e-MANTSHI

A KZNJETCOM Newsletter

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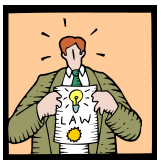
Welcome to the hundredth and twenty third issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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

There was no new legislation of importance to Magistrates this month.

Recent Court Cases

1. **JIMMALE AND ANOTHER V S (CCT223/15) [2016] ZACC 27**

An order in terms of section 276B(1) Act 51 of 1977 (the fixing of a non-parole period) should only be made in exceptional circumstances, when there are facts before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about parole.

Nkabinde J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J and Zondo J):

[1] Parole is an acknowledged part of our correctional system. It has proved to be a vital part of reformative treatment for the paroled person who is treated by moral suasion. This is consistent with the law; that everyone has the right not to be deprived of freedom arbitrarily or without just cause and that sentenced prisoners have the right to the benefit of the least severe of the prescribed punishments. As courts are now clothed with the power to postpone consideration of parole for sentenced offenders, the public interests demand that they have full knowledge of the offender's transgression and personal circumstances, including knowledge of the offender's conditions, when parole is considered. In other words, knowledge and an assessment by courts of facts relevant to the conduct of the prisoner, after the imposition of sentence, is usually a must.

[2] The issue for determination in this application for leave to appeal relates to the power of a trial court to grant a non-parole order – that is – an order by the trial court that the person sentenced should not be considered for parole before a stated portion of the sentence has been served. Leave to appeal is sought against the decision of the High Court of South Africa, Limpopo Local Division, Thohoyandou (trial Court) issuing a non-parole order immediately after convicting and sentencing the applicants. The applicants ask this Court to set aside that order. They also ask for condonation of the late filing of this application. The respondent did not file opposing affidavits but filed written submissions on certain issues, as was directed by the Court.

The law regarding imposition of a non-parole order

[11] Originally, the decision to grant parole remained the exclusive field of the Department of Correctional Services, and courts recognised the need for that because of the principle of separation of powers. See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa (1996)* [1996] ZACC 26; 1996 (4) SA 744 (CC); and the fact that courts obtain their sentencing jurisdiction from statute. In *S v Mhlakaza and Another* [1997] ZASCA 7; 1997 (1) SACR 515 (SCA) at 521D-I. The Supreme Court of Appeal, per Harms JA, said:

"The function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served . . ."

The lack of control of courts over the minimum sentence to be served can lead to tension between the Judiciary and the Executive because the executive action may be interpreted as an infringement of the independence of the Judiciary . . . There are also other tensions, such as between sentencing objectives and public resources. This question relating to the judiciary's true function in this regard is probably as old as civilisation . . . Our country is not unique. Nevertheless, sentencing jurisdiction is statutory and courts are bound to limit themselves to performing their duties within the scope of that jurisdiction. Apart from the fact that courts are not entitled to prescribe to the executive branch of government as to how long convicted persons should be detained . . . courts should also refrain from attempts, overtly or covertly, to usurp the functions of the [E]xecutive by imposing sentences that would otherwise have been inappropriate."

[12] Section 276 of the Criminal Procedure Act (Criminal Code or CPA) was amended by the Parole and Correctional Supervision Amendment Act (Amendment Act) by inserting section 276B. Section 276B(1) provides:
"(a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.
(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter."

[13] The section 276B non-parole order is described as "an order which is a determination in the present for the future behaviour of the person to be affected thereby. . . . [I]t is an order that a person does not deserve being released on parole in future." The order should be made only in exceptional circumstances, which can be established by investigation of salient facts, legal argument and sometimes further evidence upon which a decision for non-parole rests. In determining a non-parole period following punishment, a court in effect makes a prediction on what may well be inadequate information as regards the probable behaviour of the accused. Therefore, a need for caution arises because a proper evidential basis is required.

[14] Following the Amendment Act and its coming into operation, several trial courts ordered that sentenced accused should serve at least two-thirds of their sentences before being considered for parole but the decisions were reversed on appeal. In *Botha*, the Supreme Court of Appeal, per Ponnan AJA, relying on *Mhlakaza*, remarked that the recommendation by the trial court was -
"an undesirable judicial incursion into the domain of another arm of State which is bound to cause tension between the Judiciary and the [E]xecutive".
Judicial interference – even where it manifests itself in the form of a mere "recommendation" as was the case in *Botha* – is unacceptable in that it is unfair to both an accused person as well as the correctional services authorities.

[15] In *Stander*, the Supreme Court of Appeal said that the section 276B enactment is unusual and that:
"[I]ts enactment does not put the court in any better position to make decisions about parole than it was in prior to its enactment. Therefore, the remarks by this Court prior to section 276B still hold good.
An order in terms of section 276 should therefore only be made in exceptional circumstances, when there are facts before the sentencing court that would continue, after sentence, to result in a negative outcome for any future decision about parole. *Mshumpa* offers a good example of such facts, namely, undisputed evidence that the accused had very little chance of being rehabilitated."

[16] The Court remarked further that "the consideration of the suitability of a prisoner to be released on parole requires the assessment of facts relevant to the conduct of the prisoner after the imposition of sentence". It endorsed *Pauls*, [*S v Pauls* 2011 (2) SACR 417 (ECG)]. and said that exceptional circumstances cannot be spelled out in advance in general terms, but should be determined on the facts of each case. The Court said that there "should be circumstances that are relevant to parole and not only aggravating factors of the crime committed, and a proper evidential basis should be laid for a finding that such circumstances exist." The Supreme Court of Appeal said that two issues arise when a court considers imposing a non-parole period:
"[F]irst, whether to impose such an order and, second, what period to attach to the order. In respect of both considerations the parties are entitled to address the sentencing court. Failure to afford them the opportunity to do so constitutes misdirection."

[17] In *Mthimkhulu* the Supreme Court of Appeal dealt with an order of a non-parole period imposed in terms of section 276B(2). There, the trial Court failed to invite the parties to address the Court before it imposed the non-parole order. The Court said that the failure might well, depending on the case, constitute an infringement of the accused's fair-trial rights.

