 (ECG), the appellant was convicted in a regional court on a number of charges including the unlawful possession of a firearm and unlawful possession of ammunition in contravention of the provisions of the Act. The appellant appealed against the conviction and sentence imposed on the various counts. No forensic analysis was conducted on any of the items nor were any photographs handed in to court. In the course of his judgment Pickering J stated (514 H – 515 A): ‘It is clear, in my view, from the definition of “firearm” in Act 60 of 2000, as opposed to the definition of “arm” in Act 75 of 1969, that the legislature no longer intended “firearm” to bear its ordinary meaning as explained in *S v Shezi* supra. In these circumstances it was incumbent on the state to prove that the weapon of which appellant was allegedly in possession was a firearm as defined in the Act. In my view the state has failed to discharge that onus.’
The court then went on and stated (at 515 F – H) in respect of the argument by the state that because the weapon discharged or propelled a missile with enough force for it to be used for offensive purposes, it should fall within the ambit of the definition of a firearm in s 1 of the Act. ‘In my view, however, given the increased technical nature of the various definitions of “firearm” contained in the later and current Act,

such a finding cannot be made in the absence of expert evidence to that effect. Certainly, it is not a matter of which this court may take judicial notice. The state failed to lead any such expert evidence and accordingly failed, in my view, to discharge the onus upon it. In all circumstances, the appellant was wrongly convicted on count 2 [in respect of the firearm count]. Ms Hendricks conceded that similar conditions would apply to count 3 (possession of ammunition)'.

The *Filani* matter should be distinguished from *S v Sehoole* 2015 (2) SACR 196 (SCA). In the *Sehoole* matter, the respondent was convicted in a regional magistrate's court of contravention of ss 3 and 90 of the Act in that he was found in unlawful possession of a firearm and ammunition. He was sentenced, but the High Court set aside the conviction and sentence in respect of the firearm conviction. Regarding the conviction of possession of ammunition, the High Court held that there was no evidence before the court that the items found in the possession of the respondent constituted ammunition. The state appealed against the judgment. For purposes of this article, the focus will be on how the court viewed the appeal in respect of the ammunition issue.

Mbha JA stated: 'The state adduced ballistic evidence in the form of an affidavit in terms of s 212 of the CPA [Criminal Procedure Act 51 of 1977] concerning the firearm in question. It will be recalled that Kladie [who was one of the police officials involved in the arrest] had testified about the ammunition he found in the firearm. Whilst it is undoubtedly so that a ballistics report would provide proof that a specific object is indeed ammunition, there is no authority compelling the state to produce such evidence in every case. Where there is acceptable evidence disclosing that ammunition was found inside a properly working firearm, *it can*, in the absence of countervailing evidence, *be deduced to be ammunition* related to the firearm. Needless to say, each case must be judged on its own particular facts and circumstances. In the light of what I have stated above, it follows that the High Court erred in finding that a ballistics report was the only manner of proving that the offence was committed' (at para 19 and 20) (my italics).

Usually the state resorts to an s 212 affidavit by a ballistic technician in the employ of one of the various forensic laboratories in an attempt to prove that a confiscated firearm and ammunition are indeed such as described in the Act. I submit that the role played by the ballistic technician in this respect, is that of an expert witness.

The expert plays a vital part in court proceedings and an example of how the court views this can be seen in *Jacobs v Transnet Ltd t/a Metrorail* 2015 (1) SA 139 (SCA) where Majiedt JA states (at para 15): 'It is well established that an expert is required to assist the court, not the party for whom he or she testifies. Objectivity is the central prerequisite for his or her opinions. In assessing an expert's credibility an appellate court tests his or her underlying reasoning and is in no worse position than a trial court in that respect. … "The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him"'.

Discussion and considerations

It is trite law that the prosecution must prove its case beyond a reasonable doubt (see *Bamba v S* (SCA) (unreported case no 20089/14, 11-12-2014) (Mocumie AJA)).
It is also clear that the definition of 'ammunition' (and 'firearm') in terms of the Act has the effect of imparting a technical nature to it. The closed vessel test has already been described as the scientific manner in which a sample is tested to see if it agrees with known propellant characteristics.
I submit that (in my practical experience), where the issue was whether 'ammunition' complied with the definition contained in the Act, a ballistic technician testified that she 'tested' the matter found inside the cartridge case by pouring it out on paper and setting it alight. She testified that according to her, if the matter burns it is propellant (see *Thinzi* (*op cit*)). This type of testing holds of course no scientific value and should be disregarded as nonsensical. Another method (of assumption) apparently followed, is that if the primer appears unmarked, the cartridge is assumed to be ammunition. Thus no testing is performed on the primer to establish whether the primer is in fact 'live' and not defective. Still another and more recent method (this time applied by the court) as employed in the *Sehoole* matter, appears to be the deduction that ammunition is in fact ammunition. The deduction method has of course no scientific and technical basis and for that reason it is my view that this method cannot be supported.
I submit that the prosecution can only obtain a conviction on a count of unlawful possession of ammunition if it provides a detailed s 212 affidavit showing very clearly how it arrived at the conclusion. I submit that the expert should not assume or deduct merely by looking at the cartridge or the primer of the cartridge. This is particularly relevant in light of the situation that according to my knowledge, there is no closed vessel test facilities available or in use at the South African Police Services Plattekloof Forensic Laboratory.

Conclusion

The state bears the burden of proof throughout criminal proceedings to obtain conviction on the charge of unlawful possession of ammunition (or firearm for that matter) in respect of the Act beyond a reasonable doubt. Failure to provide the required technical and scientific basis for its expert's conclusion in this respect must lead to an acquittal. It is imperative for legal representatives in these types of cases, to examine the basis of the expert evidence presented by the state.

Hendrik Beukes *BA (Stell) LLB (NWU)* is an advocate at the Cape Bar.

(The above article appears in the June edition of the *De Rebus* journal)

A Last Thought