[18] In *Gcwala*, the Supreme Court of Appeal said that the period spent in custody while awaiting trial should be taken into account and should be deducted when calculating the date on which the sentence is to expire for purposes of considering parole. The Court stressed that the non-parole order should be made only in exceptional circumstances.

Is the non-parole order appropriate?
[19] The applicants contended that the trial Court erred grossly in law in issuing the non-parole order. They said that they were not afforded an opportunity to make submissions and that the trial Court made no findings as to the existence of exceptional circumstances to warrant the non-parole order. The trial Court found, without establishing the factual bases, that the murder was premeditated. This, they argued, constituted a misdirection on the part of the trial Court. The trial Court

without more ordered the applicants to serve 20 years of the custodial term of 25 years before being eligible for parole.

[20] Precedent makes it clear that a section 276B non-parole order should not be resorted to lightly. Courts should generally allow the parole board and the officials in the Department of Correctional Services, who are guided by the Correctional Services Act, and the attendant regulations, to make parole assessments and decisions. Courts should impose a non-parole period when circumstances specifically relevant to parole exist, in addition to any aggravating factors pertaining to the commission of the crime for which there is evidential basis. Additionally, a trial Court should invite and hear oral argument on the specific question before the imposition of a non-parole period.

[21] Here the trial Court did not invite oral argument on these issues. It should have done so. This is so because the imposition of that kind of an order has a drastic impact on the sentence to be served.

[22] Section 276B(1)(b) sets a limit that where a non-parole period is ordered it may not exceed two-thirds of the sentence imposed. Having been sentenced on 12 June 2012, the applicants have served approximately four years of their sentence. The respondent conceded in its written submissions that the trial Court erred in imposing a non-parole order. It submitted that there was no basis to contend that exceptional circumstances existed for the order.

[23] Notably, the trial Court imposed the non-parole period before considering the requirements set out by the Supreme Court of Appeal in *Stander*. The trial Court seems to have operated from the premise that the applicants are incorrigible and beyond redemption from a life of crime and beyond rehabilitation. That does not follow from the fact that they committed a horrendous crime. Their incorrigibility had to be established, as a further fact, relevant to the later consideration of parole. The non-parole order is clearly prejudicial to the applicants. If it stands, the applicants will be denied the opportunity to be considered for parole before four-fifths of their sentences are served instead of the statutorily prescribed maximum period of two-thirds of their sentence had proper non-parole orders been granted.

[24] The trial Court misdirected itself. Additionally, that Court materially misdirected itself by imposing the 20 year non-parole period without first establishing the exceptional circumstances necessary for that order to be made. Furthermore, the Court did not invite the parties to make submissions in that regard, as it should have done. That also constitutes a material misdirection.

[25] In conclusion, the non-parole order falls short of the more stringent tests in terms of the law. The non-parole order granted by the trial Court is inappropriate and must be set aside. That being so, in terms of section 73(6)(a) of the Correctional Services

Act the applicants will be required to serve at least half their sentences before being eligible for parole.

(The above judgment has been edited-Ed)

2. VAN IEPEREN V S (A194/2016) [2016] ZAWCHC 109

The State has an obligation to set out the *facta probanda* that it intends to rely on to prove the existence of the essential elements of an offence because the accused is entitled to know the nature of the charges and what alleged misconduct the state intends relying on to prove its case.

Allie, J:

1. The Appellant was charged in the District Court, Malmesbury, with one count of contravening the provisions of section 5(1), read with sections 1, 56(1), 56A, 57, 58, 59, 60 and 61, of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 viz., sexual assault. He was charged in the alternative, with common assault.

2. On 21 July 2014 he pleaded not guilty to both the main and the alternative counts and a trial ensued

3. On 8 September 2015 he was acquitted on the main charge on the grounds that the facts accepted by the trial Court did not disclose any act complying with the definition of sexual violation in section 1 of the Sexual Offences Act.

4. He was acquitted on the alternative charge of common assault, on the basis that the State had failed to prove the necessary intent.

5. The trial court relied on section 270 of the Criminal Procedure Act 51 of 1977 ("the CPA"), to convict the Appellant and find him guilty of *crimen injuria,* and sentenced him to a fine of R2 000.00 or 3 months imprisonment.

6. The appellant submitted that the trial Court erred in the following respects:
6.1 finding that the State had proved its case beyond reasonable doubt;
6.2 finding the Appellant guilty of *crimen injuria* on the basis that, in terms of section 270 of the CPA, the essential elements of the offence of *crimen injuria* were included in the original charge under Section 5(1) of the Sexual Offences Act.

7. Section 270 of the CPA provides as follows:
"*If the evidence on a charge for any offence not referred to in the preceding sections of this chapter does not prove the commission of the offence so charged, but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved."*

8. Section 270 is available to a court only where the "offence so charged" is not one that is mentioned in the preceding sections of Chapter 26 of the CPA.

9. The trial Court, having found that the Appellant had uttered certain remarks of a sexual nature, and slapped the buttocks of the complainant, drew a connection between the infringement of dignity that constitutes *crimen iniuria*, and the inherent infringement of dignity and/or privacy that accompanies the offence of sexual assault under section 5(1) of the Sexual Offences Act.

10. The offence of contravening section 5 of the Act is expressly referred to in section 261(2) of the CPA, which is part of the same Chapter 26 of the CPA that contains section 270.

11. The alternative charge of common assault is referred to in section 267 of Chapter 26 of the CPA. The section provides that if the evidence doesn't prove common assault but proves sexual assault or compelled sexual or self-sexual assault or pointing a firearm, air-gun or air-pistol, a conviction may follow on those competent verdicts. *Crimen injuria* is not listed as a competent verdict for common assault.

12. The court could however apply the provisions of section 270 of the CPA, to rely on the common law offence of *crimen injuria*, if the state had given the appellant notice of its intention to rely on *crimen injuria*, by applying to have the charge sheet amended to include a reference to the allegation that the verbal utterances of the appellant impaired the dignity of the complainant.

13. Section 270 is applicable to "an offence so charged " but since *crimen injuria* was not an offence raised in the charge sheet, the section can't be relied on.

14. Only two competent verdicts are allowed by section 261(2) of the CPA on a charge of contravening section 5 of the Sexual Offences Act. These are: common assault and having committed an act of consensual sexual violation with a child. *Crimen iniuria* is not, therefore, a statutorily provided competent verdict under s 261(2) of the CPA.

15. The court *a quo* found that one of the essential elements of the offence of assault viz., intent had not been proved.

16. I am not convinced that, having found that appellant slapped the buttocks or upper leg of the complainant after expressing an intention to do so, the court *a quo's* finding that intent was absent, is correct. The defence throughout the presentation of the State's case was a denial that the appellant touched the complainant on her buttocks at all.

17. The appellant raised the defence of having lightly touched her on her back for the first time when he testified.

18. During cross examination, the appellant conceded that he touched the complainant on her thigh.

19. The defence raised the following hypothetical scenario: "*I want to put the hypothesis to you. This is not the accused's version and it is not my instructions. The hypothesis is the following: If I walk behind you…. And I touch you on your buttock and tell you get a move on I am in a hurry here. And I realise listen, this is a bit too low and I say sorry, I did not mean to do that. Would that have been acceptable to you?*" The complainant answered as follows: "*Okay. If he apologised for touching me in the wrong place, it would have been fine if he apologised. He --- But you don't hurry someone up on their buttocks. You wouldn't do that to someone you don't know. Maybe a child if it is your child but you don't do that to a stranger*."

20. During his evidence in chief, the appellant, for the first time revealed that he lightly touched the complainant's back to hurry her on. This allegation wasn't put to the complainant during cross examination. The defence counsel simply questioned the complainant on what would be considered to be appropriate and acceptable touching. At the end of the cross examination of the complainant, the prosecutor raised the fact that the defence counsel didn't put the appellant's version of how he would have hurried her. The defence didn't avail itself of the opportunity to do so at that stage.

21. The appellant admitted that he touched the complainant in the manner that she described but he alleged that he didn't have the intention to sexually assault her.

22. The appellant couldn't provide a reasonable explanation for why he thought it was necessary to touch the complainant to hurry her on when she was already in the doorway in the process of exiting the courtroom.

23. Despite the complainant feeling humiliated and undermined, she was prepared to accept an apology from the appellant at court after Mr Swarts, the regional court prosecutor informed the appellant of the complainant's allegation against him. The appellant chose to dismiss the allegation as nonsense. In so doing, he demonstrated a callous disregard for the complainant's feeling of impaired dignity.

24. In my view, intent was clearly established. The trial Court entirely dismissed the alternative charge from consideration with the following words: "*die hof gaan nie verder daarop uitbrei nie"*.

25. The court *a quo*, failed to apply the law relating to common assault correctly. The State could therefore have appealed against the acquittal on common assault on a question of law. The State however elected not to appeal the acquittal on common assault and the conviction on *crimen injuria* under section 310(1) of the Criminal Procedure Act. In S v Zoko 1983(1) SA 871 (N) at 875 C the court held that the magistrate's decision that his factual finding supports a conviction of a crime that the accused was not charged with, is a decision on a question of law. This court is therefore, not in a position to interfere with the court ***a quo's*** finding that the State failed to prove the necessary intent required to establish that the appellant assaulted the complainant.

26. Appellant's counsel argued that if the court *a quo* couldn't find intent to assault, it could also not have found intent to commit *crimen injuria*. I disagree for the following reasons.

27. The intent to commit *crimen injuria* in this case, clearly relates to the verbal utterances of the appellant, whereas the assault relates to slapping the buttocks of the complainant.

28. The trial Court relied upon the verbal utterances that the appellant allegedly made to the complainant, namely that he wanted "to smack her bum"; that "she wore sexy shoes" and "she needs a man." The court *a quo* relied on those words to conclude that the appellant harmed the dignity and reputation of the complainant.

29. *Crimen injuria* is a crime under South African common law, defined as the act of "*unlawfully, intentionally and seriously violating of the dignity or privacy of another*." (Criminal Law by Snyman 6th ed at 461). What is protected by the crime is dignitas, all the rights of personality other than reputation and bodily integrity

30. There are no reported cases where sexist utterances have been found to amount to *crimen injuria*. It is a serious oversight on the part of the State that it failed to charge the appellant with *crimen injuria* nor did it refer to the verbal utterances that the complainant alleged the appellant had made to her and which were clearly a source of grave injury and offense to her.

31. In section 1 of the Constitution, human dignity is expressed as a foundational value of our democratic state and section 10 of the Constitution provides:
'*Everyone has inherent dignity and the right to have their dignity respected and protected*.'

32. The State bears the onus of alleging and proving, both objectively and subjectively, in which respects the words uttered impaired the dignity of the complainant. In S v Jana 1981 (1) SA 671 (T) at 675 A –B the court said: "*Crimen injuria is concerned generally with impairments of dignitas and not with impairments purely of fama or bodily security. The concepts of self-respect, mental tranquillity and privacy are judged both objectively and subjectively in that it depends upon the particular person and the circumstances whether it can be said that his dignitas has in fact been impaired."*

33. The complainant testified about how shocked she was that the appellant spoke to her in that way because she is an attorney of 11 years standing, the manager of the Legal Aid Board's Judicare offices in Malmesbury, Atlantis and Vredenburg and, therefore, a professional person, who was engaged in rendering professional services to her clients at the time when those words were uttered. The complainant considers herself to be on an equal footing with the appellant. She had difficulty understanding why the appellant humiliated her and attempted to diminish her standing.

34. In my view, the offending words collectively, used in the context where both the appellant and the complainant are attorneys present in a court room where other colleagues and members of the public were present, had the effect of humiliating and belittling the complainant.

35. The State's case is, however, hamstrung by a substantive irregularity, namely, the absence of an allegation in the charge sheet that the complainant's dignity was impaired by certain verbal utterances of the appellant and by the alleged slap on the complainant's buttocks.

36. The State has an obligation to set out the *facta probanda* that it intends to rely on to prove the existence of the essential elements of the offence because the accused is entitled to know the nature of the charges and what alleged misconduct the state intends relying on to prove its case.

37. Section 84 of the CPA provides as follows:
" *84 Essentials of charge*
(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.
(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.
(3) In criminal proceedings the description of any statutory offence in the words of the

law creating the offence, or in similar words, shall be sufficient."

38. In *S v Mashinini* 2012 (1) SACR 604 (SCA) at 614 b-c the Supreme Court of Appeal repeated the warning that it made in Legoa [2002] 4 All SA 373 (SCA) and Makatu 2006(2) SACR 582 (SCA) that a charge sheet should be drawn up with great care to ensure that the correct and essential averments are embodied in it.

39. Concerning the need to set out in the charge sheet, the facts necessary for the accused to prepare his/her defence without him/her suffering prejudice in trial preparation, the court in Mashinini held as follows at paras 11 & 12:

"*[11] To my mind, the solution to this legal question lies in s 35(3) of the Constitution. Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This section appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly informed of the specific charge(s) which he or she faces. Evidently, this would also include all competent verdicts. The clear objective is to ensure that the charge(s) is sufficiently detailed and clear to an extent where an accused person is able to respond and importantly to defend himself or herself. In my view, this is intended to avoid trials by ambush.*

[12] In S v Legoa, Cameron JA stated with regard to the constitutional right to a fair trial:

'Under the common law it was therefore "desirable" that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is "a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force". The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is "to be informed of the charge with sufficient detail to answer it". What the ability to "answer" a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.

The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it'."

40. The purpose of setting out the essential elements of an offence and the alleged misconduct of the accused that brings it within the ambit of the offence is to safeguard an accused person's fair trial rights. The accused person must be armed

with sufficient information to make a decision concerning the conduct of his/her defence.

41. An accused person cannot be expected to infer, without an express allegation of that nature, that his/her conduct caused harm/prejudice to the complainant.(Essop v S [2014] ZAKZPHC 45.)

42. The state led the evidence of the appellant concerning how she felt after the incident to lend support for its contention that the complainant was unlawfully assaulted. The complainant's testimony about how she felt provides support for the impairment of dignity she suffered. Although the state can supplement the allegations in the charge sheet with evidence led at the trial, it cannot create a new offence by virtue of such evidence.

43. Turning to the offensive nature of the appellant's conduct, it is incumbent upon attorneys and legal practitioners generally, to develop a consciousness about Constitutional rights and obligations which they ought to apply in the course of practising their profession. It is necessary for legal practitioners to be alert to the imperative of upholding the dignity of others and to refrain from humiliating a colleague with sexist and undermining innuendos.

44. The appellant, in denying that he was guilty of a sexual offence, said the following: "*Inteendeel ek het in my lewe nog nooit iemand anders as 'n witvrou uitgeneem as dit, as ek iemand wou uitneem nie*." The appellant appears to be labouring under the misapprehension that sexual offences are committed by a man who takes a fancy to a woman. Sexual innuendos and gratuitous sexually offensive misconduct rarely arise from flirtation. They are made with a view to treating a person condescendingly and patronisingly. Glick, Fiske et al describe benevolent sexism as " *subjective positive attitudes that put women on a pedestal but reinforce their subordination*," while "*hostile sexism ascribes negative traits to women*" (Beyond Prejudice as Simple Antipathy: Hostile & Benevolent Sexism Across Cultures by Glick, Fiske,et al-Journal of Personality and Social Psychology 2000 Vol 79 No, 5 763- 775)

45. The Registrar ought to ensure that a copy of the record and judgment be sent to the Law Society of the Cape for consideration of appropriate measures to address the appellant's apparent misunderstanding of how sexism impacts upon the recipient of such treatment. It is important that the appellant appreciates that there is a need for him to bring his conduct in line with what is acceptable behaviour.

46. Turning to the conviction on *crimen injuria*, I am of the view that the conviction and its accompanying sentence, should be set aside.

From The Legal Journals

Okpaluba, C

"Constitutional and delictual damages for judicial acts and omissions: a review of *Claassen* and recent common law decisions"

Lesotho Law Journal Vol. 19 No. 2

Abstract

It is a well-known principle of the common law that a judge or anyone called upon to discharge judicial duties or a function judicial in nature is immune from delictual/tortious liability in the absence of bad faith, malice or fraud. To that extent the recent decision of the Western Cape Full Court in Claassen v Minister of Justice and Constitutional Development and Another 2010 (6) SA 399, 2010 (2) SACR 451, [2010) 4 All SA 197 (WCC) correctly states the law. However, this article explores the alternative proposition that given the same facts, an alternative cause of action could be brought for a breach of the constitutional guarantee of the right to personal liberty arising from the same judicial error in Claassen. It is *in this regard that the judgment of the Privy Council in Maharaj v Attorney General of Trinidad & Tobago (No 2) [1979) AC 385 (PC) becomes relevant. In particular, the jurisprudence embedded in Maharaj operates without prejudice to the concept of judicial immunity; and vicarious liability. It places weight on the protection of individual liberty; as against judicial error and systems failure in the administration of justice for which the State must bear responsibility. Since the facts of the two cases are closely similar, and the constitutional guarantees implicated in both equally comparable, why should one plaintiff succeed while the other fails? In the final analysis, a court in a constitutional democracy must reconcile the tension between judicial immunity and judicial accountability on the one hand, and on the other, the protection of the entrenched rights. It is the absence of such thorough balancing that, jurisprudentially, renders Claassen not a completely perfect judgment.*

Meintjes van der Walt, L

"Judicial Understanding of the Reliability of Eyewitness Evidence: A Tale of Two Cases"

Potchefstroom Electronic Law Journal 2016 (19)

Abstract

One of the most significant consequences of the use of post-conviction DNA testing in the criminal justice system has been the growing recognition that eyewitness identification testimony is simply not as reliable as it was previously considered to be. In approximately 75% of DNA exonerations in the United States, mistaken eyewitness identifications were the principal cause of wrongful convictions. Notwithstanding scientific advances regarding human memory and other factors that could influence identifications by eyewitnesses, courts have not shown eagerness in utilising such scientific knowledge in reaching legal decisions. Two cases have been chosen for discussion in this article. In S v Henderson 27 A 3d 872 (NJ 2011) the New Jersey Supreme Court was the first in State and Federal jurisdictions in the US that adopted a science-based approach to the evaluation of eyewitness evidence. The other case under discussion is S v Mdlongwa 2010 2 SACR 419 (SCA), a South African Supreme Court of Appeal judgment, where the identification of the perpetrator was based on an eyewitness account and the evidence of an expert on CCTV images. In part one of this article the research findings with regard to estimator variables that were acknowledged in S v Henderson are discussed. Part two specifically scrutinizes S v Mdlongwa to determine the extent to which psychological eyewitness research findings are recognised in South Africa as having an influence on the reliability of eyewitness evidence. In Henderson the court recognised that the legal standards governing the admissibility and use of identification evidence lagged far behind the findings of numerous studies in the social sciences. The new wave introduced by S v Henderson has not gone unnoticed in other State courts in the USA. In Massachusetts, for example, the Justices of the Supreme Judicial Court convened a study group on Eyewitness Evidence and the resulting report inter alia recommended judicial notice of modern psychological principles, revised jury eyewitness identification instructions and continuous education of both judges and lawyers. Recognition and education pertaining to these factors can and should be incorporated in South Africa.

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

Contributions from the Law School

Morality, Justification and Specifying Rights in the Doctrine of Necessity

Samantha Goosen

Introduction

In relation to the doctrine of necessity, Professor Burchell notes that "[t]he defence of necessity arises when a person is confronted with a choice between suffering some evils and breaking the law in order to avoid it, and chooses the latter alternative. The term 'necessity' is used to refer to this type of situation where it is brought about by the force of surrounding circumstances or by human agency (i.e. compulsion, duress etc)(Burchell *Principles of Criminal Law* (3rd ed) 2010) 256). Societies are established upon rules of law that either create or judicially cultivate generalized exceptions to those commands (Martin "The Radical Necessity Defense" (2005) *University of Cincinnati Law Review* 1527 at 1532). The necessity defence is one of these exceptions. Whether based on justification or excuse the necessity doctrine is one exception to the rule that certain conduct which violates the law and produces harmful consequences is justified since it averts a greater evil and produces a net social gain. As a result of *S v Goliath* 1972 (3) SA 1 (A) necessity could constitute a complete defence to a charge of murder (supra 25B-D). This does not mean however that as a result of *Goliath (*supra) our courts will be more readily inclined to accept compulsion as a complete defence in future. The case of *S v Mandela* [2001] 1 All SA 441 A indicates that the relatively low standard that was adopted by the Appellate Division in *Goliaths* case has not found universal favour. Given the context of South Africa's climate of violence and blatant disregard for human life it would necessitate providing a reason to curb this defence when life is involved. But this factor will have to be counterbalanced against the right to life which is enshrined in section 1 of the Constitution: "A person who is faced with the most agonizing of choice of safeguarding his own right to life at the expense of another's right to life may be regarded as not having the requisite mens rea. However given the exquisite balance between the conflict between the two right bearers of this most precious of rights, a court can only find necessity to be a defense, such that the accused then lacks the requisite culpability in circumstances where the danger of death cannot be averted saved by acts of heroism which extend beyond the capacity that should and can be demanded of a reasonable person" (*S v Mandela supra* 452). Does the finding in the Mandela case now suggest that despite the existence of particular rights such as the

right to life as “inalienable” is no longer applicable in cases of necessity? Another point which has been raised is the question as to whether the doctrine of necessity has now as a result of the Mandela case been relegated to the realm of excuse as opposed to a justificatory defence? (Mihizer “Justification and Excuse: what they were, what they are, and what they ought to be” (2004) *Saint John’s Law Review* 725 at 727) It is possible that there is indeed room to distinguish between justification and excuse and secondly, that the doctrine of necessity should unequally be classified as a justification. First, even critics of the distinction concur that the distinction is in fact of enormous moral importance (Sangero“A New Defense for Self-Defense” (2006) *Buffalo Criminal Law Review* 475 at 488). Second, it is clear that the criticism is not so much focused on the distinction but rather its definition and implications since even though the actor will be exonerated in both justification and excuse, a distinction should be made between the two types of acquittals since a more complex message than just innocent or guilty should be sent to the public: an action which is innocent because the act was desirable and morally justified ought to be distinguished from someone who is found innocent because they were forgiven of the act due to the absence of culpability (excuse). The benefit of classifying necessity as a justification is that it is far more informative of the overall nature of the defence than the mere fact that it is an exemption from criminal liability. If necessity is a justification based defence it needs to be explained why it is so. It is now necessary to consider which of these theories will most accurately represent the justification version of the necessity doctrine (Sangero *supra*)

Legal interest threatened

The classic theory on which to justify the use of force against an aggressor is that of the aggressor’s culpability. Such approach tend to focus on the rights of the aggressor. Such an approach includes a moral forfeiture theory which is based on the view that people possess certain moral rights (Sangero *supra* at 506). Does this mean that you lose rights and which ones and for how long? The problem is that the aggressor does not lose his right to life irrespective of how egregious his conduct is. (Milhizer *supra* at 842)

American Approach

The Model Penal Code bases its doctrine of necessity on a utilitarian cost-benefit analysis. This approach assess whether the killing will result in a net saving of lives and subsequent overall benefit to society (Cohan “Homicide by Necessity” (2006) *Chapman Law Review* 123 at 133). While earlier versions of the commentary have noted that the lives of individuals should in every case be assumed to be of equal value as compared to lives sacrificed, subsequent versions have noted that “it would be unfortunate to exclude homicidal conduct from the scope of the defence. For recognizing that the sanctity of life has supreme place in the hierarchy of values, it is nonetheless true that conduct that results in taking life may promote the very value

sought to be protected by the law of homicide" (Model Penal Code ss 3.02 Tentative Draft 1958, discussed in Cohan *supra* at 133-134). In support of this view, the commentary makes reference to a chilling hypothetical known as the mountaineer case. Two climbers who are held together by a rope, slip and fall over the precipice. While holding them together, the rope becomes frayed to the point it will not hold them much longer. Given the possibility that they may be both faced with imminent death; the question is now whether the upper climber should cut the lower climber loose so as to give himself the chance of survival? The end result of this action is that the death of the lower climber will be accelerated but the greater evil will be avoided: one life will be saved instead of both lost (Model Penal Code *supra* at 15). On what basis then is liability excluded given that the Code comment notes that there seems to be a lack of unanimity as to the ethics of killing an innocent person to save a greater number of lives? In Herald Free Enterprise a group of passengers were stranded on a sinking ship. In attempting to escape by means of a rope ladder to safety another passenger became stuck on the ladder, paralyzed by cold and fear. When the passenger could not be persuaded to move he was pushed so that others could make their escape. He was never seen again. In this example the evil avoided outweighs that caused – one dies instead of two or many. So notwithstanding the approval of Dudley Stephens by Howe, it would be premature to conclude that necessity can never be a defence to murder" (Smith and Hogan *Criminal Law* 8th ed (1996) 251, discussed in Horder "Self-Defense, Necessity and Duress, Understanding the Relationship" (1998) *Canadian Journal of Law and Jurisprudence* 143. It seems obvious that in some circumstances a person could become part of a threat where the direct threat stems from natural causes, but surely this analogy could be extended to cases where an innocent person becomes part of a threat where it does not arise from natural causes. For example where an aggressor threatens X by demanding that if he does not kill Y his family whom he has kidnapped will be harmed. Y becomes part of the threat. As Horder (supra) notes someone who poses an unjust threat to another forfeits their right to resist necessary and proportionate steps directed at repelling the threat for so long as they pose it (Horder *supra* at 150). Necessity by definition involves strong justification (Horder supra at 155). This would necessarily entail overriding reason and overriding reason does not necessarily entitle accused to disregard reasons against acting in a way that the overriding reason dictates. Rather the overriding reasons simply create a moral imperative (Horder *supra*). On this basis it could be said that when one acts on an overriding reason, while it may be correct to act so, one may infringe the rights of those who have good reason that one should not act in such manner (because they may be harmed) for example (Horder *supra*). This is what might broadly be known as "once off emergency situations" which may occasionally override the right to life of an innocent person. That is not to say that anything goes, the relationship between consequentialist reasoning and the normative significance of events is just different from their relationship in other emergency situation governed by broader moral and political considerations (Horder *supra* at 157)

Lesser harm theory

It is submitted that the correct understanding of justification lies in a "superior interest" or "lesser harm theory" Such a theory weighs the benefits and harm to the common good and the actors legitimate interests caused by his conduct against the benefits and harm which would have been occasioned had the actor not acted. On this basis then an actor may have a moral entitlement to advance his rights at the cost of the innocent aggressor since it would be immoral to insist the victim do otherwise: detached reflection cannot be demanded in the presence of an uplifted knife (Horder *supra* at 159). This theory is significant for a number of reasons. First the argument does not rely upon the problematic downgrading of the rights of the aggressor but focuses on the morality of punishing an accused for his actions. Therefore the state is morally prohibited from punishing victims for violating aggressor's rights in certain extreme situations. Such an analytical difference means that the uplifted knife theory supports a justification defence with regard for the aggressors' rights during the emergency situation (Noti "The Uplifted Knife: Morality, Justification and the Choice of Evils Doctrine" (2003) *New York University Law Review* 1880 at 1866). Lastly, the theory requires that the harm be so grievous that an unrealistic amount of self-restraint would be required not to intervene, meaning that the defense would apply in situations where the behavior of actors is unlikely to be affected by any legal rule (Noti *supra* at 1876). This would satisfy the objective test set out in *Goliath* (*supra*). This would also keep the doctrine of necessity in accordance with the traditional approach followed in South African law, that of the psychological theory. Given the fact that the accused deliberately joined a gang, it is not clear why the accused's attorney argued his defence on the basis of whether the accused could be liable on the basis of the normative theory of criminal capacity. The general principles relating to the doctrine of necessity state that the threat cannot be caused by accused's fault. This point is clearly demonstrated in case law. In *S v Bailey* 1982 (3) SA 772 (A) X assisted a fellow prisoner Z to murder Y. Z coerced X to assist him but that court found that the coercion was not of such a nature that a reasonable person in X's position would have yield to it. The court accepted that X acted unlawfully and that he killed Y intentionally with an awareness that he was acting unlawfully. This raised the question: how should the court determine blameworthiness. The answer lay in the adoption of an objective test employing the conduct of an average person as the standard of what should be expected of accused. This approach was referred to as a normative one (*ibid* at 798E-F). The problem is that Jansen JA rejected this test in the latter part of the case, thereby adopting the psychological approach. This would by implication mean that a subjective test for capacity would have to be used. However, defense counsel in Mandela confused matters by suggesting that a normative test be developed based on conception of what can be expected of an ordinary person in society (*supra* at 453)

First, does the test proposed by defense counsel suggest a move towards an objective-subjective test (particularizing standard) for necessity? Not only does the court have no meaningful way to determine whether the accused's capacity was sufficiently effected as a result of the compulsion, since "[it] is impossible to establish certain mental capacity by asking what capacity the accused thought to have had" but further if taking the standard to its logical conclusion it will ultimately collapse into a purely subjective standard (Heller "Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases" (1998) *American Journal of Criminal Law* 1 at 94). Second, if the particularizing standard does collapse into a subjective test for necessity, it does little to inform the proportionality requirement (Heller *supra* at 95). While it could be suggested that the balance of harms is not the only inquiry, it remains the focus point of the defence (Parry "The Virtue of Necessity: Reshaping Culpability and the Rule of Law" (1999) *Houston Law Review* 398 at 401). The subjective standard would render the proportionality requirement redundant: the use of force is proportionate if it aligns with an antecedent judgment about how much force he ought to have used (Heller *supra* at 95) Third, defense counsel does not go on to explain what the practical implications of a normative approach would be bearing in mind the fundamental tenets and notions of criminal law: it would lead not only to vagueness, complexities and controversies but it would also be inconsistent and irreconcilable with fundamental notions of criminal law (Van Oosten "The Psychological fault concept versus the normative fault concept: Quo vadis the South African Criminal Law?" (1995) *Tydsrikf vir die Hedendaagse Romeinse Hollandse Reg*" 369). This would include confusing and identification of criminal fault with various other elements of crime and the aims and objects of criminal punishment. It also confuses and identifies criminal fault with criminal liability. This would render the fault requirement tautologus and redundant leaving intention and negligence in the air (Van Oosten *supra* at 369). Fourth, in respect of the question of whether it was necessary for the accused to avoid the danger in the sense of fleeing if the harm can be reasonably avoided by flight, it is clear that this question is merely academic, since in practice the question is not whether the actor should have fled, but whether he was entitled to go to the lengths he did when acting, in light of the surrounding circumstances, such as the nature of the interests threatened etc (Burchell *supra* at 369-370).

From a practical perspective, how would such an approach apply?

Under such a theory all justifications involve injury that is generally acknowledged by the law as harm. However where circumstances of justification exists even where there is injury, it is still preferable to another greater injury (that of parties having no recourse of self-help where the state fails to act) (Sangero *supra* at 532). If physical harms alone are compared, an even balance will be reached such as in cases of the life of one person versus the life of another. To break this deadlock, abstract interests will have to be taken into account and placed on the scales. These include the

degree of the aggressor's fault in creating the conflict. For instance in the example of the "frozen man", the value of that man's interests will be reduced as a result of his becoming part of the "threat" (Sangero *ibid*). Other important abstracts which should be taken into the equation include the autonomy of the victim of the attack and the protection of the socio-legal order (Sangero *ibid*). It has been suggested that the right to resist a threat is to a large extent based on the idea of an individual's autonomy: since the state is responsible for protecting the individual and since it does not always succeed in performing this task, it grants the individual the right to protect his life against a threat in cases where it has failed in this capacity (Sangero *supra* at 539). However, it is clear that while such reasoning is commensurate with the approach that the granting of the right derives from practical considerations, it does not conform with the more prevalent view that, at stake, is a natural right of the actor, which the state cannot restrict under any circumstances (Sangero supra at 541). What is common to all these factors is that they work together in favour of the person facing the threat and subsequently against the aggressor (Sangero *supra*). This would in a sense also predetermine a substantial part of the decision rather than leaving the court to try and weigh up rights and make ad hoc decisions on that basis.

Conclusion

The benefit of classifying necessity as a justification as opposed to an excuse has important implications not only as a matter of theory but also from a practical standpoint. If necessity is a justification based defence, then it needs to be explained why this is so. Different theories have been proposed to account for this contention: from rights based accounts to a lesser evils analysis. It is submitted that in cases of necessity the key issue is the moral imperative to act: what matters is whether in the circumstances it was morally imperative to act, even if this might involve the commission of wrongdoing in order to avoid some evil. This approach would not rely upon a problematic downgrading in order to avoid some evil. Rather, it focuses on the morality of punishing the accused for his actions. Therefore, the state is morally prohibited from punishing victims for violating the aggressor's rights in certain extreme situations. Such an analytical difference means that the uplifted knife theory supports a justification defence with regard for the aggressor's rights during the emergency situation. It would also restrict justified actions to situations where immediate reaction is necessary to prevent injury from occurring.

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Matters of Interest to Magistrates

Dying declaration – should the dead have a say in a matter?

Sherika Maharaj

The history of the 'dying declaration'

The dying declaration is based on the Latin maxim '*nemo moriturus praesumitur mentiri*'. Literally translated it means 'a man will not meet his maker with a lie in his mouth'. It originated in English law. As early as the 1720's, the use of the dying declaration was used as an exception to the hearsay rule and was admissible, provided it complied with certain legal principles set out under English common law.

The hearsay rule is a rule of evidence, which prohibits admitting testimony or documents into evidence when the statements contained therein are offered to prove their truth and the maker of the statement does not testify and is not subject to cross-examination on the contents thereof. In South Africa (SA) we adopted the English common law and followed the same legal principles.

Applicable legal principles

The English principles were set out in *State v Gabatlwaelwe* 1996 BLR 540 (HC).

The court held that the dying declaration is a statement that may be oral or written or taken in the form of signs or gestures. It need not be made with the deceased's dying words or dying breath. Although used in cases to incriminate the accused, they are equally admissible in his defence.

Admissibility is depended on the following factors:

- The statement must be one, which the deceased could have repeated in court had he or she lived. Therefore, if the deceased was not a competent witness or if the statement itself was based on inadmissible hearsay evidence, then it could not be admitted as a dying declaration.
- The death of the deceased must be the subject, both of the charge and the statement itself and were held to be inadmissible under the head of charges of perjury, robbery or rape.
- The statement must be made in the 'settled, hopeless expectation of death'. Death must be expected soon *albeit* not immediately. If the deceased

entertains even a faint hope of recovery at the time he or she makes the statement, it will be excluded.

One of the earliest decisions on the admissibility of a dying declaration

In the 1961 American decision of *Connor v State* 171 A.2d 699 (Md.1961), the Maryland Court of Appeal had to consider whether evidence admitted at the trial, which consisted of a statement made by the deceased to the police, was inadmissible as a dying declaration due to its opinion form. The court held that dying declarations made under certain conditions are admissible as an exception to the hearsay rule. The justification for its admissibility is based on two broad grounds namely necessity and reliability. The test of whether or not a dying declaration is an opinion is 'whether the statement is the direct result of observation through the declarant's senses, or comes from a course of reasoning from collateral facts' (LM Katz 'Admissibility of Opinions in Dying Declarations – Connor v State' (1962) 22 *Maryland Law Review* 42 at 44). If it is the former, it is admissible; if it is the latter, it is inadmissible.

The position in SA prior to 1988

In SA the provisions of s 223 of the Criminal Procedure Act 51 of 1977 (CPA) governed the admissibility of a dying declaration, and read as follows:

'The declaration made by any deceased person upon the apprehension of impending death shall be admissible or inadmissible in evidence if such declaration would have been admissible or inadmissible as evidence on the thirtieth day of May 1961.'

The position in SA after 1988

The Law of Evidence Amendment Act 45 of 1988 (the Act), changed how courts dealt with the evidence of a dying declaration. Section 9 of the Act repealed the provisions of s 223 of the CPA. Hearsay evidence under the Act means evidence whether oral or in writing, the probative value of which, depends on the credibility of any person other than the person giving such evidence.

Section 3 provides:

'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(*a*) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(*b*) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(*c*) the court, having regards to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.'

The SA courts approach post 1988

In *S v Mbanjwa and Another* 2000 (2) SACR 100 (D), the High Court dealt with the admissibility of statements made by the deceased prior to her death. The state and defence conceded that this was hearsay evidence.

The court considered the following, namely:

- The six considerations in s 3(1)(*c*) of the Act.
- That this was a criminal case and the reluctance of courts to permit untested evidence against an accused.
- The witnesses who testified were independent, unbiased, impressive and truthful and that their evidence was substantially true.
- The court assessed the reliability and completeness of what the deceased said by considering the sincerity, memory, perception and narrative capacity of the witnesses.
- The court considered that the deceased statement could have been admissible under the common law exceptions to the rule against hearsay evidence, namely dying declarations and spontaneous statements.

The court found that there were certain safeguards present in the objective facts which guaranteed the reliability of the hearsay evidence and concluded that it was in the interests of justice that it be admitted.

In *S v Shuping* (NWM) (unreported case no CC161/05, 1-1-2006) (Hendricks J), the accused, Mrs Shuping, was convicted of murder and arson. The state did not have any eyewitnesses but relied on circumstantial and hearsay evidence. The hearsay evidence consisted of statements, which the deceased allegedly made to state witnesses shortly after he was burned. The state applied to have evidence admitted in terms of s 3(1)(*c*) of the Act. Henricks J stated that the hearsay evidence must be

excluded unless he was of the opinion that it should be admitted in the interests of justice. The court had regard to each of the six considerations in the Act. The court held that it was not necessary to determine conclusively whether the deceased's statements would definitely have qualified either as a dying declaration or spontaneous statement. It held that 'the interests of justice demands the admissibility of the hearsay evidence and there is compelling justification for admitting and relying on that evidence'.

In *S v Ramavhale* 1996 (1) SACR 639 (A) Schutz JA stated that 'a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so.' Hearsay evidence was long recognised to be unreliable and continues to be so. He further stated that: 'An accused person usually has enough to contend with without expecting him also to engage in mortal combat with the absent witness.'

In *S v Mpofu* 1993 (2) SACR 109 (N) it was held that the reception of hearsay evidence under s 3(1)(*c*) of the Act 'should not logically be divorced from a consideration of those factors which at common law made for admissibility or not.'

In *Mzizi v S* [2009] 3 All SA 246 (SCA) the Supreme Court of Appeal (SCA) dealt with the admission of the statement by the deceased to the police officer identifying his attacker after he was shot and before he died. It was argued that the statement was inadmissible hearsay evidence and that the court should not have admitted it as evidence. This was regarded as a dying declaration. The SCA held that there can be no doubt that the statement uttered by the deceased, if it was admitted to prove the identity of his killer, constitutes hearsay evidence. The court held that: 'Although it is arguable that the statement in question was admitted in compliance with the requirements of section 3(1)(*c*), for the purposes of this judgment, I am willing to assume in the applicant's favour that its admission did not comply with that section. I am willing to assume further that such failure amounted to an irregularity. For, if the utterance by the deceased is discounted from the body of evidence implicating the applicant, the remaining evidence would still be sufficient to sustain his conviction.'

In *Van Willing and Another v State* (SCA) (unreported case no 109/2014, 27-3-2015) (Schoeman AJA) the SCA had to deal with the admissibility of hearsay evidence in terms of s 3(1)(*c*) of the Act. The person who made the statement was the deceased, after he was shot. The appellants were convicted of murder. The state elicited evidence that the deceased told at least three witnesses the identity of the perpetrators. The SCA, when dealing with the probative value of the evidence, assessed it under two heads, namely, the reliability and completeness of the witness transmission of the deceased's words and the reliability and completeness of whatever it was that the deceased did say. The court found that the admission of the hearsay evidence was in the interests of justice.

When a court admits hearsay evidence after exercising its discretion in terms of s 3(1)(*c*), it has the effect that the person who made the statement cannot be cross-examined. The question that arises is whether this is in conflict with an accused's constitutional right to challenge evidence. The SCA in *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) held that it is not.

Procedure to be followed when a party wishes to introduce hearsay evidence

In the *Ndhlovu* matter, Cameron JA, alluded to a careful approach to be followed before such evidence will be admitted at a criminal trial. The court must be asked clearly and timeously to consider and rule on its admissibility. It was stated that an accused cannot be ambushed by the late or unheralded admission of hearsay evidence and before the state closes its case the judge must rule on admissibility so that the accused can appreciate fully the evidentiary ambit he or she faces.

Conclusion

Our courts do not like to strictly classify a statement as a dying declaration or a spontaneous statement. They accept that statements of the deceased are hearsay in nature and apply the provisions of s 3 of the Act to determine admissibility. More often than not courts admit the statements if it is in the interests of justice.

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A Last Thought

"The position of the judiciary is therefore fundamentally different from that of other independent bodies like the Hawks, the Public Protector or the NPA. While these bodies could easily be "captured" with the appointment of a dishonest or pliable person as its head, it is not possible to "capture" the judiciary in this manner.
When I last checked there were about 300 judges in South Africa. In the absence of a suspension of the Constitution it would not be possible to remove all 300 judges from office because they happen to be honest and have integrity and can therefore not be pressured into advancing the political interests of a specific political faction or business group in South Africa.
Given the fact that the body who appoints or recommends judges – the Judicial

Service Commission (JSC) – is comprised of 23 people and given, further than candidates for appointment are subjected to a gruelling public interview, it is close to impossible to stack the judiciary with intellectually incurious and dishonest judges in the short to medium term (if ever).

While the JSC does not always make wise appointments, and while political considerations do play a role in the appointment of judges (as, I have argued elsewhere, politics should play a role in this process), the vast majority of judges always act with integrity and honesty. As we have seen with the Constitutional Court judgment in the Nkandla case, most judges are also fearless and make decisions based on the facts and the law as honestly and impartially as they can – no matter how high the political stakes and no matter how powerful the litigants."

Prof Pierre de Vos in *Why legal safeguards alone cannot protect independence of the Hawks* dated 1 September 2016 on the *Constitutionally Speaking* blog.